Can you afford not to mitigate?

Although it has long been recognised that the Court can impose costs sanctions upon a successful party if they have unreasonably refused to mediate, there have been very few reported cases where the Court has done so. However, 2020 has seen three cases in which the Courts have penalised litigants in those circumstances.

In this article, Mark Aizlewood and Dean De Cesare of Carter Perry Bailey LLP examine the recent case law and the Courts' increasing tendency to impose costs penalties.

BXB v Watch Tower & Bible Tract Society of Pennsylvania was a personal injury case. On 30 April 2018, the Court made the now usual direction that the parties should consider any form of ADR and any party not engaging must serve a statement giving reasons for their conduct.

The Claimant suggested a joint settlement meeting in February 2019, which was refused by the Defendant as they had no authority to negotiate a settlement. Notwithstanding the Court's direction, no statement was served justifying that stance.

The Court upheld the Claimant's claim that she should be entitled to costs assessed on the indemnity basis not just from the date of her Part 36 offer (which she beat) but back from the time the Defendant declined to attend a joint settlement meeting.

The Court was singularly unimpressed with the Defendant's conduct castigating it as unreasonable in not only amounting to silence in the face of an invitation to participate in ADR but also "*a breach of an obligation imposed by a Court Order to explain a refusal to so participate*."

DSN v Blackpool Football Club Ltd is another personal injury case where the Claimant beat his Part 36 offer, but where the Court ordered the Defendant to pay costs on the indemnity basis from an earlier date as the Defendant had acted unreasonably in that it had "*refused to engage in any discussion whatsoever about the possibility of settlement*".

In March 2018, the Claimant made a Part 36 offer of £50,000 to which the Defendant made no response.

On 30 October 2018, the Court issued a direction as to ADR (as in the *BXB* case).

On 26 March 2019, the Claimant made a Part 36 offer of £20,000; again, the Defendant did not respond.

On 30 October 2019, the Claimant invited settlement discussions to which the Defendant responded by way of a statement pursuant to the Court's direction indicating that the Defendant believed it had a strong defence and that accordingly no purpose would be served by any form of ADR.

In December 2019, the Claimant made a third Part 36 offer of £10,000, which the Defendant rejected.

In March 2020, the Court upheld the Claimant's claim and awarded damages in the sum of £19,746.37.

Notwithstanding that the Claimant himself only invited settlement discussions in October 2019, the Court ordered that indemnity costs be awarded from 1 December 2018, one month after the Court's ADR direction, but 8 months after the Claimant's first Part 36 offer (which it did not beat). It is clear that the Court disapproved of the Defendant's conduct in simply ignoring the offers and not engaging in any discussions.

Further, the Judge held that "*no defence, however strong, by itself justifies a failure to engage in any kind of alternative dispute resolution"* whilst commenting, "*As it turned out, the Defendant did not have a strong defence case. It lost the case*".

In *Wales v CBRE (1) & Aviva (2),* the Court, notwithstanding that it dismissed the claim against both defendants, disallowed a substantial proportion of CBRE's costs, because of its repeated unreasonable refusals to agree to mediate.

Before the issue of proceedings, CBRE declined to respond to requests to mediate and subsequently stated that it would not participate in a proposed mediation when a three party mediation was suggested.

CBRE again declined to mediate following the issue of proceedings as it was considered premature at that stage.

Notably Aviva (the second defendant) indicated at all stages that it was prepared to mediate provided all parties attended.

The Claimant made a final request to mediate 2 weeks before trial. Again, Aviva agreed but CBRE declined arguing that there was insufficient time to prepare and in any event, it was unlikely that a mediation would have been successful as statements had not been exchanged and there were factual issues in dispute.

The Judge held that CBRE had acted in breach of the requirements of the Practice Direction on Pre-Action Conduct, in denying *"the* [claimant the] *opportunity to fully canvass and engage with the underlying issues*". Further CBRE had not given any satisfactory explanations for its failures to mediate.

Accordingly, the Court disallowed 50% of CBRE's costs for the period during which they had unreasonably failed to engage in ADR.

No doubt, the willingness of Aviva to attend a mediation counted against CBRE when the Court came to consider conduct (no cost penalty was imposed upon Aviva relating to ADR).

CPB Comment

An award of costs on the indemnity basis can be significant, particularly in large commercial cases, and parties should make every effort to ensure their actions do not result in such an order being made against them. The recent decisions make it clear that, as far as settlement discussions are concerned, the Court will look at a party's conduct as a whole and not just a refusal to mediate.

The following principles can be taken from the Courts' recent decisions:

- Whilst there remain some cases where a party can reasonably decline to mediate (for instance where allegations of fraud and serious wrongdoing are made or it is not cost effective to mediate), such circumstances will be the exception.
- Certainly, no defence, however strongly felt, will justify a failure to engage in some kind of ADR.
- The Court will examine a party's conduct throughout the claim as far as engagement in settlement discussions is concerned (this will include pre-action decisions not to engage in ADR).
- The fact that a Claimant recovers substantially less than originally claimed will not prevent an award of indemnity costs if there has been an unreasonable refusal to engage in ADR or explore settlement.
- Unsurprisingly, the presence of factual disputes will not justify a refusal to mediate.
- Silence in the face of an invitation to participate in ADR is, as a general rule, of itself, unreasonable.
- Likewise, a failure to respond to a Part 36 offer will attract judicial criticism.

A note on Covid-19:

Whilst the Covid-19 pandemic has undoubtedly affected (and in some cases stalled) the litigation process, it is unlikely to be seen as a good reason not to engage in some form of ADR.

Given that hearings are being held remotely, the Court is likely to take the view that sophisticated commercial parties should also be able to conduct ADR remotely and thus be able to explain to the court what steps they have taken to seek to resolve the dispute. It will certainly not be considered a good reason for not having entered into settlement discussions.

Litigants should also remember that the Government has issued guidance in which it states that it expects commercial contractual parties to act "*responsibly*" and "*fairly*" in their dealings with one another during the "*Covid-19 emergency*". We can expect this public policy guidance to be taken on board by the Courts in the short/medium term.

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