
# Building Towards Compulsory Mediation

**by**

**Erich Suter**

***Reprinted from***
**(2011) 77 *Arbitration* 375-381**
**Sweet & Maxwell**
**100 Avenue Road**
**Swiss Cottage**
**London**
**NW3 3PF**
***(Law Publishers)***

SWEET & MAXWELL

# Building Towards Compulsory Mediation

**Erich Suter**

The Players in *Rolf v De Guerin*[1] are all too familiar. A house owner and a building contractor contracted to carry out work on the house.

## 1. The Background

The builder, Mr De Guerin, contracted with Mrs Rolf in June 2007 to build a garage and a loft extension on her house. The cost of the garage was £34,000 and the cost of the loft extension was £18,000. The costs were to be paid by way of an initial payment of 25 per cent of the total cost and the remainder was to be paid in weekly instalments: over 10 weeks for the garage; and over 14 weeks for the loft extension.

Inevitably the work did not go smoothly. The judge found that Mrs Rolf's husband, Mr Mislati, was effectively in day-to-day control of the building work. The judge also found that Mr Mislati played "an interfering and aggressive role" in the work, to the point where Mr De Guerin felt he had no practical control over the contract or the work. This, together with Mrs Rolf's ceasing to make the weekly payments, which he took as the "final straw", led Mr De Guerin to treat his contract as repudiated. He accepted the repudiation by walking off site at some time around August 20, 2007. By this time the garage had three walls and only needed the roof and the door. As for the loft, all that had been done was that a flight of steps up to where it would be had been built. By the time the work finished Mrs Rolf had paid £28,750 to Mr De Guerin plus some money for supplies. The majority, if not all, of these payments were found to be allocated to the work on the garage.

## 2. The Claim and Offers to Negotiate and Mediate

After Mr De Guerin walked off the job Mrs Rolf engaged another builder to finish the garage at a cost of £20,000. Mrs Rolf brought a claim against Mr De Guerin in July 2008 for £50,000. Mrs Rolf completed the claim form herself and gave no particulars of the sums being claimed. In February 2009 Mrs Rolf wrote to Mr De Guerin's solicitors suggesting that:

> "… before we employ an expert to provide a full report relating to the claim, and before we employ a solicitor to handle the remainder of the case I am prepared to consider a settlement in order to avoid further expense on both sides".

Mr De Guerin's solicitors wrote back saying that whilst they commended Mrs Rolf's willingness to consider settlement, they could not advise their client until full particulars of Mrs Rolf's claim had been supplied. Mrs Rolf duly particularised her claim, which amounted to some £92,600. Having particularised her claim to Mr De Guerin's solicitors Mrs Rolf went on to say "therefore I am considering raising the amount claimed from the original £50,000".

Mrs Rolf again wrote to Mr De Guerin's solicitors in early April 2009 asking for them to discuss settlement with her. She asked that they enter into discussions within a week on pain of her putting the matter into the hands of solicitors. There was no response. Mrs Rolf engaged solicitors, who settled revised particulars of loss. These revised particulars reduced the claim to £44,435.45. Although these particulars of loss were "not very coherent"[2] nonetheless they had the effect of reducing the amount claimed substantially.

[1] *Rolf v De Guerin* [2011] EWCA Civ 78; [2011] C.P. Rep. 24.
[2] *Rolf v De Guerin* [2011] EWCA Civ 78 at [17].

In June 2009 Mr De Guerin's solicitors entered a revised defence. First it was argued that there were two contracts, one for the garage and one for the loft extension, and that neither contract had been with Mr De Guerin, himself, but with Greyfox—his company. Mr De Guerin claimed that both contracts had been terminated by Mrs Rolf's repudiatory breach of contract in stopping the interim payments. Mr De Guerin's solicitors rejected Mrs Rolf's expert report on the basis that it was based on what Mr Mislati had told the expert of the state of the garage after Mr De Guerin's work stopped. (By the time the expert saw the garage the work on it had been finished.) There was no counterclaim.

On June 24, 2009 Mrs Rolf's solicitors wrote to Mr De Guerin's solicitors making a Pt 36 offer to settle her claim for £14,000 plus reasonable costs. The offer was open for acceptance for 21 days and was available to either Mr De Guerin or Greyfox. That offer received no response. Mrs Rolf's solicitors wrote again on July 29 saying:

> "We look forward to receiving your client's response to our client's offer of settlement, and offer of mediation or round table meeting with a view to resolving this dispute."

This made it clear that the Pt 36 offer, and the offer of mediation, etc. were still on the table.[3]

On October 1 Mrs Rolf's solicitors again chased the Pt 36 offer and her offer of mediation. There was no response.

The trial was fixed for January 11, 2010. On Tuesday January 5, out of the blue, Mr De Guerin's solicitors made an offer to settle the claim for £14,000 plus Mrs Rolf's reasonable costs payable in monthly instalments over 36 months. Mr De Guerin's solicitors added that Mr De Guerin was in financial difficulties and had entered into an arrangement with his creditors such that he was paying off £27,700 at a rate of £125 per month.

> "It must follow [Rix L.J. held] that his offer to settle at £14,000 plus costs over 3 years was, at the very least, totally unrealistic."[4]

Even so, it appears that Mrs Rolf would have accepted this offer, if Mr De Guerin had been prepared to give a charge over his home for the amount. He declined, saying his wife was not willing to agree to a charge. The case went to trial, and Mrs Rolf was awarded £2,500 in damages. The judge made no order for costs up to June 24, 2009—which was the date of Mrs Rolf's Pt 36 offer—but then awarded costs in favour of Mr De Guerin from a period of three weeks after June 24, 2009.[5]

## 3. The Part 36 Issue

Prior to April 6, 2007, Pt 36 of the Civil Procedure Rules (CPR) required that if the costs consequences of Pt 36 were to follow in the case of a money claim, such as this, there must be a payment into court. If the claimant failed to better a Pt 36 payment-in made by the defendant at trial, then unless the court considered it unjust to do so, the claimant would be ordered to pay the defendant's costs incurred from three weeks after the date of the payment-in.

> "It was the generally accepted practice that beating the payment-in by as little as £1 was doing better than the payment into court and the cost consequence followed: the claimant was always at risk."[6]

[3] In fact, as Rix L.J. noted at [21]: "there is in fact no practical time limit within which a Pt 36 offer may be accepted: see CPR r.36(9)(2)". CPR r.36.9(2) provides that, subject to certain exclusions set out in r.36.9(3), "a Part 36 offer may be accepted at any time (whether or not the offeree has subsequently made a different offer) unless the offeror serves notice of withdrawal on the offeree".

[4] *Rolf v De Guerin* [2011] EWCA Civ 78 at [27].

[5] *Rolf v De Guerin* [2011] EWCA Civ 78 at [30].

[6] *Carver v BAA Plc* [2008] EWCA Civ 412; [2009] 1 W.L.R 113 at [3].

From April 6, 2007 the current Pt 36 regime came into operation.[7] Under the new regime "payments-in" to court were abolished. Under the new Pt 36 a claimant can, for the first time, make a settlement offer.[8] Where a claimant fails to obtain a judgment "more advantageous" than a defendant's Pt 36 offer[9] the defendant is entitled to costs and interest from three weeks after the date of the offer.[10] Where judgment against the defendant is at least as advantageous to the claimant as the claimant's Pt 36 offer, the defendant will be ordered to pay: (a) interest on any sum of money awarded (other than interest) at a rate of up to 10 per cent above base rate; (b) costs on an indemnity basis from a date generally three weeks after the date of the offer; and (c) interest on those costs at a rate of up to 10 per cent above base rate.[11] It was on the provisions of the current Pt 36 rules that the costs decision at first instance floundered in *Rolf v De Guerin*.[12]

The judge at first instance appears to have treated the costs consequences of Mrs Rolf's Pt 36 offer as those which would apply if the offer had been made by the defendant. That is, since she had failed to beat the offer the defendant should be entitled to costs.

The Court of Appeal had no hesitation in overturning the judge's decision on costs. Rix L.J. noted the "advantages to a party in pitching his offer realistically, and … [the] potential disadvantages to an offeree in declining the offer"[13] because of the advantages of making an offer to which the costs consequences of Pt 36.14 apply. He went on to note, however:

> "[T]here is nothing about the procedure which states that an offeror is to be prejudiced as to costs because he has expressed his willingness to accept less than his open position. That would make the procedure a most dangerous one to use."[14]

Where Pt 36 does not apply (as was the case here) then it is CPR r.44.3(4)(c) which regulates the court's power to award costs. This provides that the court must have regard to "all the circumstances" including "any admissible offer to settle … which is *not* an offer to which costs consequences under Part 36 apply" (emphasis added). This, Rix L.J. considered, "would make no sense if the offer to settle were to be held against the offeror".[15]

In looking at what costs should have been awarded Rix L.J. noted that the judge appeared, apart from the Pt 36 offer, to have decided that there should be no award of costs. Mrs Rolf had succeeded on the contract partner issue—i.e. that Mr De Guerin, rather than Greyfox, was her contract partner in respect of the building work. She had also been the winner in

[7] There has been further revision to Pt 36 by the Civil Procedure (Amendment) Rules 2010 (SI 2010/621) which amended Pt 36 following the introduction of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. But the amendments are not relevant for these purposes.

[8] See CPR r.36.3(1).

[9] CPR r.36.14(1)(a).

[10] CPR r.36.14(2). The question of whether an offer is more "more advantageous" to the claimant than a defendant's Pt 36 offer is different from the yardstick used, in money claims, under the old Pt 36—of simply bettering the amount offered. In *Carver v BAA Plc* [2008] EWCA Civ 412, for example, the claimant was held not to have obtained a judgment which was "more advantageous" to her than the defendant's Pt 36 offer. In that case the claimant had bested the defendant's offer by £51—it was held that, having regard to the stress of continuing to fight the claim; the stress of the trial itself; and the irrecoverable costs incurred, the judge was entitled to find that the claimant had not obtained a judgment which was more advantageous to her than the defendant's Pt 36 offer made a year earlier. But see also *Gibbon v Manchester City Council* [2010] EWCA Civ 726; [2010] 1 W.L.R. 2081, where Moore-Bick L.J. noted the concerns expressed by many about the decision in *Carver* (including Jackson L.J. in his *Review of Civil Litigation Costs, Final Report* (TSO, 2009)), on the grounds that it introduces an unwelcome degree of uncertainty into the operation of Pt 36. Moore-Bick L.J. said, at [40]: "In my view there is much force in that criticism". Having noted that *Carver* is binding on the courts he went on to say, "but it should be recognised that what may be more important than the factors to be taken into account is the weight that is to be attached to them, and that remains a matter for the judge in each case. Moreover, when deciding how much weight to attach to any particular factor I think it important to see things from the litigant's perspective rather than to be too ready to impose the court's own view of what is and is not to his advantage" (at [40]).

[11] CPR r.36.14(3). It should be noted that there are provisions for a court not to make such an award under this rule or r.36.14(2) (see discussion at fn.10 above) where it would be unjust to do so—see r.36.14(4); or where r.36.14 is disapplied—see r.36.14(6).

[12] *Rolf v De Guerin* [2011] EWCA Civ 78.

[13] *Rolf v De Guerin* [2011] EWCA Civ 78 at [34].

[14] *Rolf v De Guerin* [2011] EWCA Civ 78 at [34].

[15] *Rolf v De Guerin* [2011] EWCA Civ 78 at [35].

the sense of being awarded £2,500. By contrast, however, she had lost on the repudiation point, and the size of the award was fairly small having regard to her claim, which had varied between £44,000 and £92,000. On an issue-based approach Mrs Rolf came out rather lower than Mr De Guerin—the "contract partner" issue only having taken half a day of the four-day trial.

## 4. Unwillingness to Mediate

One of the factors which weighed heavily with the Court of Appeal was Mrs Rolf's willingness to negotiate and to mediate contrasted with Mr De Guerin's consistent refusal to meet or negotiate—at least until his unrealistic eleventh-hour offer was made.

> "It was completely clear to Mr De Guerin from the first that Mrs Rolf wanted to avoid litigation if she could, and was willing to settle for a figure which was far lower than her claim … £14,000 … represented some 70% of her out of pocket expense for completing the garage. Moreover, even that figure was plainly negotiable, as was to be inferred from her anxiousness to mediate or to meet for discussions, as well as her desire to avoid the expense of litigation."[16]

As the Court of Appeal observed, Mr De Guerin's precarious financial position was probably one of his best defences in terms of encouraging a settlement—if only he had been willing to mediate.

When asked by the Court of Appeal why he had been unwilling to mediate:

> "Mr De Guerin said that, if he had mediated, he would have had to accept 'his guilt'; he would have been unable to persuade a mediator what Mr Mislati was like, the judge had to see that for himself at trial when Mr Mislati gave evidence; and in any event, 'I wanted my day in court, and I was proved correct'."[17]

As to the former reason the Court of Appeal was unimpressed. Although Mr De Guerin did not plead that Mr Mislati's actions made the contract unworkable, the judge found that they did amount to repudiation of the contract. Nor did Mr De Guerin, in either of his witness statements, refer to Mr Mislati's actions. In the circumstances the Court of Appeal considered that:

> "… this could hardly have been his reasoning at the time, as distinct from a subsequent rationalisation, otherwise he would have pleaded and given written evidence about Mr Mislati".[18]

Rix L.J. went on to say:

> "As for wanting his day in court, that of course is a reason why the courts have been unwilling to compel parties to mediate rather than litigate: but it does not seem to me to be an adequate response to a proper judicial concern that parties should respond reasonably to offers to mediate or settle and that their conduct in this respect can be taken into account in awarding costs."[19]

One of the circumstances to which the court must have regard in awarding costs is the conduct of the parties. Rix L.J. pointed out that there is authority that such conduct can include the reasonableness or otherwise of a party's response to a request for mediation.[20]

[16] *Rolf v De Guerin* [2011] EWCA Civ 78 at [41].
[17] *Rolf v De Guerin* [2011] EWCA Civ 78 at [41].
[18] *Rolf v De Guerin* [2011] EWCA Civ 78 at [41].
[19] *Rolf v De Guerin* [2011] EWCA Civ 78 at [41].
[20] See, for example, *Dunnett v Railtrack Plc* [2002] EWCA Civ 303; [2002] 1 W.L.R. 2434; and *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002.

In *Dunnett*[21] Shiemann L.J., in granting permission to appeal, had "suggested" that mediation should be tried. The defendants, who had made an offer of £2,500 which they considered their limit to settle the case, were not prepared even to consider mediation. This was on the basis "that this would necessarily involve the payment of money, which [the defendants] were not willing to contemplate, over and above what they had already offered". Brooke L.J., who gave judgment, said of this justification:

> "This appears to be a misunderstanding of the purpose of alternative dispute resolution. Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide."[22]

As a result of the defendant's unwillingness to enter into mediation in *Dunnett* the Court of Appeal made no order for costs despite the fact that the appeal was dismissed. In certain cases, of course, as considered in *Halsey v Milton Keynes General NHS Trust*,[23] a party may act reasonably in refusing to mediate,[24] but as was noted in *Dunnett* and again in *Rolf*, "the parties themselves have a duty to further the overriding objective",[25] and this includes a requirement to consider mediation and ADR.

## 5. Building Disputes

*Burchell v Bullard*[26] was another case concerning a dispute between a homeowner and a builder. The builder, who was claiming £18,000 from the homeowner, offered mediation before he commenced his action. The homeowner refused the offer, but managed to dodge the costs bullet because the decision in *Dunnett* post-dated the offer to mediate. In *Burchell* the builder claimed £18,000; the homeowner counterclaimed £100,000. At the end of the trial the builder's claim was successful and the homeowner's counterclaim was successful to the tune of some £14,000. Allowing for VAT and interest the homeowner ended up paying the builder about £5,000. The recorder allowed the claimant the costs of the claim and the defendant the costs of the counterclaim—which far exceeded those of the claim. A roofer who had been brought in as a Pt 20 defendant by the builder and who had had an award against him of £79 (but who had been properly joined as a defendant), had no award of costs made against him.

Ward L.J. set out the financial costs/damages results of the trial:

> "As we had expected, an horrific picture emerges. In this comparatively small case where ultimately only about £5,000 will pass from defendants to claimant, the claimant will have spent about £65,000 up to the end of the trial and he will also have to pay the subcontractor's costs of £27,500. We were told that the claimant might recover perhaps only 25% of his trial costs, say £16,000, because most of the contest centred on the counterclaim. The defendants' costs of trial are estimated at about £70,000 and

[21] *Dunnett v Railtrack Plc* [2002] EWCA Civ 303.
[22] *Dunnett v Railtrack Plc* [2002] EWCA Civ 303 at [14].
[23] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.
[24] See E. Suter, "Discussion required? Part 1" (2008) 158 N.L.J. 1525 and "Discussion required? Part 2" (2008) 158 N.L.J. 1562—where each of the circumstances set out in *Halsey* as justifying a refusal to enter into mediation is considered.
[25] *Dunnett v Railtrack Plc* [2002] EWCA Civ 303 at [13].
[26] *Burchell v Bullard* [2005] EWCA Civ 358; [2005] B.L.R. 330.

> it was estimated the claimant would have to pay about 85%, i.e. £59,500. Recovery of £5,000 will have cost him about £136,000. On the other hand the defendants who lost in the sense that they have to pay the claimant £5,000 are only a further £26,500 out of pocket in respect of costs. Then there are the costs of the appeal—£13,500 for the appellant and over £9,000 for the respondents. A judgment of £5,000 will have been procured at a cost to the parties of about £185,000. Is that not horrific?"[27]

Ward L.J. went on "to add to the horror". After permission to appeal had been given because of arguable injustice in the award of costs, the appellant builder's solicitors wrote on August 11, enquiring whether the respondents "would submit the question of costs to mediation pursuant to the Court of Appeal Scheme". The response was that whilst the respondents were prepared to listen to:

> "…any sensible proposal your client might make we do not see that involvement of the Court of Appeal mediation scheme would be necessary or appropriate".

Ward L.J. noted that whilst this response would not impact on the costs in the court below it might well impact on the costs of the appeal.

One of the factors which the Court of Appeal considered in *Burchell* was whether the defendant homeowners had acted unreasonably in refusing the builder's initial offer of mediation. This had been made in May 2001, "long before the action started and long before the crippling costs had been incurred".[28] Ward L.J. considered some of the issues considered in *Halsey v Milton Keynes General NHS Trust*[29] to determine whether or not a refusal to mediate was unreasonable. He noted that among the relevant matters to take into account here were (a) the nature of the dispute; (b) the merits of the case; (c) whether the costs of the ADR would be disproportionately high; and (d) whether the ADR had a reasonable prospect of success. Ward L.J.'s starting point was that:

> "Dealing with [the factors set out above] in turn, it seems to me, first, that a small building dispute is *par excellence* the kind of dispute which, as the recorder found, lends itself to ADR."[30]

He went on to find that the merits of the case favoured mediation. The defendants would have been unreasonable to believe that this case was so watertight that they need not engage in attempts to settle. Thirdly, the costs of ADR would have been a drop in the ocean compared with the fortune that had already been spent on this litigation. Finally, the way in which the claimant modestly presented his claim and readily admitted many of the defects satisfied the Court of Appeal that mediation would have had a reasonable prospect of success. "The stated reason for refusing mediation that the matter was too complex for mediation is plain nonsense."[31]

The defendants dodged the bullet of a costs sanction for refusing mediation in *Burchell* from the outset only because the offer of mediation had pre-dated *Dunnett*, but, Ward L.J. warned that:

> "The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued. With court fees escalating it may be folly to do so. I draw attention, moreover, to paragraph 5.4 of the pre-action protocol for Construction and Engineering Disputes … which expressly requires the parties to consider at a pre-action meeting whether some form of alternative dispute resolution procedure would be more

[27] *Burchell v Bullard* [2005] EWCA Civ 358 at [23].
[28] *Burchell v Bullard* [2005] EWCA Civ 358 at [40].
[29] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.
[30] *Burchell v Bullard* [2005] EWCA Civ 358 at [41].
[31] *Burchell v Bullard* [2005] EWCA Civ 358 at [41].

> suitable than litigation. These defendants have escaped the imposition of a costs sanction in this case[;] defendants in a like position in the future can expect little sympathy if they blithely battle on regardless of the alternatives."[32]

The Court of Appeal, perhaps humanely in *Burchell*, did not rely, as the Court of Appeal in *Dunnett* had, on the duty of the parties to further the overriding objective; perhaps in part because the offer of mediation appears not only to have pre-dated *Dunnett*, but also to have preceded the involvement of solicitors in the case.

But certainly *Burchell* clearly subscribed to, if not laid down, the proposition that mediation should be considered in small building claims and that parties "cannot rely on their own obstinacy to assert that mediation [would have] no reasonable prospect of success".[33]

It is notable that Rix L.J., who gave the leading judgment in *Rolf*, was also the only other judge in the Court of Appeal in *Burchell*. (He gave a brief judgment in *Burchell* that dealt in particular with the ADR/mediation issue.)

Jackson L.J.'s *Review of Civil Litigation Costs: Final Report* says:

> "Encouraging ADR. Mediation is dealt with in chapter 36 below. The two principal forms of ADR are conventional negotiation and mediation. ADR has proved effective in resolving construction disputes of all sizes. In relation to small building disputes, however, it is particularly important to pursue mediation, in the event that conventional negotiation fails."[34]

In *Rolf* Rix L.J. held:

> "The spurned offers to enter into settlement negotiations or mediation were unreasonable and ought to bear materially on the outcome of the court's discretion, particularly *in this class of case*."[35] (Emphasis added.)

It seems that now a party to a small building dispute who declines an offer of mediation is likely in the future to be at substantial risk of an order for costs. As Sir Humphrey Appleby might have put it in *Yes Minister*: any future decision to refuse mediation in a small building dispute case will be a "courageous decision!"

[32] *Burchell v Bullard* [2005] EWCA Civ 358 at [43]. It should be noted that in this case the claimant, who was successful on appeal, was awarded the costs of the appeal in any event—so the failure of the defendant to agree to mediation under the Court of Appeal mediation scheme did not arise as an issue.

[33] *Burchell v Bullard* [2005] EWCA Civ 358 at [41].

[34] Jackson, *Review of Civil Litigation Costs: Final Report*, 2009, p.299 at para.4.6.

[35] *Rolf v De Guerin* [2011] EWCA Civ 78 at [48].