Every Loser Wins: Costs Sanctions Following An Unreasonable Failure To Mediate

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St John's barrister and mediator Ben Handy considers the recent High Court authority of *Laporte & Christian v The Commissioner of Police of the Metropolis [2015] EWHC 371 (QB)*.

The courts have once again punished a wholly successful party in costs for their unreasonable refusal to mediate – a trend that is only likely to grow.

Introduction

It is now over a decade since the Court of Appeal made it clear, in the case of *Dunnett*[1], that parties who unreasonably refuse an offer of mediation would be punished in costs. They went further shortly afterwards in *Halsey*[2], setting out a list of factors that are to be considered where such conduct is alleged.

Though it has been slow to sink in, the message has been hammered home more recently in the cases of *Rolf* (in 2011) and *PGF*[3] (in 2014) - in each case the ultimately 'successful' party was heavily penalised because they were not prepared to try alternative methods of resolving their dispute without a trial.

On 19th February 2015 the High Court handed down judgment in the case of *Laporte & Christian v The Commissioner of Police of the Metropolis [2015] EWHC 371 (QB)* and reiterated once more just how highly the Courts have come to value alternative dispute resolution (ADR) in all its guises.

[1] *Dunnett v Railtrack [2002] EWCA Civ 302*
[2] *Halsey v Milton Keynes NHS Trust [2004] EWCA Civ 576*
[3] *Rolf v De Guerin [2011] EWCA Civ 78* and *PGF II SA v OMFS Co 1 Ltd [2014] 1 W.L.R 1386*

The Facts[4]

This was a claim for damages for assault and battery, false imprisonment and malicious prosecution, and breach of the claimants' Convention rights to freedom of expression and assembly.

The claimants were amongst a number of protestors at a council meeting that was being held to debate cuts to the budget and local services. The meeting began in public, but the disruptions in the public gallery were such that the council moved into private session while police stepped in to break up the protest. They herded the protesters down a staircase and out of the building. In the course of these events the claimants were arrested, imprisoned and ultimately prosecuted for assaulting police officers in the course of their duty. Those prosecutions later collapsed on the day of trial in the face of a submission that there was no case to answer. The claimants then brought this claim.

The facts were hotly disputed. There were accusations of lying and collusion on both sides. In essence, the claimants alleged that the police had been exceptionally heavy-handed in the way they dealt with the protest, while the police threw the same accusations back at the protesters.

The claim was dismissed, with Mr Justice Turner making the following findings:

i. The police had been entitled to eject the protesters from the building – but the police officers had overplayed the protesters' behaviour at least as much as the protesters had underplayed it, and some of the officers had colluded and embellished their accounts;
ii. The claimants were not treated with excessive force and were arrested lawfully;
iii. The time the claimants spent in custody was not excessive;
iv. The officers had an honestly held belief that they were assaulted in the execution of their duty, whether or not that was accurate;
v. There is a need *"to protect the machinery of local government from being brought to a standstill by serious and deliberately disruptive conduct no matter how well intentioned the objects"* that has to be balanced against the claimants' Convention rights.

The battleground then shifted to the issue of costs. The defendant asked that the claimants pay their costs – the usual order given the result at trial. The claimants argued that there should be no order for costs because the defendant refused to engage in ADR.

Refusal to Mediate[5]

Between September 2013 and June 2014, the claimants made repeated offers of mediation in order to resolve the matter or at least narrow the issues. The defendant originally agreed to engage in mediation 'with an open mind'. In October 2013, the Court ordered them to respond to a formal offer of mediation by 1st November 2013.

[4] Set out in a separate judgment with citation *[2014] EWHC 3574 (QB)*
[5] paras 16 – 34 of the judgment

They did not do so, but in January 2014 offered to meet the claimant in a mediation hearing 'in an attempt to narrow the issues for trial'.

In February 2014 the claimants called the defendant to discuss ADR and they again agreed to meet on an 'open minds' basis on a date to be confirmed. Later that month, the claimants wrote to the defendant proposing dates for the meeting. The defendant responded agreeing that both parties should meet with open minds and though the defendant probably would not make any financial offer, this could not be ruled out. In May the claimants again wrote suggesting dates and suggested meeting without counsel if that made finding appropriate dates easier.

On 23rd May 2014 a Pre-Trial Review took place, following which the solicitors for the claimants and defendant met and discussed ADR. The defendants got the impression that the claimants saw a money offer as a prerequisite to compromise, but accepted that they would come to mediation with an open mind. On 28th May the claimants wrote to ask who would be attending the mediation on behalf of the defendant and for a list of issues to discuss.

On 2nd June, the claimants suggested a date for meeting on 16th June. A chaser was sent the next day. On 4th June, the defendant emailed the claimants but made no reference to ADR. The claimants immediately responded to ask again about ADR. Later that day, the defendant wrote to the claimants saying that they no longer thought that an ADR meeting was appropriate and that they would explain that view fully in a letter to follow. No such letter was sent, despite the fact that the claimants themselves wrote on a couple of further occasions asking for a fuller explanation and expressing their unhappiness at the refusal of their longstanding offer of ADR.

The trial took place at the end of June 2014.

The Findings

The Judge considered the *Halsey* factors in turn before turning to other matters[6]:

i. The nature of the dispute

Recalling the judgment in *Halsey*, he noted that some disputes are intrinsically unsuited to ADR - where the parties wish the court to determine issues of law or construction that may be essential to a continuing commercial relationship between the parties; where there are allegations of fraud or disreputable conduct against a group or individual; or where the remedy sought is essential to protect the position of a party (such as an injunction). However, *"most cases are not by their very nature unsuitable for ADR".*

The defendant argued that the claim raised points of public importance regarding the scope of police powers and alleged fabrication of evidence. The claimants had themselves asked for permission to appeal citing the need for 'an authoritative determination' of the scope of certain police powers.

[6] paras 39 – 60 of the judgment

The Judge disagreed. He found that there were financial risks on both sides and issues of pure fact to be resolved upon which both sides ran the risk of adverse findings – in the absence of a continuing commercial relationship *"it is unrealistic to suggest that a settlement by way of ADR would have been inappropriate for this type of dispute."*

ii. The merits of the case

Again citing *Halsey*, the Judge noted that where a party reasonably believes that they have a watertight case, the refusal of mediation is likely to be more reasonable. The more borderline the case, however, the more compelling the reasons will need to be for refusing ADR.

In this case, the defendant had expressed that they were open minded – a concession that the merits of the defence were not so watertight as to justify a refusal to properly engage in ADR. There was material in a number of areas that would have given the defendant food for thought in predicting his chances of success, even without the benefit of hindsight.

iii. Have other settlement methods been attempted?

Quite simply, *"the defendant had made no offers to settle the case before ADR was suggested. It cannot therefore be heard to say that it had exhausted other opportunities of resolving the case which would have obviated the need to go to court."*

iv. Would the cost of mediation be disproportionately high?

The defendant conceded that the costs of mediation would not have been so high, but contended that an offer to settle would have had to include a large costs liability to the claimants.

The Judge rejected that submission on the grounds that it was not material to the Court of Appeal's considerations under this heading – it was more relevant to considering whether the mediation had reasonable prospects of success. He did not seem to consider the fact that the defendant was able to make any offers it chose to - they did not necessarily have to include any costs liability.

v. Whether any delay in setting up the ADR would have been prejudicial

The Court of Appeal in *Halsey* was referring to offers of mediation made so late in the day that they would have the effect of postponing trial. In this case, the first offer of mediation was made nearly a year prior.

vi. Whether the mediation had a reasonable prospect of success

The Judge spent more time dealing with this crucial factor. The Court of Appeal had stated that it was for the offering party to satisfy the Court that mediation

did have reasonable prospects of success, rather than for the refusing party to show that it did not.

The solicitor for the defendant argued that it had come incrementally to the view that the claimants would only accept a financial offer and, as the defendant was unlikely to make one, ADR was not appropriate. The Judge made the following observations:

i. The defendant had never excluded the possibility of a money offer;
ii. The claimants never expressly made a money offer a precondition;
iii. Parties uniformly try to lower their opponent's expectations prior to ADR. Simply because one side guesses or predicts what it may take to settle the matter at ADR does not entitle them to treat that, without more, as a formal precondition;
iv. The claimant's offer of ADR was not purely tactical – they had made the offer early and pursued it vigorously;
v. It appeared that the defendant's solicitor was on the procedural back-foot throughout so that she was simply too busy preparing for trial to properly pursue ADR.

The Judge found that there were reasonable prospects that mediation would have succeeded, at least in part. The defendant was not justified in coming to a contrary conclusion.

vii. Further matters

The defendant relied on the Court of Appeal authority of *Daniels v Commissioner of Pollce of the Metropolis [2005] EWCA 1321*, which stated that it may be reasonable for a defendant who routinely faces unfounded claims to take a stand even where the costs of doing so are disproportionately high. The Judge dismissed that argument on the basis that the defendant had never ruled out the chance that some money offer might be made to settle the case, and never sought to categorise the case as one that was so self-evidently unfounded that it should be fought regardless of the cost.

Further, there was no prospect that a settlement here would impact on police powers or tactics in future – mediation does not involve an adjudication on the facts of the case and the case involved various different claims against various different officers – there could be no necessary inference that any compromise was based upon any particular factual or legal background.

The Punishment

Having made those findings, Mr Justice Turner held that *"the defendant's failure fully and adequately to engage in the ADR process should be reflected in the costs order I make"*. He disallowed one third of their costs after assessment, notwithstanding that they had been successful *"on every substantive issue"*.

Conclusion

With the focus ever more on protecting limited and overstretched court resources, it is inevitable that such penalties are only likely to become harsher and more frequent. Paying lip service to mediation is no longer likely to be good enough, and parties must bear this in mind both when making and responding to such offers.

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