Indemnity Costs for Failure to Mediate?

27 July 2022

INTRODUCTION

In *Paul Richards and Keith Purves v Speechly Bircham and Charles Russell Speechlys LLP* [2022] EWHC 1512 (Comm) the court considered the consequential matters arising from the trial of those proceedings in which the claimants were successful in their claim for negligence. The consequential matters included, *inter alia*, costs and the basis on which they were to be awarded. Specifically, the court considered whether a refusal to engage in mediation should result in costs being awarded on the indemnity basis.

BACKGROUND

In support of their application for indemnity costs, the claimants pointed to four offers to mediate contained in "without prejudice save as to costs" correspondence. Three of those offers had been made prior to issue of the Claim Form and the fourth was made following service of the Defence and in advance of a case management conference.

The defendants resisted the application on the basis that (i) their approach to mediation was not unreasonable, relying on *Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd* [2014] EWHC 3148 (TCC); and (ii) that in any event, an unreasonable refusal to mediate was only one facet of a party's conduct to be taken into account when determining costs, relying on *Gore v Naheed* [2017] EWCA Civ 369.

The defendants' response to the first offer to mediate was that they did not consider it would be productive or cost effective at that stage, and that they would keep the merits of some form of alternative dispute resolution ("ADR") under review.

The defendants' response to the subsequent three offers to mediate was that there was no point in engaging in mediation as the claim was doomed to fail, as well as pointing, in the final refusal, to the expense of mediation given the uncertainty of its outcome.

Both parties made Part 36 offers which they failed to beat.

JUDGMENT

The Reasonableness of Refusing to Mediate

In their submissions as to the reasonableness of their refusal to mediate, the defendants pointed to (i) their having made a Part 36 offer, (ii) the fact that they had budgeted for mediation in their costs budget which indicated that they were open to mediation, (iii) without prejudice discussions had taken place between Leading Counsel in an attempt to settle and (iv) in their initial refusal to mediate, they had said that any mediation should follow disclosure, which, at the time of the fourth and final offer to mediate, had not taken place.

Having considered *Garritt-Critchley v Ronnan* [2014] EWHC 1774 (Ch), Judge Russen QC held that the defendants' failure to mediate was unreasonable. He agreed with the claimants that any need for disclosure to shed light on certain aspects of the case could have been dealt with in preparation for mediation or inquired into at mediation and, further, that "*certain assumptions which the Defendants' submissions reveal had been made about the Claimants' motivations for and expectations of the litigation (which meant 'mediation was therefore most unlikely to succeed') were just the kind of matters which a mediator would have explored.*" As had been recognised in *Garritt-Critchley*, "*most mediators are skilled in seeking to moderate the expectations of any party which may be based on matters collateral to the merits of its case.*" [17]

In relation to the defendants having made a Part 36 offer, Judge Russen QC bore in mind that the offer was made "*only just over*" three months before the trial and noted that "*the timing of the Defendants' offer signifies their general passivity in the ADR process over the period of almost 3 years since a mediation was first proposed.*" [19]

As to the defendants' point in correspondence regarding the expense of mediation given the uncertainty of its outcome, Judge Russen QC said that the defendants had wrongly compared the combined budgeted costs of mediation (£105,000) with the judgment sum (almost £1.5m). The correct approach was to compare the costs of mediation with the costs of taking a claim to trial.

While *Northrop* was not considered in any detail, the judge held that the defendants' reliance on five of the six factors identified in *Northrop* as bearing upon the reasonableness of a refusal to mediate "*(1) the nature of the dispute; (2) the merits of the case; (3) attempts at other settlement methods; (4) costs of ADR; (5) the prospects of successful ADR"* did not assist them. [20]

One Facet of a Party's Conduct

As to the defendants' second argument, that refusal to mediate is only one facet of a party's conduct to be taken into account when determining costs, the judge was more sympathetic, noting that in *Gore v Naheed*, Patten LJ had endorsed "*the observation that even an unreasonable failure to engage in mediation does not automatically result in a costs sanction*." [23]

Judge Russen QC went on to say that "*a 'failure' to engage in (or at) a mediation clearly does not carry the clearly defined costs consequences of an unaccepted but effective Part 36 offer*" reasoning that it would be too difficult to identify with any confidence where any "*blame*" lay within the pursuit and conduct of what is a privileged process. He said that the uncertainty of outcome of any mediation means that a party who suggests unreasonableness on the part of their opponent "*cannot point to the result at trial and demonstrate that costs have been wasted through the mediation not having taken place. In my judgment, the Defendants' failure in this case to engage constructively with the mediation proposals does not justify an order for costs against them on the indemnity basis. To make such an order would involve elevating that factor over others which weigh in their favour.*" [24 – 25]

The other factors which weighed in the defendants' favour were that they had successfully resisted a significant part of the claim and had done significantly better than either of the two Part 36 offers made by the claimants. That was "*a very different outcome from the one in Garritt-Critchley*." [25]

The judge concluded by saying "*In circumstances where neither side made a cost-effective Part 36 offer, the Defendants' unreasonable conduct in relation to mediation is in my judgment sufficiently marked by an order that they pay the Claimants' costs down to and including trial on the standard basis. That is an appropriate 'sanction' for them not engaging in a process of ADR which might have curtailed those costs in a significantly lower sum at an earlier stage of the proceedings*." [26]

COMMENT

In summary, the court found that the defendants' failure to engage in mediation, while unreasonable, did not justify an award for costs on the indemnity basis. Such an award would elevate that factor over others which weighed in the defendants' favour, namely their having resisted a significant part of the claim and having beaten a Part 36 offer by some margin.

This is a welcome decision for litigants giving them reassurance that, when it comes to costs, a refusal to mediate will be considered in the round. A litigant's decision as to whether to engage in mediation can be based on the merits, and while costs should always be considered, litigants can rest assured that refusing to mediate, even unreasonably, will not automatically result in costs being awarded on the indemnity basis.

* * *

Please do not hesitate to contact us with any questions.

LONDON

Christopher Boyne
cboyne@debevoise.com

Doreena Hunt
dhunt@debevoise.com