Case No: HQ12X00694

Neutral Citation Number: [2015] EWHC 371 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2015

Before :

MR JUSTICE TURNER

- -

Between :

1. JANE LAPORTE	**Claimants**
2. NICHOLAS CHRISTIAN	
- and -	
THE COMMISSIONER OF POLICE OF THE METROPOLIS	**Defendant**

- -
- -

Phillippa Kaufmann QC and Martha Spurrier (instructed by **Bhatt Murphy**) for the **Claimants**
George Thomas and Cecily White (instructed by **Metropolitan Police Service**) for the **Defendant**

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Judgment

The Hon Mr Justice Turner:

Judgment on Costs

INTRODUCTION

1. In this case, the claimants lost for reasons set out in the judgment to be found at Laporte and another v The Commissioner of the Police of the Metropolis [2014] EWHC 3574 (QB). They assert, however, that there should be no order for costs because the defendant refused to engage in ADR. In response, the defendant not only seeks an award of costs against the claimants but contends that they should be assessed on an indemnity basis and that a payment on account of £100,000 should be made.

2. In resolving these issues I am, once again, grateful to the industry of counsel who have served detailed and lengthy skeleton arguments setting out both the legal framework and the factual background to their respective contentions.

THE LEGAL FRAMEWORK

3. The general rules about costs are to be found in CPR Part 44.

4. CPR 44.2(1) provides that decisions relating to costs are in the discretion of the court:

> (1) The court has discretion as to –
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.

5. CPR 44.2(2) establishes the general rule that costs will follow the event:

> (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.

6. CPR 44.2(3) provides for exceptions to the general rule which do not apply to this case.

7. CPR 44.2(4) identifies the circumstances to which the court is to have regard when exercising its discretion in making decisions about costs:

> (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

8. The burden of persuasion therefore rests on the claimants with respect to their contention that there should be no order for costs and upon the defendant on his claim that costs should be assessed in his favour on the indemnity basis.

ALTERNATIVE DISPUTE RESOLUTION

9. The term "alternative dispute resolution" ("ADR") is defined in the glossary to the CPR as a "collective description of methods of resolving disputes otherwise than through the normal trial process". One such process is, of course, mediation.

10. In Halsey v Milton Keynes General NHS Trust [2004] 1 WLR 3002 the Court of Appeal acknowledged the potential benefits of ADR whilst recognising that, ultimately, the court has no power to order parties to engage in it. Robust encouragement may well be appropriate. Compulsion is not.

11. The central issue in Halsey was how the successful litigant previously recalcitrant on the issue of ADR should fare on the issue of costs. Dyson L.J. held at para 13:

> "In deciding whether to deprive a successful party of some or all of his costs on the grounds that he has refused to agree to ADR, it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. In our view, the burden is on the unsuccessful party to show why there should be a departure from the general rule. The fundamental principle is that such departure is not justified unless it is shown (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR."

12. The Court went on to identify some of the factors which fall to be considered when addressing the issue as to whether or not a refusal to agree to ADR is to be regarded as having been unreasonable and held at para 16:

> "The question whether a party has acted unreasonably in refusing ADR must be determined having regard to all the circumstances of the particular case. We accept the submission of the Law Society that factors which may be relevant to the question whether a party has unreasonably refused ADR will include (but are not limited to) the following: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect

> of success. We shall consider these in turn. We wish to emphasise that in many cases no single factor will be decisive, and that these factors should not be regarded as an exhaustive check-list."

13. In PGF II SA v OMFS Co 1 Ltd [2014] 1 W.L.R. 1386, the Court of Appeal revisited Halsey and, in particular gave guidance as to the proper approach to the issue of costs in cases in which the winning side had failed adequately to articulate its earlier failure to engage in ADR. Briggs L.J. concluded at para 30 that the advice given in the ADR Handbook (2013) was sound:

> "The *ADR Handbook* , first published in 2013, after the period relevant to these proceedings, sets out at length in para 11.56 the steps which a party faced with a request to engage in ADR, but which believes that it has reasonable grounds for refusing to participate at that stage, should consider in order to avoid a costs sanction. The advice includes: (a) not ignoring an offer to engage in ADR; (b) responding promptly in writing, giving clear and full reasons why ADR is not appropriate at the stage, based if possible on the Halsey guidelines; (c) raising with the opposing party any shortage of information or evidence believed to be an obstacle to successful ADR, together with consideration of how that shortage might be overcome; (d) not closing off ADR of any kind, and for all time, in case some other method than that proposed, or ADR at some later date, might prove to be worth pursuing. That advice may fairly be summarised as calling for constructive engagement in ADR rather than flat rejection, or silence."

And at para 34:

> "In my judgment, the time has now come for this court firmly to endorse the advice given in para 11.56 of the *ADR Handbook* , that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds. I put this forward as a general rather than invariable rule because it is possible that there may be rare cases where ADR is so obviously inappropriate that to characterise silence as unreasonable would be pure formalism. There may also be cases where the failure to respond at all was a result of some mistake in the office, leading to a failure to appreciate that the invitation had been made, but in such cases the onus would lie squarely on the recipient of the invitation to make that explanation good."

14. The Court went on to emphasise at para 51 that a failure to engage with ADR did not mechanistically disentitle the successful party to claim all of its costs:

> "… a finding of unreasonable conduct constituted by a refusal to accept an invitation to participate in ADR or, which is more serious in my view, a refusal even to engage in discussion about ADR, produces no automatic results in terms of a costs penalty. It is simply an aspect of the parties' conduct which needs to be addressed in a wider balancing exercise. It is plain both from the *Halsey case [2004] 1 WLR 3002* , itself and from Arden LJ's reference to the wide discretion arising from such conduct in *SG v Hewitt [2013] 1 All ER 1118* , that the proper response in any particular case may range between the disallowing of the whole, or only a modest part of, the otherwise successful party's costs.
>
> 52 There appears no recognition in the Halsey case that the court might go further, and order the otherwise successful party to pay all or part of the unsuccessful party's costs. While in principle the court must have that power, it seems to me that a sanction that draconian should be reserved for only the most serious and flagrant failures to engage with ADR, for example where the court had taken it on itself to encourage the parties to do so, and its encouragement had been ignored. In the present case the court did not address the issue at all. I therefore have no hesitation in rejecting Mr Seitler's submission that the judge did not go far enough in penalising the defendant's refusal to engage with ADR."

OTHER ISSUES

15. In addition to the defendant's approach to ADR, the claimants rely upon the defendant's failure to reply to the letter of claim and upon errors in its schedule of costs.

THE FACTUAL BACKGROUND

ADR

16. It was Mr Dutta on behalf of the claimants and Ms Fowler, an employed barrister working in the defendant's Directorate of Legal Services on behalf of the defendant, who were responsible for the progress of the procedural stages on behalf of their respective clients.

17. The claimants sent their letter of claim on 19 June 2012. The defendant agreed to provide a substantive reply by 10 October 2012. By letter dated 25 October 2012, Ms Fowler indicated that she had been on sick leave for most of August and September and asked for more time to respond to the letter of claim. Further extensions were requested and granted in December 2012. By email dated 5 February 2013, Ms Fowler said that due to workload pressures she had only just been able to sit down and read into the matter thoroughly. She said that thereafter she would be able to form a view as to whether to advise her client to settle or defend the claim. She requested a further period of four weeks in which to respond to the letter of claim. This request

was refused and proceedings were commenced. Thus no response to the letter before action was ever sent.

18. On 13 May 2013, the defendant filed his allocation questionnaire. Under section A relating to settlement, the defendant declined the opportunity to attempt to settle at that stage stating: "There are many factual areas in dispute in this case which are not capable of compromise at this stage. The defendant retains an open mind and is always open to discussion with the claimants on appropriate matters. Once witness statements have been taken and exchanged the case will be reviewed again." Ms Fowler states that there had been a short telephone conversation between Mr Dutta and herself in which he appeared to agree that this was a sensible course of action.

19. A covering letter stated that a costs schedule would be provided "in the next few days" but it was not.

20. The claimants made a formal offer of mediation on 26 September 2013. According to Ms Fowler this was at a time when, as Mr Dutta was aware, she was on a holiday from which she was not due to return until 10 October.

21. On 3 October 2013 the Defendant was ordered by Master Kay QC to respond to the claimants' formal offer of mediation by 4pm on 1 November 2011. No response was received by this date. Ms Fowler states that she was distracted by the priority of preparing witness statements. In an email dated 31 January 2014 the defendant offered to meet with the claimants in a mediation hearing in an attempt to narrow the issues for trial.

22. On 7 February 2014 Mr Dutta telephoned Ms Fowler to discuss, amongst other things, ADR and they agreed to meet on an "open minds" basis on a date to be confirmed. Ms Fowler was left with the impression that Mr Dutta considered that ADR would only be worthwhile if there was going to be an offer of monetary compensation.

23. On 28 February 2014 Mr Dutta wrote to Ms Fowler proposing dates for ADR. In that letter he summarised the position of the parties following the telephone conversation between them on 7 February 2014. He set out the claimants' position as follows:

> "a. We wish to cooperate with you on behalf of our clients in order to focus and/or narrow the issues to be tried in this claim in the absence of settlement. We are open to suggestions as to how this can best be achieved…
>
> b. The Order dated 13 October 2013 required you to respond to the claimants on a different matter, namely our offer of mediation dated 26 September 2013…If you have instructions to make a meaningful offer our clients would be pleased to attend mediation in order to explore ADR…If you do not have instructions to make a meaningful offer we are concerned that a mediation where your client simply offers to 'drop hands' would not constitute a proportionate use of funds and our time might be better spent on preparing for trial. We are in your client's hands as to whether he is willing to enter into

> mediation with an open mind to achieving a meaningful settlement.
>
> c. In view of the fact that the Court asked the parties to address ADR as long ago as November last year, we ask that this issue is resolved one way or another in the short term. We should therefore be grateful to hear from you on the basis of full instructions by 7 March 2014…"

24. On 5 March 2014 Ms Fowler responded to Mr Dutta agreeing that both parties should approach mediation with an open mind and stating that although it was unlikely that the defendant would make a financial offer this could not be ruled out. The letter went on to express the fear that Mr Dutta was making it a pre-condition to any mediation that there would be money on the table.

25. On 7 May 2014 Mr Dutta wrote to Ms Fowler for a second time, suggesting dates for ADR, stating:

> "In view of the costs that will be incurred in preparing for a PTR and a three week jury trial, it is incumbent on both parties to make a serious attempt to achieve ADR without further delay…
>
> In accordance with their duties under the CPR, our clients will approach this process in a frank and constructive manner. Their view remains that a payment of compensation will be necessary to compromise this claim; however they are of course willing to listen to what your client has to say in that regard and vice versa in the spirit of ADR."

26. Mr Dutta also confirmed that the claimants would not object to a meeting between solicitors and/or clients in the absence of counsel if that meant that it would be easier to find an appropriate date.

27. During May 2014 attempts were made by both sides to arrange for a round table meeting on dates upon which all intended participants would be available. On 23 May 2014 a PTR hearing took place at which the defendant was ordered to provide specific disclosure relating to similar fact evidence concerning three of his TSG officers. Allegations of impropriety were made against the inspector and other officers. Following this hearing a conversation took place between Mr Dutta and Ms Fowler concerning ADR. Ms Fowler again got the impression that Mr Dutta saw a money offer as a prerequisite to compromise but that he accepted that the claimants would come to ADR with an open mind.

28. On 28 May 2014, Mr Dutta emailed Ms Fowler asking for confirmation as to who would attend ADR on behalf of the defendant and for a list of issues to discuss. A colleague of Ms Fowler responded to the email pointing out that Ms Fowler was on annual leave and would be back on 2 June whereupon she would answer the questions which had been raised. On 2 June, clerk to the claimants' counsel emailed Ms Fowler suggesting an ADR meeting on 16 June at counsel's chambers. In the absence of a response, a chasing email was sent on 3 June. Ms Fowler emailed Mr Dutta on 4 June

but made no reference to ADR. Mr Dutta responded immediately to ask again about ADR.

29. Later that afternoon, Ms Fowler emailed Mr Dutta saying:

> "I will be sending a letter re ADR. For reasons which I will explain in the letter I no longer think an ADR meeting is an appropriate use of resources for either party given what was said by you and your Counsel at and just following the hearing on 23 May."

30. On the same date the claimants wrote to the defendant seeking an explanation for the refusal to meet for ADR. The claimants' representative stated:

> "I am surprised by your client's decision, at this stage, to refuse to engage in ADR and your reference to "what was said by [me] and [Counsel] at and just following the hearing on 23 May. There was nothing more said on my clients' behalf than what has already been said in correspondence and you will recall that it was on the basis of our previous exchange of correspondence that an ADR meeting had been agreed.
>
> I would take this opportunity to remind you that the costs to be incurred in the three-week trial of this claim are likely to be very significant and therefore my clients are mindful of the need to ensure that any opportunity to resolve this claim without the need for trial is utilised. To that end, it had been hoped that your client would accept my clients' 26 September 2013 invitation to enter into ADR with an open mind, as my clients would intend to. It is regrettable that your client has refused to engage. I should be grateful if the content of this email could be brought to your client's attention and I look forward to hearing from you with confirmation that it has been, together with your client's reasons for refusing to engage in ADR…"

31. The claimants never received a written response to this email nor did they ever receive the letter of explanation promised by Ms Fowler on behalf of the defendant in her email of 4 June 2014. Ms Fowler explained that she never sent the letter because she was too busy preparing for trial. She does say, however, that she had a telephone conversation with Mr Dutta in which she identified his apparent determination to receive monetary compensation as the obstacle to further attempts at ADR. This conversation is undocumented and Mr Dutta has no recollection of it. She suggests that Mr Dutta's written responses were "all tactical, to avoid any cost consequences for his clients, rather than written with any genuine attempt to engage in a mediation process without any pre-mediation meeting undertaking…to make a financial offer."

32. On 6 June 2014 the claimants made Part 36 offers to the defendant. No response to the Part 36 offers was ever received.

33. On the same date the claimants wrote to the defendant to formally record their unhappiness at the defendant's refusal of their longstanding and repeated offer of ADR. The claimants informed the defendant that in light of this refusal they would be relying on PGF II SA and the Practice Direction on Pre-Action Conduct in order to invite the court not to award costs in favour of the defendant if he succeeded at trial. The letter concluded by stating:

> "To be clear, the Claimants' door remains open to ADR, as it has done so throughout these proceedings, in the remaining three weeks before trial."

34. No response to this letter was ever received.

The Pre-Action Protocol

35. The claimants point out that the defendant never provided a practice direction response to the letter of claim of 19 June 2012, in spite of its express agreement to do so on 20 June 2012 and again on 25 October 2012 and two chasing letters from the claimants' representatives. When no response was received by the agreed second extended deadline of 10 December 2012, the claimants sought a response by 17 December 2012. No response was received on this date or on any date thereafter. The claim was therefore pleaded by the claimants.

Costs Schedules

36. On 9 June 2014, for the first time in the proceedings according to the claimants, the defendant served a costs schedule on the claimants. It is to be noted, however, that Ms Fowler completed a costs estimate in 2013 which she believed she had served by letter dated 13 June 2013. The claimants queried the accuracy of the later schedule on a number of bases, including that it sought costs for Ms Fowler's time for 23 hours per day between 16 June 2014 and 27 June 2014 (in preparation for trial). The claimants sent a chasing email to the defendant seeking an amended, accurate costs schedule on 20 June 2014. On the same date Ms Fowler confirmed by email that there had been a mistake in the costs schedule giving rise to approximately £25,000 being claimed erroneously.

37. Mr Dutta responded to this email immediately indicating that this revised figure still did not cure the schedule of its inaccuracies. He asserted that Ms Fowler's revised calculations meant that she was still claiming that she would spend 15.45 hours per day on the case between 16 June and 27 June 2014, in addition to a Grade B fee earner spending 12 hours per day on the case in the same period, and a Grade C fee earner spending 7.5 hours per day on the case. The claimants repeated their request for an accurate costs schedule, endorsed by the defendant's representative's signature.

38. By email dated 25 June 2014 the claimants wrote to the defendant again reiterating that in the absence of any accurate and signed costs schedule, the defendant was being put on notice that the claimants did not consider it reasonable for the defendant, in the event of his success at trial, to seek costs beyond £200,000 and that the claimants had not therefore obtained a further insurance premium. This email was sent at 11:50am, the defendant having failed to provide an accurate, signed costs schedule by 09:30am, contrary to what had been agreed. The claimants' representative asked the defendant

to revert to him in the event that the content of this email was disputed. No response was ever received from the defendant, nor say the claimants did the defendant ever provide an accurate and/or signed costs schedule.

THE HALSEY LIST

39. In the light of the above it is now appropriate to address each of the six factors listed for consideration in Halsey remembering, of course, that this is not to be approached as a mechanistic exercise and that these factors are not to be regarded as being exhaustive in any given case.

THE NATURE OF THE DISPUTE

40. The Court of Appeal in Halsey at para 17 had the following to say about this factor:

> "Even the most ardent supporters of ADR acknowledge that the subject-matter of some disputes renders them intrinsically unsuitable for ADR. The Commercial Court Working Party on ADR stated in 1999:
>
> > "The Working Party believes that there are many cases within the range of Commercial Court work which do not lend themselves to ADR procedures. The most obvious kind is where the parties wish the court to determine issues of law or construction which may be essential to the future trading relations of the parties, as under an on-going long term contract, or where the issues are generally important for those participating in a particular trade or market. There may also be issues which involve allegations of fraud or other commercially disreputable conduct against an individual or group which most probably could not be successfully mediated."
>
> Other examples falling within this category are cases where a party wants the court to resolve a point of law which arises from time to time, and it is considered that a binding precedent would be useful; or cases where injunctive or other relief is essential to protect the position of a party. But in our view, most cases are not by their very nature unsuitable for ADR."

41. The defendant seeks to argue that this is a case in which the nature of the dispute made the case unsuitable for ADR. He contends that the claimants were seeking to litigate a point of legal principle concerning the scope of police powers and were alleging that a police inspector had fabricated his account of the scenario giving rise to those powers.

42. In truth, both sides now want their cake and ha'penny on this issue. For the purpose of obtaining permission to appeal, the claimants emphasise the need for "an authoritative determination at an appellant level of the nature and scope of the self help power" but must deal, at the same time, with the risk that the need to determine generally

important issues of law is a factor militating against the use of ADR. The defendant, in contrast, points to the matters of legal principle in the context to the value of ADR but at peril of strengthening the claimants' prospects of obtaining permission to appeal.

43. Since the skeleton arguments were filed and served, I have refused permission to appeal.

44. In my view, this was not a case in which the nature of the dispute made it unsuitable for mediation. The claimants could have succeeded in obtaining some level of damages even if they had lost on the law and even if, in addition, the actions of the inspector had been vindicated. There were issues of pure fact to be resolved about what happened on the staircase upon which both sides ran the risk of adverse findings. There was no continuing commercial relationship between the parties and it is unrealistic to suggest that a settlement by way of ADR would have been inappropriate for this type of dispute.

THE MERITS OF THE CASE

45. This factor was dealt with in Halsey at paras 18 and 19:

> "18 The fact that a party reasonably believes that he has a strong case is relevant to the question whether he has acted reasonably in refusing ADR. If the position were otherwise, there would be considerable scope for a claimant to use the threat of costs sanctions to extract a settlement from the defendant even where the claim is without merit. Courts should be particularly astute to this danger. Large organisations, especially public bodies, are vulnerable to pressure from claimants who, having weak cases, invite mediation as a tactical ploy. They calculate that such a defendant may at least make a nuisance-value offer to buy off the cost of a mediation and the risk of being penalised in costs for refusing a mediation even if ultimately successful.
>
> 19 Some cases are clear-cut. A good example is where a party would have succeeded in an application for summary judgment pursuant to CPR r 24.2 , but for some reason he did not make such an application. Other cases are more borderline. In truly borderline cases, the fact that a party refused to agree to ADR because he thought that he would win should be given little or no weight by the court when considering whether the refusal to agree to ADR was reasonable. Borderline cases are likely to be suitable for ADR unless there are significant countervailing factors which tip the scales the other way. In Hurst v Leeming [2003] 1 Lloyd's Rep 379 , 381 Lightman J said: "The fact that a party believes that he has a watertight case again is no justification for refusing mediation. That is the frame of mind of so many litigants." In our judgment, this statement should be qualified. The fact that a party *unreasonably* believes that his case is watertight is no justification for refusing mediation. But

> the fact that a party *reasonably* believes that he has a watertight case may well be sufficient justification for a refusal to mediate."

46. The defendant accepts in his skeleton argument that he was "prepared to mediate up to the point that it was apparent that there was no scope for narrowing the issues". I take this to be a concession that the merits of the defence were not perceived to be so strong in themselves to have justified a refusal to engage in ADR. Indeed my express criticisms of the defence witnesses in a number of areas demonstrate how there was material which, without the benefit of hindsight, would have given the defendant food for thought in predicting his chances of success.

HAVE OTHER SETTLEMENT METHODS BEEN ATTEMPTED?

47. The Court of Appeal said in Halsey at para 20:

> "20 The fact that settlement offers have already been made, but rejected, is a relevant factor. It may show that one party is making efforts to settle, and that the other party has unrealistic views of the merits of the case. But it is also right to point out that mediation often succeeds where previous attempts to settle have failed. Although the fact that settlement offers have already been made is potentially relevant to the question whether a refusal to mediate is unreasonable, on analysis it is in truth no more than an aspect of factor (f)."

48. The defendant had made no offers to settle the case before ADR was suggested. It cannot therefore be heard to say that it had exhausted other opportunities of resolving the case which would have obviated the need to go to court.

THE COST OF MEDIATION WOULD BE DISPROPORTIONATELY HIGH

49. At para 19 of Halsey the Court held:

> "This is a factor of particular importance where, on a realistic assessment, the sums at stake in the litigation are comparatively small. A mediation can sometimes be at least as expensive as a day in court. The parties will often have legal representation before the mediator, and the mediator's fees will usually be borne equally by the parties regardless of the outcome (although the costs of a mediation may be the subject of a costs order by the court after a trial). Since the prospects of a successful mediation cannot be predicted with confidence… the possibility of the ultimately successful party being required to incur the costs of an abortive mediation is a relevant factor that may be taken into account in deciding whether the successful party acted unreasonably in refusing to agree to ADR ."

50. The defendant concedes that the costs of mediation would not have been disproportionately high but contends that an offer to settle would have had to include a large costs liability to the claimants. For my own part, I do not consider that this

point is material to the issue which the Court of Appeal was addressing under this heading. It is, however, potentially relevant in determining whether mediation had a reasonable prospect of success.

DELAY

51. On the topic of delay, the Court in Halsey had this to say:

> "If mediation is suggested late in the day, acceptance of it may have the effect of delaying the trial of the action. This is a factor which it may be relevant to take into account in deciding whether a refusal to agree to ADR was unreasonable.

52. There was no reason why mediation in this case would have had the effect of delaying the trial of the action. The first offer of ADR was made in September 2013, long before the date upon which the hearing was likely to take place.

WHETHER THE MEDIATION HAD A REASONABLE PROSPECT OF SUCCESS

53. The Court of Appeal in Halsey spent more time on this factor than the others holding:

> "23 In Hurst v Leeming [2003] 1 Lloyd's Rep 379 , Lightman J said that he considered that the "critical factor" in that case was whether "objectively viewed" a mediation had any real prospect of success. He continued, at p 381:
>
> > "If mediation can have no real prospect of success, a party may, with impunity, refuse to proceed to mediation on this ground. But refusal is a high risk course to take, for if the court finds that there was a real prospect, the party refusing to proceed to mediation may, as I have said, be severely penalized. 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 often does bring about a more sensible and more conciliatory attitude on the part of the parties than might otherwise be expected to prevail before the mediation, and may produce a recognition of the strengths and weaknesses by each party of his own case and of that of his opponent, and a willingness to accept the give and take essential to a successful mediation. What appears to be incapable of mediation before the mediation process begins often proves capable of satisfactory resolution later."
>
> 24 Consistently with the view expressed in this passage, Lightman J said that on the facts of that case he was persuaded that "quite exceptionally" the successful party was justified in

taking the view that mediation was not appropriate because it had no realistic prospects of success.

25 In our view, the question whether the mediation had a reasonable prospect of success will often be relevant to the reasonableness of A's refusal to accept B's invitation to agree to it. But it is not necessarily determinative of the fundamental question, which is whether the successful party acted unreasonably in refusing to agree to mediation. This can be illustrated by a consideration of two cases. In a situation where B has adopted a position of intransigence, A may reasonably take the view that a mediation has no reasonable prospect of success because B is most unlikely to accept a reasonable compromise. That would be a proper basis for concluding that a mediation would have no reasonable prospect of success, and that for this reason A's refusal to mediate was reasonable.

26 On the other hand, if A has been unreasonably obdurate, the court might well decide, on that account, that a mediation would have had no reasonable prospect of success. But obviously this would not be a proper reason for concluding that A's refusal to mediate was reasonable. A successful party cannot rely on his own unreasonableness in such circumstances. We do not, therefore, accept that, as suggested by Lightman J, it is appropriate for the court to confine itself to a consideration of whether, viewed objectively, a mediation would have had a reasonable prospect of success. That is an unduly narrow approach: it focuses on the nature of the dispute, and leaves out of account the parties' willingness to compromise and the reasonableness of their attitudes.

27 Nor should it be overlooked that the potential success of a mediation may not only depend on the willingness of the parties to compromise. Some disputes are inherently more intractable than others. Some mediators are more skilled than others. It may therefore sometimes be difficult for the court to decide whether the mediation would have had a reasonable prospect of success.

28 The burden should not be on the refusing party to satisfy the court that mediation had no reasonable prospect of success. As we have already stated, the fundamental question is whether it has been shown by the unsuccessful party that the successful party unreasonably refused to agree to mediation. The question whether there was a reasonable prospect that a mediation would have been successful is but one of a number of potentially relevant factors which may need to be considered in determining the answer to that fundamental question. Since the burden of proving an unreasonable refusal is on the unsuccessful party, we see no reason why the burden of proof should lie on the successful party to show that mediation did

not have any reasonable prospect of success. In most cases it would not be possible for the successful party to prove that a mediation had no reasonable prospect of success. In our judgment, it would not be right to stigmatise as unreasonable a refusal by the successful party to agree to a mediation unless he showed that a mediation had no reasonable prospect of success. That would be to tip the scales too heavily against the right of a successful party to refuse a mediation and insist on an adjudication of the dispute by the court. It seems to us that a fairer balance is struck if the burden is placed on the unsuccessful party to show that there was a reasonable prospect that mediation would have been successful. This is not an unduly onerous burden to discharge: he does not have to prove that a mediation would *in fact* have succeeded. It is significantly easier for the unsuccessful party to prove that there was a reasonable prospect that a mediation would have succeeded than for the successful party to prove the contrary.

29 So far we have been considering the question whether a successful party's refusal of ADR was unreasonable without regard to the impact of any encouragement that the court may have given in the particular case. Where a successful party refuses to agree to ADR despite the court's encouragement, that is a factor which the court will take into account when deciding whether his refusal was unreasonable. The court's encouragement may take different forms. The stronger the encouragement, the easier it will be for the unsuccessful party to discharge the burden of showing that the successful party's refusal was unreasonable.

30 An ADR order made in the Admiralty and Commercial Court in the form set out in Appendix 7 to the Guide is the strongest form of encouragement. It requires the parties to exchange lists of neutral individuals who are available to conduct " ADR procedures", to endeavour in good faith to agree a neutral individual or panel and to take "such serious steps as they may be advised to resolve their disputes by ADR procedures before the neutral individual or panel so chosen". The order also provides that if the case is not settled, "the parties shall inform the court … what steps towards ADR have been taken and (without prejudice to matters of privilege) why such steps have failed". It is to be noted, however, that this form of order stops short of actually compelling the parties to undertake an ADR .

31 Nevertheless, a party who, despite such an order, simply refuses to embark on the ADR process at all would run the risk that *for that reason alone* his refusal to agree to ADR would be held to have been unreasonable, and that he should therefore be penalised in costs. It is to be assumed that the court would not

> make such an order unless it was of the opinion that the dispute was suitable for ADR .
>
> 32 A less strong form of encouragement is mentioned in the other court guides to which we have referred at para 6 above. A particularly valuable example is the standard form of order now widely used in clinical negligence cases, and which was devised by Master Ungley. The material parts of this order provide:
>
> > "The parties shall … consider whether the case is capable of resolution by ADR . If any party considers that the case is unsuitable for resolution by ADR , that party shall be prepared to justify that decision at the conclusion of the trial, should the trial judge consider that such means of resolution were appropriate, when he is considering the appropriate costs order to make. The party considering the case unsuitable for ADR shall, not less than 28 days before the commencement of the trial, file with the court a witness statement without prejudice save as to costs, giving the reasons upon which they rely for saying that the case was unsuitable."
>
> 33 This form of order has the merit that (a) it recognises the importance of encouraging the parties to *consider* whether the case is suitable for ADR , and (b) it is calculated to bring home to them that, if they refuse even to consider that question, they may be at risk on costs even if they are ultimately held by the court to be the successful party. We can see no reason why such an order should not also routinely be made at least in general personal injury litigation, and perhaps in other litigation too. A party who refuses even to consider whether a case is suitable for ADR is always at risk of an adverse finding at the costs stage of litigation, and particularly so where the court has made an order requiring the parties to consider ADR."

54. The central point relied upon by the defendant is that Ms Fowler came incrementally to the view that the claimants would only accept a financial offer and that the defendant was unlikely to make one and so ADR was not appropriate.

55. I would make the following observations:

i) At no time had the defendant excluded the possibility of making a money offer;

ii) At no time had the claimants insisted that the making of a money offer would be a formal precondition of engaging in ADR;

iii) It is always likely that those representing any given party to a dispute will seek to lower the expectations of the other side in preparation for ADR. Simply because one side makes a prediction of what it might take to reach a settlement does not entitle the other side to treat such a prediction, without more, as a formal pre-condition. Tactical positioning should not too readily be labelled as intransigence.

iv) I do not agree that Ms Fowler was entitled to take the view that Mr Dutta's approach to ADR was purely tactical. It had been on the claimants' agenda from the outset and was pursued with appropriate vigour throughout.

v) It is difficult to escape the conclusion that Ms Fowler was repeatedly on the procedural back foot in the months leading up to the hearing as a result of which the pursuance of ADR was deprioritised to help her to meet the demands of preparing the case for trial.

56. On the evidence before me I am satisfied that there was a reasonable chance that ADR would have been successful in whole or in part. The defendant was not justified in coming to a contrary conclusion.

FURTHER MATTERS

57. The defendant seeks to rely upon further matters in support of its approach to ADR and points to the case of Daniels v Commissioner of Police of the Metropolis [2005] EWCA 1321 in which the Court of Appeal held that it may be reasonable for a defendant who routinely faces wholly unfounded claims to take a stand even where the costs of so doing are likely to be disproportionate to the alleged value of the claim in any given case. I do not consider that this case assists the defendant.

58. Those representing the defendant never categorised this case as one which was so self-evidently unfounded that it should be fought regardless of the risk of incurring disproportionately high costs. They never ruled out the chance that some money offer might be made.

59. Furthermore, there was no real risk here of any settlement having a potential impact on police powers or policing tactics. A mediation or joint settlement meeting does not involve an adjudication on the issues in the case. Since the claimants' case involved different types of claim against different officers there would be no necessary inference from the terms of any compromise that it was based upon one interpretation or another either of the factual evidence or the legal background.

CONCLUSION ON ADR

60. Having considered each of the factors listed in Halsey and having regard to other circumstances and arguments raised in addition thereto, I have formed the view that the defendant failed, without adequate (or adequately articulated) justification to engage in ADR which had a reasonable prospect of success. This will, therefore, impact on the exercise of my discretion as to costs. However, I must look at this matter in the round as a result of which I have to consider the separate issues arising

from the criticisms raised of the defendant's failure to respond to the letter before action and of the flaws in the costs schedules.

PRE-ACTION PROTOCOL

61. The defendant undoubtedly ought to have responded to the letter before action more timeously and it is unsurprising that the claimants eventually lost patience and proceeded to plead their case formally. Had this been the only valid criticism of the procedural failings of the defendant I may well have concluded that it did not justify any substantive costs consequences. However, I have reached the view that the failure to respond in time was to prove to have been symptomatic of a sustained inability to prioritise the progress of this case thereafter and, in particular, to allocate sufficient time, attention and/or resources to dealing with ADR in parallel to substantive preparation. This lends further corroboration to my view that the defendant stumbled past ADR on the way to the hearing rather than engaging with it with proportionate commitment and focus. To this limited extent only, therefore, do I take the non-compliance with the pre-action protocol into account.

COSTS SCHEDULES

62. I have recorded the criticisms made by the claimants about the timing and accuracy of the defendant's costs schedules. I do not, however, consider that an adjudication on the rights and wrongs of this particular aspect of the case would influence the exercise of my broader discretion on the issue of costs.

INDEMNITY COSTS

63. The defendant seeks an award of indemnity costs pointing to the width of the discretion alluded to in the case of Excelsior Commercial & Industrial Holdings v Salisbury Hamer Aspden Johnson (Costs) [2002] EWCA Civ 879.

64. The following points are made in his skeleton argument:

> "a) It is a consequence of the Judge's finding that the Claimants' arrests and subsequent prosecutions were in large part a consequence of their own actions on 24th February 2011;
>
> b) Notwithstanding that the arrests were in large part a consequence of the Claimants' own actions, they elected to bring civil proceedings. This was not a case where the necessity to secure an effective remedy left the Claimants with no option but to issue proceedings (such as, for example, in some housing cases or a personal injury involving substantial care needs);
>
> c) The Claimants sought to challenge every aspect of the policing operation. They have lost on every issue raised;
>
> d) On any objective viewing of the video footage, the overall policing decision to remove protestors from the third floor corridor and stairwell (whether on the grounds of a breach of the peace, removing trespassers or preventing disorder at a

public meeting) was patently reasonable. It has been demonstrated to be lawful. There never were any reasonable grounds for including this in the claim;

e) The Court has found that both Claimants:

i) were acting in a disruptive manner which was directly threatening the viability of the Council meeting, and were participating in a breach of the peace (para 92);

ii) struggled not to see things through the distorting lens of their own firm convictions (para 94 and 114);

iii) gave evidence that was more of an ex post facto rationalisation of their conduct than an accurate recollection (para 96 and 114).

It is therefore open to the Court to determine that, in bringing and/or conducting these proceedings, the Claimants have not acted reasonably.

f) It was the Claimants who, while ostensibly seeking mediation, sought to place preconditions on the mediation that rendered it futile. The reality is that the only mediation that was ever going to be acceptable to the Claimants was one that resulted in them being paid damages and costs."

65. The defendant further contends that there is a risk that the costs incurred may be seen to have been disproportionate to the potential damages as a result of which the defendant would be substantially out of pocket if costs were to be awarded on the standard basis.

CONCLUSIONS

66. Taking into account all of the factors listed in Halsey and all other relevant matters to which I have referred in this judgment I am satisfied that the defendant's failure fully and adequately to engage in the ADR process should be reflected in the costs order I make. Regardless of this aspect of the case I would not have been minded to have made an order for indemnity costs in his favour. My adverse findings on the conduct of some of the police officers involved and the reasonable way in which the claim was presented on behalf of the claimants procedurally would militate against that. Further, I am not satisfied that public bodies should normally have a stronger claim to indemnity costs than other litigants.

67. I do not consider that the scale of the defendant's shortcomings in the context of his failure to engage with ADR was such as to justify disentitling him from claiming any of his costs. He did ultimately win on every substantive issue and, although ADR made settlement a sufficiently likely possibility, it would have been by no means certain. Exercising the broad discretion afforded to me by the rules, I award the defendant two thirds of his costs against the claimants to be assessed on the standard basis.

68. I further order that the claimants must pay the sum of £50,000 on account of costs under CPR 44.2(8).

69. I extend the time within which either party may file an appellant's notice with the Court of Appeal in respect of this and the substantive judgment to 12 March 2015.