'Unreasonableness': costs applications in the Small Claims Court

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THE *DAMMERMANN* DECISION.

1. The Court of Appeal in Dammermann v Lanyon Bowdler LLP [2017] EWCA Civ 269 has provided guidance on the meaning of '*unreasonableness*', a word used to determine costs applications in the Small Claims Court, and more general guidance on when costs on that track should be awarded.

2. The acid test of unreasonableness is whether the relevant party's conduct admits of a reasonable explanation. The fact that he has unsuccessfully pursued a claim or defence is not in itself sufficient; and the fact that an offer of settlement has been refused may be a relevant consideration.

3PB'S ANALYSIS.

3. **The rule.** CPR 27.14(2)(g), applicable in the small claims track and which creates a presumption against ordering costs, provides:

   'The court may not order a party to pay a sum to another party in respect of that other party's costs, fees and expenses, including those relating to an appeal, except... such further costs as the court may assess by the summary procedure and order to be paid by a party who has behaved unreasonably.'

4. **The proceedings.** Mr Dammermann had lost a small claims hearing against the Defendant firm of solicitors then lost an appeal before a Circuit Judge (CJ), at which stage costs were ordered on the basis of unreasonable behaviour pursuant to CPR 27.14(2)(g). His claim failed because the solicitors were not agents of his mortgagee.

5. Mr Dammermann appealed against the costs order on three grounds:

   5.1. the same CJ that ordered costs had himself granted permission to appeal;

   5.2. the point of law on which he lost the case was obscure;

   5.3. the CJ was wrong to take into account his rejection of a £1,000 offer to settle.

6. **The Court of Appeal's analysis.** Allowing the appeal, the CoA stated that the first two grounds had 'considerable force' (para. 12). The fact that the CJ had granted permission to appeal (thus indicating a reasonable prospect of success) was a relevant factor that the CJ had overlooked. As to the second point, the CJ had not (contrary to the respondent's submission) held that the appeal was totally without merit. In fact the case had involved 'a somewhat intricate point' (para. 26).

7. **The rejection of settlement offers.** The consideration of the third ground is of broader interest. In small value disputes it is common for a party to make a commercial offer to settle, on the basis that it is more cost effective than incurring their own (likely irrecoverable) costs.

8. The making and rejection of such offers is a relevant consideration to unreasonableness. As the CoA highlighted, there is express power to consider the rejection of an offer per **CPR 27.14(3)**:

   'A party's rejection of an offer in settlement will not of itself constitute unreasonable behaviour under paragraph 2(g) but the court may take it into consideration when it is applying the unreasonableness test.'

   The CoA stated that if this were the only point of appeal it would not have succeeded. The CJ was entitled to take the rejection into account.

9. **Broader guidance on unreasonableness.** The CoA accepted an invitation to provide general guidance on when a party has behaved unreasonably. Unsurprisingly, the CoA emphasised the limitation that 'all such cases must be highly fact-sensitive' (para. 30) but drew on guidance[1] from the principles of wasted costs applications:

   '*conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the*

[1] Ridehalgh v. Horsefield [1994] Ch 205

conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting in a practitioner's judgment, but it is not unreasonable'

10. As to the special status of litigants in person, the CoA continued (para. 31):

    '*the meaning of "unreasonably" cannot be different when applied to litigants in person in Small Claims cases. Litigants in person should not be in a better position than legal representatives but neither should they be in any worse position than such representatives*'

11. The CoA ended their judgment with a cautionary note against awarding costs as a matter of routine:

    '*it would be unfortunate if litigants were too easily deterred from using the Small Claims Track by the risk of being held to have behaved unreasonably and thus rendering themselves liable for costs*' (para. 32).

IMPACT OF THE DECISION

12. Dammermann is important guidance from a higher court as to the meaning of unreasonableness. As a rare instance of a small claim reaching the Court of Appeal, it is a valuable statement of principle, which has reaffirmed that an order for costs should be the exception and not the norm.

13. Joe England has provided further analysis of Dammermann in the context of litigation in Employment Tribunals in an article on the 3PB Employment Group site.[2] The word 'unreasonable' is similarly used to determine costs applications in the ET.

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Joe England is a specialist Commercial and Employment Law barrister, with particular interest in matters of overlap (*e.g.* TUPE transfers and employment-related professional negligence claims).

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[2] http://www.3paper.co.uk/group/employment-and-equalities