ExpediteResolution

settling difficult claims earlier

MEDIATION CASE DIGEST 2015

- **Know your mediation law before dealing with proportionality and cost budgeting in court.**
- **It's never been easier to persuade a party to mediate.**
- **A defensive strategy against mediation costs sanctions is a "must have".**

- **Halsey v Milton Keynes NHS Trust**
- **PGF II SA v OMFS Company 1 Ltd**
- **Lynn v Borneos LLP t/a Borneo Linnels**
- **Garritt-Critchley and Others v Ronnan and Solarpower PV Limited**
- **Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd**
- **Laporte & Anor v The Commissioner of Police for the Metropolis**

Jackson on mediation and costs

Jackson LJ, has, among other things, re-set the direction and focus of ADR. This is evidenced by his statements:

"(ADR, particularly mediation) has a vital role to play in reducing the costs of civil disputes, by fomenting the early settlement of cases. ADR is, however, under-used. Its potential benefits are not as widely known as they should be."[1]

[1] "Jackson Report" ("Review of Civil Litigation Costs: Final Report" by Jackson LJ, published by HMSO in 2010, Executive Summary, para 6.3, p xxii).

"The aim is that, in general, no case should come to trial without the parties having undertaken some form of alternative dispute resolution to settle the case."[2]

Knowing your mediation law for case and costs management hearings is important and the bench book issued to the judiciary is "The Jackson ADR Handbook"[3] which has twice been endorsed by the courts.

Case digest 2015

The cases referred to below show that the courts have followed Jackson's lead. None of these cases specifically relate to personal injury claims but they all relate to procedure generally and they highlight:

"… an ever-increasing responsibility thrown upon the parties to civil litigation to engage in ADR wherever that offers a reasonable prospect of producing a just settlement at proportionate cost."[4]

The leading case of *Halsey*[5] still applies, as does the list of matters to be considered when considering whether a refusal to mediate is unreasonable. Also, the authorities relying on *Halsey* still hold good. They all, however, now have to be viewed through the prism of the overriding objective, as modified by the addition of the words "and at proportionate cost".

Background: Halsey v Milton Keynes General NHS Trust[6]

CPR 44.4 deals with factors the court should take into account in deciding the amount of costs. It includes at (3) (a) (ii):

"the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;"

In *Halsey*, back in 2004, the Court of Appeal confirmed that a party which unreasonably refused to mediate could be penalised in costs. Dyson LJ said at paragraph 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

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[2] Cumulative First Supplement to the 2013 edition of the White Book (Civil Procedure, Sweet & Maxwell), p ix.
[3] www.Amazon.co.uk £34.99
[4] PGF II SA v OMFS Co [2013] EWCA Civ 1288, per Briggs LJ, para 27
[5] [2004] EWCA Civ 576
[6] http://www.bailii.org/ew/cases/EWCA/Civ/2004/576.html

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."

The Court rejected an argument put forward by the Civil Mediation Council that there should be a presumption in favour of mediation, saying, at paragraph 16:

"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."

The effect of the case was to put the burden on the unsuccessful party to show unreasonableness. In addition the court provided a non-exhaustive list of reasons that could be used to justify a refusal to mediate. The advice to any party wishing to decline an invitation to mediate was to explain it on the basis of one, if not more, of the *Halsey* reasons.

Many commentators criticised the judgment suggesting the combination of the *Halsey* reasons and the burden being on the unsuccessful party meant that it was difficult to establish an unreasonable refusal. However, the following cases seem to show those objections look more and more unfounded.

PGF II SA v OMFS Company 1 Ltd

In **PGF II SA v OMFS Company 1 Ltd** [2013] EWCA Civ 1288[7] the Technology and Construction Court at first instance departed from the usual costs rule under Part 36. The claimant accepted a Part 36 offer nearly 12 months after it was made and just one day before the trial was due to start. In the interim both parties had incurred a further £250,000 in costs. The court made no order for costs from 21 days after the Part 36 offer thus depriving the defendant of a significant sum.

The reason for the penalty was that the defendant had completely ignored the claimant's offer to mediate. The court held that their silence amounted to a refusal and the refusal was unreasonable.

The decision was upheld on appeal. Briggs LJ said at paragraph 34:

"In my judgment, the time has now come for this court firmly to endorse the advice given in Chapter 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,

[7] http://www.bailii.org/ew/cases/EWCA/Civ/2013/1288.html

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."

The court went on to examine the two *Halsey* reasons the defendant put forward in support of their argument that the refusal to mediate was reasonable. Firstly it argued the merits of the case. It made a Part 36 offer and left it until trial without further adjustment. This demonstrated the defendant's belief in the strength of its case, a belief which, since the claimant eventually accepted it, could not have been otherwise than reasonable. This was dismissed by Briggs LJ as follows:

"First, it is in my view simply wrong to regard a Part 36 offer, without any supporting explanation for its basis, as a living demonstration of a party's belief in the strength of its case. As I have said, defendants' Part 36 offers are frequently made at a level below that which the defendant fears having to pay at trial, in the hope that the claimant's appetite for, or ability to undertake, costs risk will encourage it to settle for less than its claim is worth."

The second ground the defendant sought to rely upon was that the mediation had no reasonable prospect of success. This was based on the gap between the parties' respective Part 36 offers, described by the defendant as their respective bottom lines. This was rejected. The court did not regard Part 36 offers as representing bottom lines so there was no unbridgeable gap and the history of the offers, considered objectively, showed the parties were *"converging at a rate which made a mediation or some other form of ADR highly appropriate".*

Lynn v Borneos LLP t/a Borneo Linnels

This is an unreported case, the judgment was delivered by His Honour Judge Cook in the Birmingham District Registry of the High Court on 30th January 2014[8]. It was a professional negligence claim, which for the purposes of determining the costs the defendants won.

The claimant argued the defendant unreasonably refused to mediate and the court agreed allowing the defendant to recover only 60% of their costs.

The judge noted there was no reasoned refusal to go to mediation, the defendants simply did not respond or made *"a fairly bland refusal to all the invitations to mediate"*. Although PGF was not cited the judge said *"the effect of authority is now, in my view, that the court should regard a refusal or a failure to engage in a mediation in those circumstances as unreasonable"*.

The costs penalty was imposed notwithstanding the defendants' confidence in its own case, which confidence was borne out by success at trial and the judge's

[8] If you would like a copy of the transcript visit http://www.heskethmediation.com/case-law/suspected-fraud-not-good-reason-refuse-mediation/

view that "nothing I have seen suggests to me that there would have been any realistic hope that the matter would have settled at mediation".

The court also noted the defendants regarded the claim as a "try-on" and explored the possibility of making allegations of fraud or discreditable conduct against the claimant. This suggests the judge did not consider that cases involving issues of fraud are necessarily unsuitable for mediation.

Garritt-Critchley and Others v Ronnan and Solarpower PV Limited

In **Garritt-Critchley and Others v Ronnan and Solarpower PV Limited** [2014] EWHC 1774 (Ch)[9] Judge Waksman QC in the High Court awarded indemnity costs against a defendant that accepted the claimant's Part 36 offer after a trial but before judgment had been delivered. The judge described the case as requiring a fact and evidence intensive exercise where the court would have to the credibility of witnesses and importance of documents. It required the parties to risk assess carefully whether or not their case would prevail. There was an obvious sliding scale of possible awards, it wasn't an all or nothing case.

The defendant sought to rely on a number of the *Halsey* grounds, all of which were dismissed by the judge. They were as follows:

a) The nature of the dispute.
The defendant argued there was no natural middle ground because the outcome depended on whether a concluded agreement was reached. The judge described it as misconceived to consider mediation to be unsuitable because of difference of opinion on a binary issue.

b) The merits of the case.
The court on the facts did not think it reasonable for the defendant to be so confident in its case. It noted that no application for summary judgment had been made. The judge also quoted Lightman J in Hurst v Leeming [2002] EWHC 1051 (Ch)[10] *""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."*

c) Whether the mediation had a reasonable prospect of success.
The defendant considered the six figure gap in the parties' respective valuations which existed for a large part of the litigation was evidence a settlement at mediation was unlikely. The judge said at paragraph 22 *"Parties don't know whether in truth they are too far apart unless they sit down and explore settlement. If they are irreconcilably too far apart, then the mediator will say as much within the first hour of mediation. That happens very rarely in my experience."*

d) Whether the costs of the ADR would be disproportionately high.
After the claimant had offered £10,000 to settle the claim the defendant

[9] http://www.trustmediation.org.uk/wp-content/uploads/2014/06/Garritt-Critchley-v-Ronnan.pdf

[10] http://www.bailii.org/ew/cases/EWHC/Ch/2002/1051.html

refused to mediate on the basis that a day in mediation may cost as much as the offer. The judge rejected that saying the comparison should have been made to the costs of trial, not the offer. The parties' figures showed a mediation would have cost significantly less than the trial did.

Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd (No 2)

In **Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd (No 2)** [2014] EWHC 3148 (TCC)[11]. In this case the court held the defendant was entitled to terminate a Licence Agreement under the true construction of the provisions of Clause 10.4 of the Enabling Agreement which governed the Licence Agreement. Accordingly the defendant was entitled to its costs but the claimant argued those costs should be reduced by 50% by reason of the defendant's unreasonable refusal to mediate the dispute.

Ramsey J accepted BAE reasonably considered that it had a strong case and on the merits decided that this was *"a factor which provides some but limited justification for not mediating"*. On this issue the judge commented:

"As stated in Halsey, the fact that a party reasonably believes that it has a watertight case may well be sufficient justification for a refusal to mediate.

The authors of the Jackson ADR Handbook properly, in my view, draw attention at paragraph 11.13 to the fact that this seems to ignore the positive effect that mediation can have in resolving disputes even if the claims have no merit. As they state, a mediator can bring a new independent perspective to the parties if using evaluative techniques and not every mediation ends in payment to a claimant."

The court concluded that notwithstanding this reasonable belief the defendant's refusal to mediate was unreasonable. It said at paragraph 71:

"This is therefore a case where the nature of the case was susceptible to mediation and where mediation had reasonable prospects of success. However, BAE reasonably considered that it had a strong case. On that basis was it unreasonable for BAE to reject NGM's offer to mediate? I have come to the conclusion that it was. Whilst BAE's view of their claim provided some justification for not mediating, I consider that the other factors show that it was unreasonable for BAE not to mediate the dispute. Whilst BAE point out that the matter was resolved by a comparatively short Part 8 hearing, even that would have been likely to have been avoided by the use of mediation.

Where a party to a dispute, which there are reasonable prospects of successfully resolving by mediation, rejects mediation on grounds which are not strong enough to justify not mediating, then that conduct will generally be unreasonable. I consider that to be the position here."

[11] http://www.bailii.org/ew/cases/EWHC/TCC/2014/3148.html

The defendant escaped a costs penalty, notwithstanding the unreasonable refusal to mediate, as their conduct was mitigated by the claimant's conduct in failing to accept a "without prejudice save as to costs" offer made by the defendant.

Laporte & Anor v The Commissioner of Police for the Metropolis

The first reported case of 2015 on the subject is **Laporte & Anor v The Commissioner of Police for the Metropolis** [2015] EWHC 371 (QB)[12].

The Claimant offered to mediate. The Defendant, despite being prompted more than once by the Claimant (and by the Court to consider ADR), did not accept the offer. At trial the Defendant succeeded on every substantive issue. Further, the Court found that, had there been a mediation, although there was a likely possibility of a settlement it would have been by no means certain.

When exercising its discretion on costs the Court considered the Defendant's conduct in the round, including the appropriate Halsey factors.[13] The Court awarded the Defendant only two-thirds of its costs, thus imposing a cost sanction of one-third. (The fact that the Defendant asked for £100,000 and the Court awarded interim costs of £50,000 suggested that this sanction would have been a significant amount of money).

Notable Points from the case

- If an offer of mediation is not accepted provide a thorough, reasoned response in writing – or risk a significant sanction.

- One of the conduct factors considered by the court was the fact that, although the Court ordered the Defendant to reply to the Claimant's offer to mediate by a certain date, the Defendant did not do so until well after that date.

- The Judgment provides an insight into how a Claimant, having offered mediation, should press for a response with "appropriate vigour".[14]

- The Defendant was found to have failed to engage with ADR "…..with proportionate commitment and focus". There was also a failure to "….fully and adequately…engage in the ADR process".[15]

- It would probably have been a mistake for the Claimant to have insisted on any pre-conditions for the mediation, but although they came close to doing this they did not actually do so.

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[12] http://www.bailii.org/ew/cases/EWHC/QB/2015/371.html
[13] Halsey v Milton Keynes General NHS Trust [2004] 1 WLR 3002.
[14] Paragraph 55(iv)
[15] Paragraphs 61 and 66

Conclusions

The courts are now more likely to use costs sanctions against parties who refuse to mediate. The perceived burden of showing a refusal to mediate is unreasonable appears to have been eased by these recent decisions.

What is the driver behind this move? Most likely it is the current lack of funding in the court service. Briggs LJ acknowledged the point in *PGF:*

"Thirdly, the constraints which now affect the provision of state resources for the conduct of civil litigation (and which appear likely to do so for the foreseeable future) call for an ever-increasing focus upon means of ensuring that court time, both for trial and for case management, is proportionately directed towards those disputes which really need it, with an ever-increasing responsibility thrown upon the parties to civil litigation to engage in ADR, wherever that offers a reasonable prospect of producing a just settlement at proportionate cost. Just as it risks a waste of the court's resources to have to try a case which could have been justly settled, earlier and at a fraction of the cost by ADR, so it is a waste of its resources to have to manage the parties towards ADR by robust encouragement, where they could and should have engaged with each other in considering its suitability, without the need for the court's active intervention."

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