Neutral Citation Number: [2009] EWHC 1431 (TCC)

Case No: HT-08-93

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

St. Dunstan's House

133-137 Fetter Lane,

London EC4A 1HD

Date: 10/06/2009

Before:

MR. JUSTICE COULSON

- -

Between:

ROUNDSTONE NURSERIES LIMITED **Cla**

- and -

STEPHENSON HOLDINGS LIMITED **Defe**

- -

- -

MR. THOMAS CRANGLE (instructed by **Coffin Mew LLP**) for the **Claimant**

MR. GIDEON SCOTT HOLLAND (instructed by **Shadbolt LLP**) for the **Defendant**

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Judgment

MR. JUSTICE COULSON:

A. INTRODUCTION

1.
There are two aspects of the Pre-Action Protocol process and/or ADR, and the relationship between them and any parallel court proceedings in the TCC, which seem regularly to give rise to difficulties. One is the time that the parties allow the process to take. These delays significantly increase the costs incurred during the pre-action period which, because of the inevitable 'front-loading' caused by the Pre-Action Protocol itself, are regarded by many as high enough already. The other is the effect of (and possible difficulties created by) a stay obtained in the parallel court proceedings. Both problems are present in stark form in these two applications.

2.

In 2002 the defendant, Stephenson Holdings Limited ("Stephenson"), built a concrete floor slab for the claimant, Roundstone Nurseries Limited ("Roundstone") at their nursery premises in Chichester. There is a debate now as to whether there was a contract between the parties, or whether Stephenson were engaged as a subcontractor by Bridge Greenhouses Limited ("Bridge") who were also in contract with Roundstone in respect of the Chichester premises. The concrete floor slab is defective, with evidence of cracking, spalling at concrete joints, and delamination. Roundstone blame Stephenson for these defects. Stephenson deny liability claiming, amongst other things, that the defects are matters of design for which Bridge alone were responsible

3.
Roundstone commenced proceedings in the TCC against Stephenson (and not Bridge) as long ago as 2nd April 2008. On two subsequent occasions, the parties have asked the court to stay the proceedings whilst they endeavoured to comply with the Pre-Action Protocol for Construction and Engineering Disputes, into which they wanted to incorporate a mediation hearing. The mediation was due to take place on 15th April 2009 but, in circumstances which are dealt with in greater detail below, the hearing was cancelled at the last minute. On 24th April 2009, judgment in default of defence was entered against Stephenson.

4.
By an application dated 30th April 2009, Stephenson sought to set aside judgment pursuant to CPR Part 13. That was opposed. In addition, by an application dated 3rd June 2009, Roundstone sought an order that Stephenson pay, on an indemnity basis, the costs thrown away by their late decision to withdraw from the mediation due to take place on 15th April.

5.
This morning I was told that, following the service by Stephenson yesterday of a detailed defence, Roundstone accepted that the judgment in default should be set aside. However, Roundstone maintain that, although that application will now be allowed by consent, they are entitled to the costs of the application and, even if they are wrong about that, they certainly should not pay Stephenson's costs of the application to set aside. Roundstone maintain that their change of position has only been caused by the eleventh-hour service of the pleading. Stephenson, on the other hand, submit that judgment in default should never have been entered, and that they are entitled to their costs of that application. Unfortunately, given the nature of that costs dispute, it means that, although the substance of the application has now been agreed, I still need to deal with it in detail, in order to arrive at the right conclusion on costs. In this context, I note that the parties took up the entirety of the time set aside for the hearing, notwithstanding their agreement on the substance of Stephenson’s application, to argue about costs.

6.
I set out in **section B** below the relevant procedural history. At **section C** I address the CPR Part 13 principles before, at **section D**, analysing the application to set aside in order to identify the appropriate costs order. In **section E** I address Roundstone’s application for costs arising out of Stephenson's late withdrawal from the mediation

B. THE PROCEDURAL HISTORY

7.
As noted above, Roundstone commenced these proceedings in April 2008. It appears that commencement then was the result of potential limitation difficulties and that there had at that stage been no attempt on their part to comply with the Pre-Action Protocol. The claim form and the

particulars of claim were served on 1st August 2008. The acknowledgment of service was dated 11th August. As a result of the failure to comply with the Pre-Action Protocol, the parties agreed that the proceedings should be stayed in order to allow that process to be completed.

8.
The parties drafted a consent order to that effect which was granted by the court on 19th September 2008. This order vacated the CMC that had been fixed and stayed these proceedings until 19th December. It required the parties to notify the court by Tuesday 23rd December whether or not the action had been settled.

9.
So far as I can tell from the papers, very little of significance happened between September and mid-December 2009. There was no letter of response. There was no pre-action meeting and, although Roundstone's expert's report was repeatedly promised throughout this period, it was not provided. Thus, the parties were obliged to seek a second order from the court. That was granted on 15th December and it was in these terms:

"(1) The stay of proceedings ordered on 19th September 2008 be extended until Friday, 27th March 2009 to enable the parties to continue to complete the requirements of the pre action protocol and thereafter to consider and adopt any appropriate course of alternative dispute resolution to include but not necessarily limited to mediation.

(2) Either party shall, after Friday 27th February 2009, have permission to apply for the stay to be lifted and request the court to fix the case management conference on the first available date with a time estimate of 30 minutes.

(3) The parties to notify the court by Tuesday, 24th March 2009 as to whether the action has settled

(4) Costs in the case."

10.
Roundstone's expert's report was finally served on 19th December 2008. There was a loose agreement in the correspondence that, once that report had been served, a report in response would be prepared by Stephenson. Unhappily, Stephenson's expert was not formally instructed until 16th February 2009, a delay for which I cannot see any reasonable excuse.

11.
During the next 4 month period, that is to say between the granting of the consent order on 15th December and 15th April 2009, there was a large amount of inter-solicitor correspondence, much of which I have been taken to this morning. There was, however, little progress in the Pre-Action Protocol process or, to the extent that it was separate, the ADR. Steps were taken in late February to arrange a mediation hearing, although it was not until 2nd March that an appointment was fixed with Mr. David Richbell, a well-known mediator. Even then, the hearing was fixed for 15th April 2009 which was, of course, beyond the expiry of the stay identified in the court order of 15th December.

12.
This potential problem had been recognized by the solicitors in late February. On 26th February 2009 Coffin Mew, the solicitors for Roundstone, asked Shadbolt, the solicitors acting for Stephenson, to prepare the necessary consent order in respect of which they said:

"Our recent experience of the TCC is that the court will now require a firm mediation date to be set before granting adjournments. On that basis it is imperative that the parties have a firm mediation date before the consent order is filed."

13.
In their follow-up letter on 27th February, Coffin Mew sought agreement of the date of 15th April so that they could make arrangements to lodge a suitable consent order with the TCC. The same point was made in their letter of 2nd March 2009.

14.
Also on 2nd March, Shadbolt informed Coffin Mew in writing that their preliminary expert's report indicated that the design and specification of the floor undertaken by Bridge was inadequate and the cause of the problems. It was also said that Stephenson's contract was with Bridge and not with Roundstone. Thus it was suggested that, having regard to both the contract/no contract and the design issues, "it is important that Bridge should attend the mediation if it is to have any prospect of success."

15.
On 5th March, Coffin Mew sought Stephenson's letter of response to the claim letter, in accordance with the Pre-Action Protocol, saying that this had been what was intended by the order of 15th December, with its reference to the protocol process being completed by 27th February. Shadbolt wrote back on 6th March to say:

"The consent order dated 15th December provides that the proceedings are stayed until 27th March 2009. There is a provision for either party to apply for the stay to be lifted after 27th February 2009. There is not, however, any order that our client provide a letter of response by 27th February 2009 or indeed any other date. Our client is currently making preparations for the mediation and does not wish to prejudice that preparation or the mediation itself by providing a formal letter of response to your client's letter of claim. Our client also does not wish to waste costs unnecessarily if the matter can be settled at the mediation."

16.
In their reply of 9th March, Coffin Mew complained about Shadbolt’s refusal to provide the letter of response and said that, unless it was provided, they would seek an order from the court. They were, however, prepared to grant an extension of time for its provision up to 27th March 2009. They did not take any point about the other part of Shadbolt's letter of 6th March, which had confirmed that, if the mediation did not result in a settlement, "the parties will clearly have to make an application to the court for further directions and that will include a timetable for a formal letter of response".

17.
On 11th March 2009, Shadbolt wrote to Coffin Mew reiterating their points about the absence of a contract between the parties and the allegation that the complaints were matters of design. They also wrote to Bridge to seek their agreement to attend the mediation. It appears that Coffin Mew also approached Bridge for the same purpose. In response, Bridge's solicitors maintained that they required further information and documents, and in particular the expert's report from Stephenson. Whilst it does not appear that they objected in principle to attending the mediation, it is clear that they required the early provision of those documents as a condition of their attendance at such short notice.

18.

There was considerable correspondence between Shadbolt and Coffin Mew about the proposed mediation on 15th April. It appears that the parties spent some time preparing mediation position papers. There was also some consideration of the position in these proceedings. In their letter of 27th March, Coffin Mew correctly noted that it was necessary for the parties:

"…to advise the court as to the present position and the stay period expires today. A further consent order will be required. However, we cannot give consideration to the terms of this consent order until we have a definitive statement from you as to what we may except and when."

19.
In their reply of the same date, Shadbolt again reiterated that they would not be providing a formal letter of response prior to the mediation and said:

"Our client's mediation position paper will set out our client's case and we suggest that any further consent order simply confirms the extension of the stay to the proceedings pending the mediation on 15th April 2009."

20.
Although Coffin Mew's letters of both the 1st and 6th April continued to chase the outstanding expert's report, it did not seek to take issue with Shadbolt's suggestion as to the terms of the further consent order. Critically, however, neither party did anything about that proposed order, nor was any application made to the court to extend the stay. Thus, the expiry of the stay came and went on 27th March without either party seeking to extend it.

21.
The expert's report from Stephenson was significantly delayed (just as Roundstone’s report had been) and was not in fact served until 7th April. Even before that, on 30th March, Shadbolt had been expressly told by Bridge's solicitors that, as a result of its non-provision, Bridge would not be attending the mediation hearing. Once the report was provided it was sent immediately to both Bridge and Roundstone. In response, Bridge's solicitors again confirmed that they would not be participating in the mediation on 15th April.

22.
As I have said, mediation position papers were apparently exchanged on 8th April 2009 although, because they were exchanged on a without prejudice basis, I have not seen them. On the following day, that is to say 9th April 2009, Shadbolt wrote to Coffin Mew. They referred to Bridge's solicitors' statement that they would not be attending the mediation and went on:

"In the circumstances any resolution of this particular dispute cannot be achieved without the participation of Bridge either in the form of litigation proceedings or in the mediation. Unless you can persuade Bridge to attend on Wednesday the mediation will be a pointless exercise and a complete waste of time for all concerned.

We suggest that the most appropriate course of action is for the mediation to be rescheduled to a date that is convenient to Bridge once they have had an opportunity to consider the nature of the claim against them."

23.
Although Shadbolt sought to persuade Bridge's solicitors to change their minds, they refused to do so. As a result, in their follow-up letter, also on 9th April 2009, Shadbolt made plain that they would not be attending the mediation hearing. Thus, on 9th April, which was Maundy Thursday, the mediation

due for the following Wednesday was cancelled. A week later, on 15th April 2009, without any reference to Shadbolt, Coffin Mew sought judgment in default of defence. That Judgment was entered on 24th April 2009.

C. CPR PARTS 12 and 13: APPLICABLE PRINCIPLES

24.
CPR 12.3 provides that a claimant may obtain judgment in default of defence if pursuant to r.12.3(2):

"(a) where an acknowledgement of service has been filed but a defence has not been filed…"

The relevant time period for service of the defence in the present case was 28 days from the date of the service of the Particulars of Claim.

25.
CPR Part 13.2 allows the court to set aside a judgment that has been wrongly entered. The relevant provision for present purposes is r.13.2(b) which provides that the judgment must be set aside "in the case of a judgment in default of a defence, [where] any of the conditions in rule 12.3(2) and 12.3(3) was not satisfied …"

26.
CPR part 13.3 provides:

"(1) In any other case, the court may set aside or vary a judgment entered under Part 12 if –

(a) the defendant has a real prospect of successfully defending the claim; or

(b) it appears to the court that there is some other good reason why –

(i) the judgment should be set aside or varied; or

(ii) the defendant should be allowed to defend the claim …"

27.
The regime is straightforward. If the judgment is irregular in one of the three ways identified in r.13.2, the judgment must be set aside. In the present case, would require that, after all, a defence had been served within 28 days of the Particulars of Claim. In addition, it does appear that a default judgment will be regarded as irregular, and may be set aside, if the claim form was not served in accordance with the CPR: see **Credit Agricole Indosuez v. Unicof Limited** [2003] EWHC 97 (Comm). However, no suggestion of irregular service arises here.

28.
Even if the judgment is regular then, pursuant to r.13.3, the court may set aside the judgment if either the defendant has:

(a) a real prospect of successfully defending the claim or

(b) it appears to the court that there is some other good reason why the judgment should be set aside.

29.
The test under (a) above is essentially the same test as for summary judgment under CPR Part 24 (see **Swain v. Hillman** [2001] 1 All ER 91), save that the burden of proof under CPR 13 is on the defendant, whereas under CPR 24 it is on the claiming party: see **ED & F Man Liquid Products v Patel** [2003] EWCA Civ 472.

30.
The test under (b) above is designed to avoid injustice in circumstances which the CPR cannot necessarily foresee. In this context, the notes in the White Book at 13.3.2 make plain that it can be relevant for the court to consider the parties' conduct (see, by way of example, **Hart Investments Limited v. Fidler** [2006] EWHC 2857 (TCC)). Under either test, it is necessary for the defendant to demonstrate that he has acted promptly in seeking to set aside judgment, although again there is no suggestion in the present case that the defendant has not so acted.

D. ANALYSIS OF APPLICATION TO SET ASIDE

D1. Was the Judgment irregular ?

31.
The defence in this case was due to be served on 29th August 2008 (28 days after the Particulars of Claim). In fact no defence has ever been served, at least not until yesterday, 9th June 2009. Judgment could not, of course, have been entered whilst the proceedings were the subject of the stay but, as both parties acknowledged in their March/April correspondence, the second stay expired on 27th March 2009.

32.
In those circumstances, it does not seem to me that the judgment in default was irregular. It appears that, because of the concentration upon the mediation hearing, the parties omitted to seek an extension of the stay granted by the court on 15th December. In such circumstances, Roundstone were technically entitled to enter the judgment in default in April. Mr. Scott Holland made an express concession to that effect when I put that point to him this morning.

D2. 'Some Other Good Reason'

33.
As was, I think, apparent during the argument this morning, it is at this stage that my sympathy for Roundstone's position ceases. They knew that, even though the stay had come to an end, there was – pursuant to the court order of 15th December - an obligation on both parties to inform the court of any possible settlement by 27th March. Neither party sought to comply with that order, so both parties were in breach of it. Roundstone made no reference to that failure when they sought to enter judgment in default.

34.
Furthermore, Roundstone knew that Stephenson were operating on the basis that a further stay was obviously required, at least until after the mediation had been concluded. They knew that, because Shadbolt had expressly confirmed that position in the correspondence noted above, and Coffin Mew had never once suggested to the contrary. They had made no challenge to the correctness and commonsense of such an approach and their silence must be taken to amount to acquiescence.

35.
For those two reasons alone, I find that Coffin Mew acted unreasonably when they applied to enter judgment in default. I can well understand that they were upset by the somewhat high-handed manner in which Stephenson/Shadbolt had cancelled the mediation at the last moment. Indeed, Mr. Crangle said that the judgment in default had been entered "out of frustration". However, it does seem to me that the cancellation of the mediation cannot possibly be a proper excuse for the decision to apply to

the court for judgment in default, without reference to Shadbolt, and in the knowledge that the application would be strongly resisted if it had been so notified.

36.
During the course of his helpful submissions on this point, Mr. Crangle went so far as to say that, if a claimant was technically entitled to enter judgment in default then he was entitled to do so, even if he knew that the defendant had a real prospect of defending the claim and therefore setting aside such judgment. I am afraid I do not accept that submission: it seems to me that it is contrary to the entire basis of the Civil Procedure Rules. If a claimant knows that, because of some technical glitch, he could enter judgment in default against the defendant, but that the defendant had a real prospect of successfully defending the claim (and therefore getting judgment set aside) then that claimant should not, at least as a general rule, enter judgment in default. If he does, it seems to me that he must face the costs consequences of that decision.

37.
Thus, I conclude that there is a good reason why the judgment in default should be set aside: because it was obtained in an improper manner and was the result of unreasonable conduct. Therefore, it seems to me the judgment in default requires to be set aside pursuant to the over-riding objective (CPR 1.1).

D3. Real Prospect of Successfully Defending the Claim

38.
Of course it might be said that, notwithstanding those findings, the judgment in default should still not be set aside unless I concluded that Stephenson did have a real prospect of successfully defending the claim. Whether that is right or wrong in principle does not matter in this case, because it seems to me that, on any view, Stephenson do have a real prospect of successfully defending the claim. Indeed, that is now accepted by Roundstone. There are two reasons for my conclusion. The first is the ‘no contract’ point. If it were right that there was no contract between Roundstone and Stephenson, it would obviously mean that any cause of action against Stephenson would lie only in tort, and would be fraught with the usual difficulties: see **Murphy v. Brentwood DC** [1991] 1 AC 398 and **Henderson v. Merrett Syndicates Ltd** [1995] 2 AC 145.

39.
More importantly, the material before me sets out a clear case that the defects in the floor are matters of design for which Stephenson were not responsible, as opposed to a matter of workmanship for which they would be liable. It is impossible for me, on the basis of this material, to form any conclusions as to the ultimate outcome of that dispute, but it would be idle to say that, on this ground too, there was not a real prospect of Stephenson successfully defending the claim.

40.
Of course, it is now accepted that these matters do give rise to a real prospect that Stephenson can successfully defend the claim. However, Roundstone's position before me today is that this concession arises only out of the late service of the defence and is not as a result of any previous material that had been provided by Stephenson/Shadbolt. I reject that submission. On any fair reading, given the content of the Shadbolt correspondence in March/April 2009, and the expert's report of 7th April, the two points to which I have made reference above were plainly set out, in some detail, long before the service of the defence. It seems to me, therefore, that on the material available at the time that judgment was entered against Stephenson, Roundstone would or should have known that there was a real prospect of Stephenson successfully defending this claim.

41.
During his submissions, Mr. Crangle argued that it was the service of the defence made all the difference, because the expert's report had been provided on a without prejudice basis, and had in any event not been referred to in the original application to set aside. He argued, therefore, that Roundstone were entitled to leave the report out of account when considering the question of whether or not there was a real prospect of Stephenson successfully defending the claim. Again I am bound to reject that submission. It seems to me that it would be wholly artificial to introduce into the test of whether a party has a real prospect of successfully defending the claim a series of rules as to admissibility or relevance, based on whether particular defences had been expressly referred to in the application to set aside or the witness statement in support, on the one hand, or were instead contained in material that had been provided as part of the Pre-Action Protocol or a mediation, on the other. And to say that the claimant is entitled to ignore material that was provided by the defendant 'without prejudice' when assessing whether or not there was a real prospect of its claim being defeated is, in my judgment, again contrary to the whole basis of the CPR, which requires co-operation and commonsense, not tactical games-playing.

D4. Summary

42.
For these reasons, I consider that there is no ground for setting aside the default judgment under CPR 13.2. That is properly conceded by Stephenson. On the other hand, it seems to me that both the grounds under r13.3 have been made out and so, as is now conceded by Roundstone, the judgment in default should be set aside. For the reasons that I have set out above, it seems to me that judgment in default should never have been entered, and that Roundstone knew that Stephenson always had a real prospect of successfully defending this claim. In those circumstances Stephenson are entitled to the costs of the application to set aside.

E. ROUNDSTONE'S APPLICATION

E1. The Issues

43.
Roundstone seek an order that "the defendant do pay the claimant's costs thrown away on an indemnity basis as a result of the defendant's withdrawal from the mediation scheduled for 15th April 2009. Such costs to be summarily assessed. The claimant seeks an order in the terms above due to the defendant's failure to comply with the pre action protocol and its decision not to attend a prearranged mediation on 15th April 2009".

44.
The reference to the alleged failure to comply with the Pre-Action Protocol was a reference back to Shadbolt's insistence that, instead of providing a response to the letter of claim, they would set out Stephenson's position in the mediation position paper. It seems to me that, in circumstances where the boundaries between the Pre-Action Protocol and the mediation had become wholly blurred, it was not unreasonable for Shadbolt to take that line, although I think that there was something to be said for the provision of a letter of response in any event. Be that as it may, I cannot find that they were in breach of the Pre-Action protocol process, in view of their clear statement as to the method in which they were going to deal with Stephenson's overall position (ie in the mediation position paper).

45.

That leaves the question of the costs arising from the cancellation of the mediation. That application is rather more complex than it might first appear, because it seems to me that it raises the following issues:

(a) Was the mediation a separate ADR process, or was it part of the Pre-Action Protocol process agreed by the parties?

(b) If the mediation was a separate ADR process, does the court have the necessary jurisdiction to make an order in respect of any part of the costs of the mediation?

(c) If the mediation was part of the Pre-Action Protocol process, does the court have the necessary jurisdiction to make an order in respect of any part of the costs of the mediation?

(d) If the court does have the necessary jurisdiction to make the order sought, should it exercise its discretion in favour of Roundstone and make an order in respect of the costs thrown away?

(e) If the court does make an order in respect of the costs thrown away, should those costs be assessed on an indemnity basis?

E2. The Principles

46.
The costs of a separate, stand-alone ADR process, particularly if it takes place before the proceedings are commenced, will not usually form part of 'the costs of or incidental to the litigation'. Often it is agreed by the parties that each party will bear their own costs of such a mediation, with the result that the costs cannot subsequently be sought by one or other party in the proceedings. In such circumstances, the costs of a pre-action mediation will not normally be recoverable: see **Lobster Group Limited v. Heidelberg Graphic Equipment Limited** [2008] EWHC 413 TCC.

47.
Although, as Mr. Crangle rightly points out in his skeleton, paragraph 7.4.2 of the TCC guide says that co-operation is expected where the court has made an order for ADR, and that adverse costs orders may be made, it might be said that, in this case, there was no express order from the court requiring ADR. Instead there was an order requiring the parties to comply with the Pre-Action Protocol process and "thereafter to consider and adopt ADR if appropriate". That order, express or implied, is made at the outset of every TCC case.

48.
On the other hand, as a matter of principle, it seems to me that costs incurred during the Pre-Action Protocol process may, in principle, be recoverable as costs incidental to the litigation: see **McGlinn v. Waltham (No. 1)** [2005] 3 All ER 1126. On the facts of that case, the Pre-Action Protocol costs sought were not in fact found to be recoverable.

49.
On this analysis it may matter whether, as a matter of principle, the mediation on 15th April, in respect of which these costs were allegedly thrown away, should be treated as part of the Pre-Action Protocol process or a separate, stand-alone attempt at ADR.

E3. The Nature of the Mediation in the Present Case

50.

Doing my best on the material before me, I have concluded that this mediation was, and was treated by the solicitors as being, an integral part of the parties' agreed attempt to comply with the Pre-Action Protocol process. It seems to me that this is clear from those letters from Shadbolt to which I have already referred, in which they rejected the need for a letter of response from Stephenson. Such a letter is, of course, an important part of the Pre-Action Protocol process. Instead, they said that Stephenson's response would be provided by way of their mediation position paper.

51.
Furthermore, the Pre-Action Protocol for Construction and Engineering disputes is the only protocol which requires a without prejudice meeting between the parties. It is not uncommon, and often very sensible, for the parties to achieve this requirement by having the without prejudice meeting under the umbrella of a mediation. It seems to me that that is what happened here. There was no other proposal for a without prejudice meeting other than the mediation hearing on 15th April. Again, that suggests that the mediation was being treated as part of the Pre-Action Protocol process.

52.
I asked about the arrangements for the costs of the mediation. I was told that there was no agreement that the costs would be borne by each party regardless of the outcome, and no agreement that one or other party could not subsequently seek those costs as part of the Pre-Action Protocol process, and therefore as costs incidental to the proceedings. Thus, it seems to me that the costs in relation to the mediation in this case were capable of being sought in these proceedings, because the parties did not agree otherwise (contrary to the position in **Lobster**).

53.
For all those reasons, therefore, I have concluded that the costs allegedly thrown away in connection with this mediation may be recoverable in principle as costs 'incidental to the litigation', in accordance with the reasoning set out in **McGlinn**. The remaining questions are whether or not I should exercise my discretion in favour of allowing the recovery of such costs and, if so, on what basis I should do so.

E4. Costs Thrown Away

54.
I have concluded that Shadbolt were wrong to cancel the mediation on 9th April in circumstances where the mediation hearing was due to take place the following Wednesday. That is because:

(a) The mediation was an agreed part of the Pre-Action Protocol process for the reasons I have set out above. Stephenson were therefore obliged to participate in it.

(b) Without the mediation, there was no way in which the Pre-Action Protocol requirement for a without prejudice meeting between Stephenson and Roundstone could be fulfilled.

(c) The mediation had been arranged before there was any question of inviting Bridge to participate, and should have gone ahead even without their involvement. I note, as Mr. Crangle pointed out, that Bridge had been identified by Shadbolt as a possible party as long ago as June 2008.

(d) Bridge did not participate in the mediation because of the late service of Stephenson's expert's report. It was not unreasonable for them to take that line. It seems to me that it was not for Stephenson then unilaterally to cancel what would have been the completion of an eight-month Pre-Action Protocol process.

55.
I consider that, as a result, Stephenson should pay the costs thrown away by their late cancellation of the mediation. It should not have happened. However, I do not believe that, by cancelling it, Stephenson or Shadbolt were acting in a way which would warrant an assessment of those costs on an indemnity basis. The conduct was not of the kind which triggers a liability for indemnity costs: see **Reid Minty v Taylor** [2002] 1 WLR 2800 and **Kiam v. MGN Ltd (No. 2)** [2002] 1 WLR 2810. This was a bona fide, but incorrect, decision, made perhaps without any real thought of the ultimate consequences. Thus, costs are payable, but on the standard basis.

56.
There is a suggestion that I should now go on to assess summarily the costs thrown away. This is the second time in two days that I have been asked to perform such a function. For the reasons I gave in **Bovis v. Kendrick** [2009] EWHC 1359 (TCC), I must decline to do so. The assessment of costs thrown away is properly a matter for agreement between the parties in the first instance or, failing such agreement, it is a matter for the costs judge. It is not, it seems to me, a matter for the judge assigned to the case. I am not sure I have the necessary jurisdiction to undertake the task in any event.

57.
Furthermore, it seems to me that any proper assessment of the costs thrown away could not be performed at least until end of the Pre-Action Protocol process and possibly at a stage thereafter. That is because it will not usually be clear until then what costs could be said to have been wasted, and what costs were not. Take as a matter of example Mr. Richbell's fees. I understand that he has been paid the £4,000 that he charges for a day's mediation and preparatory work. However when, as I expect that it will be, the mediation comes back before him, it seems to me unlikely that Mr. Richbell will insist on charging a further fee, at least not in the same amount. Accordingly, it is not yet known what fees, if any, will be thrown away as a consequence of the unilateral cancellation of the mediation.

58.
For those reasons, I order that Stephenson should pay the costs thrown away by the cancellation of the mediation, such costs to be assessed on a standard basis if the parties cannot agree them, and such assessment not to take place until further order of the court. I now turn to deal with the directions that will be necessary to get this case back on track.