The price of an unreasonable refusal to engage: ADR, Litigation and cost consequences

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1. The touchstone of all ADR procedures is that parties enter into them voluntarily. However, there is an increasing body of case law in the English courts that suggests mediation should be seriously considered:

   a. before litigation is entered into. Failure to do so may result in adverse or impacted costs for a client, even if successful; and

   b. in the course of litigation (instigated by the parties and increasingly with court directions) an unreasonable refusal of a request to mediate may have bearing on Part 36 offers and costs.

2. In light of inevitable delays to litigation during the lockdown, we explore the duties on legal representatives to consider Alternative Dispute Resolution ("ADR") at this time and how to respond to requests to mediate. Ultimately, we ask whether a party's freedom to forgo ADR has a price.

No compulsory ADR

3. It remains the case that a court cannot compel parties to resolve their disputes through mediation (*Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576). In this, the paradigm case, the Court concluded that it had no jurisdiction to force the parties to mediate as this would likely be regarded as a violation of Article 6.

4. However, this does not mean a victorious party will recover their costs where they have failed to respond to an invitation to and/or engage with ADR. In *Halsey* the Court emphasised that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. Depriving a successful party of some or all of its costs on the grounds that it has refused to agree to ADR is exceptional and the burden is on the unsuccessful party to show why a different order should be provided. Such a departure is not justified unless it is shown that the successful party acted unreasonably

in refusing to agree to ADR. Factors which may be relevant to the question of 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" (Halsey)

The Duty to consider ADR

5. Pursuant to the overriding objective, arguably the duties on litigators include:

   a. consideration of whether alternative dispute resolution is a possible remedy (*Dunnett v Railtrack plc* [2002] EWCA Civ 303 [2002] 1 WLR 2434; *Cowl v Plymouth City Council* [2002] 1 WLR 803); and

   b. discussion with client regarding ADR.

6. Once instructed, time is often of the essence. By the time proceedings have commenced it may be too late to try to organise a mediation or another form of ADR given the court's timetable (see *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd & Ors* [2014] EWHC 3546 (TCC)

Refusal to engage with ADR

7. The mere presence of ADR does not mean it is unreasonable to litigate (*Briggs v First Choice Holidays* [2017] EWHC 2012 (QB)). Nevertheless, all considerations have to be taken into account (*Lahey v Pirelli Tyres Ltd* [2007] EWCA Civ 91) adjudged at the time when the decision to refuse to participate in offers of ADR was made (*Corby Group Litigation v Corby District Council* [2009] EWHC 2109 (TC)).

8. Since *Halsey,* the courts have considered on a number of occasions whether a party has acted unreasonably in refusing to engage with the ADR process. A number of arguments have been considered in this regard:

   a. The desire to obtain formal vindication did not justify the refusal to mediate (*Burgess v Penny* [2019] EWHC 2034 (Ch));

b. The involvement of a governmental agency was no bar to mediation (see *The Serpentine Trust Limited v HMRC* [2018] UKFTT 535 (TC)));

c. Silence in response to an invitation to participate in ADR, absent exceptional circumstances, was of itself held to be unreasonable even if there might have been reasonable grounds to justify the same (*PGF II SA v OMFS Company 1* Ltd [2013] EWCA Civ 1288, [2014] 1 WLR 1386*)*.

COVID 19 and recent decisions

9. On 31 March 2020, the Civil Mediation Council (CMC) published a letter to members from Sir David Foskett, Chair of the CMC, in light of the ongoing COVID-19 outbreak. The letter highlights that, despite the current situation, "*the need for mediation has not gone away*" and that the outbreak "*could result in a greater demand for the help that mediators can bring*". In light of mediators beginning to adapt their normal working arrangements to offer online mediation where practicable, the CMC has produced dedicated guidance for members on online mediation.

10. Subsequently, on 7 May 2020, the Cabinet Office issued Guidance (for England only) calling for "*responsible contractual behaviour*" in the performance and enforcement of contracts impacted by the Covid-19 emergency stating that "*disputes, especially a "plethora of disputes*", can be "*destructive to good contractual outcomes"* and … *"the Government strongly encourage[s] parties to seek to resolve any emerging contractual issues responsibly – through negotiation, mediation or other alternative or fast-track dispute resolution*" (para. 17).

Recent decisions

11. This year, the courts have analysed arguments concerning unreasonable refusals to engage with ADR.

BXB v Watch Tower and Bible Tract Society of Pennsylvania [2020] EWHC 656 (QB)

12. In *BXB v Watch Tower*, the Claimant succeeded in a claim for damages for personal injury. The court opined following the defendants' refusal to participate in a joint settlement meeting, that they should have served a witness statement explaining the reasons for that non-participation , in accordance with the court's standard ADR direction. They did not do so, and that breach of the direction was "unreasonable conduct."

13. Further, the court determined in all the circumstances of that case, that it was appropriate to make an indemnity costs order because:

    a. Whilst it was accepted that the defendants could reasonably present the strength of the arguments in the case, this did not mean that "*there was nothing to discuss*". A joint settlement meeting could have focused on agreeing quantum subject to liability and as a result, shortened the trial.

    b. Although the Claimant recovered less than the amount sought, this did not "*excuse the failure to engage at all with the proposal of a joint settlement meeting"*. The first Part 36 offer demonstrated that the Claimant was prepared to settle the case for less than was eventually awarded, and the Defendants should have considered this.

DSN v Blackpool [2020] EWHC 670

14. In *DSN v Blackpool* [2020] EWHC 670 the Claimant's solicitors made a Part 36 offer to settle the claim for £50,000. The Defendant did not respond to this offer at all. Subsequently at a hearing, the court made a standard ADR direction. Further, the Claimant provided another Part 36 offer and invited the Defendant to enter into settlement negotiations. The Defendant responded by confirming that it did not intend to engage in settlement negotiations "*and remains confident in the strength of its defence"*. Another Part 36 offer was also rejected.

15. The Court held the Defendant in this case failed and so refused to engage in any discussion whatsoever about the possibility of settlement. It did not respond to any of the three Part 36 offers (except to reject the final one). The reasons given for refusing to engage in the mediation were inadequate. The Court considered that "*no defence, however strong, by itself justifies a failure to engage in ADR*." Overall, the Defendant's conduct took this case '*out of the norm*'.

***Richard Wales (t/a Selective Investment Services) v CBRE Managed Services Ltd* [2020] EWHC 1050 (Comm)**

16. Furthermore, in *Richard Wales v CBRE Managed Services Ltd* the court was prepared to disallow some of the successful Defendant's costs. The court took into account:

    a. The First Defendant's repeated refusal to mediate.

b. The unsatisfactory explanation for the First Defendant's failure to participate in the mediation at a formative stage. Witness evidence was not required for the purposes of a successful conclusion of a mediation.

c. The dispute here was suitable for mediation and was not a tactical ploy to buy off the cost of a mediation.

d. In terms of the other *Halsey* factors, the costs were not disproportionality high and the Court considered that "*there is a reasonable prospect that common ground could have been found on at least some of the issues and, indeed, that a wider basis could have been found for compromising the litigation as a whole"*

***Kelly v Kelly* [2020] 3 WLUK 217**

17. In *Kelly v Kelly* there had actually been two prior mediations before the case was heard in court. The Defendant alleged that the claimant had not honoured the agreements reached on either occasion and indicated that he was unwilling to mediate further. The Court held that the Defendant was entitled to costs on the indemnity basis after the expiry of his CPR Pt 36 offer as he had beaten that offer at trial and his refusal to engage in further mediation, was "reasonable and understandable".

Reflections

18. It is suggested that the recent case law demonstrates a particular trend whereby the Courts will examine closely the actions of the parties in relation to offers of ADR as to whether they are 'reasonable' or not - determined against a backdrop of whether they might constitute "unreasonable refusals to mediate" following the existing case law. Even the failure to respond to a Part 36 Offer alongside an offer to mediate, can of itself potentially signify an unreasonable refusal to engage with ADR. The recent judgments have also emphasised the need to provide adequate witness evidence required to explain why a party has declined to engage in ADR. Parties cannot rely on the strength of their case alone to justify rejecting offers of ADR and embarking on a blinkered trajectory towards trial.

19. The court is likely to maintain its current approach, imposing serious cost consequences where parties have unreasonably refused to engage in ADR.

20. In fact, with the pressure on the court's resources ever increasing and a backlog of cases likely accumulating, the court may be even more critical of parties who dismiss attempts to settle the dispute through ADR. In the context of the COVID-19 emergency

(see above), attention has been drawn to the very recent Government guidance as to approaching disputes at this time with its emphasis on considering ADR and mediation as alternatives to litigation. Anecdotally, it is understood that remote/virtual mediations during this period are happening and indeed, resulting in successful outcomes.

21. As a result, the present task for litigators is to ensure they proactively and carefully engage with ADR. Not only does a failure to do so create an unacceptable cost risk for the client, it also potentially exposes the litigator to claims by the client if adverse cost orders are made.

22. It would indeed appear that unreasonable refusals to engage with ADR may well, ultimately, come at a cost.

This article is an overview of the law and is not a replacement for formal legal advice tailored to your specific query. If you seek further information, please contact 3PB Commercial clerking team by emailing David.fielder@3pb.co.uk

David Parratt QC and Rebecca Farrell will be delivering a webinar on this subject on 16th June 2020. Please see 3PB's website for further details https://www.3pb.co.uk/events/adr/.

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