Cost cutting

How keen are courts to penalise parties, which refuse to mediate, through costs? **Matthew Smith** investigates

- unreasonable refusal to mediate versus fear of costs sanctions
- judicial intervention—no settlement without agreement on costs

In the current climate, courts shepherd parties toward alternative methods of dispute resolution by making it plain that inappropriate failure to attempt or participate in them will be reflected in adverse costs orders. Ironically, and especially in the current climate, issues of costs are often themselves the bar to a successful compromise. The double irony is that the courts have also emphasised that parties cannot resort to the courts for the resolution of the costs issue alone, even if a compromise has been reached on everything else.

In fact the position is not as bleak as appears from the above. This article examines what the courts expect of litigants by way of endeavour to avoid a trial; why the appropriateness of alternative dispute resolution may depend on whether one is a claimant or defendant; and also why it is unwise not to ensure that costs are fully disposed of in any compromise reached.

The courts' expectation

In *Hickman v Blake Lapthorn* [2006] EWHC 12 (QB), [2006] All ER (D) 67 (Jan) the claimant had sustained serious head injuries (see *NLJ*, 3 March 2006, p 364). He brought a claim in negligence against his solicitors and counsel for advising him to settle at an undervalue. Judgment was given in favour of the claimant. Counsel was found to be two-thirds to blame and his instructing solicitors one-third.

The claimant had made offers that were attractive to the defendant solicitors because any final award and costs after trial were cumulatively likely to exceed the amount that the claimant indicated that the case could be settled for.

However, the defendant's barrister was not prepared to compromise. His view was that the claimant was claiming too much.

After trial the barrister's view was vindicated in the sense that the claimant recovered less than he had offered to compromise for in terms of damages. The defendant's solicitors' view was also justified because the overall costs of defending the claim after trial were far greater—£185,000 greater for the purposes of the argument—than the case could have been compromised for, including costs.

The defendant's solicitors sought an order that the defendant's barrister be responsible for the larger portion of its and the claimant's costs on the grounds that his refusal to mediate was unreasonable. This argument had an obvious attraction because clearly it was likely that a significant amount of money could have been saved had the barrister been prepared to take part in mediation.

Lurking beneath the surface of this case, however, was the dangerous consequence that if the defendant solicitors' attractive argument was allowed to succeed a claimant could hold a defendant to ransom. The judge dealt with this by indicating that while the overall costs that could have been saved by mediation were a factor to be considered, it could not be right that to avoid being vulnerable on costs a defendant should always be prepared to pay more than a claim is worth, to save costs.

The principles in *Halsey v Milton Keynes General NHS Trust*; *Steel v Joy* [2004] EWCA Civ 576, [2004] 4 All ER 920 were applied. These were summarised by the judge in *Hickman v Blake Lapthorn* at para 21:

"(a) A party cannot be ordered to submit to mediation as that would be contrary to Article 6 of the European Convention on Human Rights [*Halsey v Milton Keynes General NHS Trust*, para 9].

(b) The burden is on the unsuccessful party to show why the general rule of costs following the event should not apply, and it must be shown that the successful party acted unreasonably in refusing to agree to mediation [para 13].

(c) A party's reasonable belief that he has a strong case is relevant to the reasonableness of his refusal, for otherwise the fear of cost sanctions may be used to extract unmerited settlements [para 18].

(d) Where a case is evenly balanced…a party's belief that he would win should be given little or no weight in considering whether a refusal was reasonable…his belief must be unreasonable [para 19].

(e) The cost of mediation is a relevant factor…[para 21].

(f) Whether the mediation had a reasonable prospect of success is relevant to the reasonableness of a refusal to agree to mediation…[para 25].

(g) In considering whether the refusal to agree to mediation was unreasonable it is for the unsuccessful party to show that there was a reasonable prospect that the mediation would have been successful [para 28].

(h) Where a party refuses to take part in mediation despite encouragement from the court to do so, that is a factor to be taken into account…[para 29].

(i) Public bodies are not in a special position [para 34]."

While different litigants might have taken a different view, the defendant barrister had legitimately and reasonably refused to mediate. Accordingly, that refusal was not reflected in costs.

The different positions of the parties

It has become common to assume that mediation is always an appropriate tool for dispute resolution. Any party declining an offer of mediation may have that refusal flung in its face when costs come to be considered. It is not at all obvious, however, as *Hickman v Blake Lapthorn* demonstrates, that courts should always penalise parties who refuse mediation.

First, any defendant who agrees to go to mediation is likely to be confronted with a claimant who assumes that the only real question at the mediation is "how much". After all, if the defendant had no interest in settling, why would he come to the mediation, and if he is interested in settling, surely that must mean he is prepared to pay something? Some defendants may reasonably take the view that the claimant's case is wholly without merit. Others may realise that once the principle of liability is conceded, it is going to be difficult for them to avoid paying substantial sums. In those circumstances mediation is a no-win option for the defendant, and it is unreasonable to expect him to agree to it. In other cases the defendant may be insured, but may have difficulties with his insurers, with the result that he is not really in a position to negotiate a settlement.

Not all cases are suitable for mediation. In those cases where mediation is a possibility it should be timed carefully so that it happens at a point where both parties can contribute usefully to it. Also, it may be entirely reasonable for a party to decline mediation. *Hickman v Blake Lapthorn* shows that courts will bear this in mind when a costs penalty is sought against a party who refuses to mediate.

It is less easy to see why a claimant should refuse to mediate. A defendant who offers mediation is presumably willing to negotiate. A willingness to negotiate implies a willingness to settle. Thus, a claimant who refuses mediation needs to be very confident that he is going to recover substantially his entire claim.

Inclusion of costs in any compromise

Where a full compromise cannot be reached, sensible litigants will attempt to clear the decks as much as possible by a partial compromise. There are clear dangers if the remaining issue is costs.

Litigants who have not involved the judge in the resolution of the dispute may put the court in an impossible situation by asking it to deal with costs. As the judge has not been involved in the resolution of the dispute s/he may not know enough about the issues to adjudicate. If the dispute has been compromised it would be inappropriate for the judge to engage in a quasi-hearing of the dispute to make findings to enable adjudication upon costs.

This difficulty arose recently in *Promar International Ltd v Clarke* [2006] EWCA Civ 332, [2006] All ER (D) 35 (Apr). The claimant employer brought proceedings for an injunction and damages against the defendant employee for breach of a restrictive employment covenant.

The defendant denied breaching the covenant. He stated that he was well aware of the restrictive covenant and would abide by it. An interim injunction was granted but replaced by an undertaking until trial or further order. The trial took place on 15 December 2004. The six-month period of the restrictive covenant expired towards the end of February 2005.

At trial, the claim for damages was almost £133,000. The factual issue as to whether the defendant had breached the restrictive covenant was live. In the course of the opening for the claimant, the defendant made an unconditional offer to give an undertaking to the court. In response, the claimant abandoned its claim for damages. All that was left unresolved was the issue of costs.

The trial judge was reluctant to become involved in resolving the issue of costs. He asked the parties to negotiate but agreement could not be reached.

When he adjudicated upon costs, the judge acknowledged that he did not know what the conclusion would have been had the evidence proceeded. He made his decision based on who, on balance, was to blame for the dispute not having been resolved earlier. He concluded that primary responsibility rested with the defendant in that he should have tested the water by asking whether an undertaking would do. For that reason he ordered the defendant to pay three quarters of the claimant's costs. By that order, the judge took into account the fact that the claimant had abandoned its claim for damages and also that it could be argued that the claimants had failed to do things they should have done to dispose of the dispute.

Following the trial, counsel for the defendant discovered the Court of Appeal decision in *BCT Software Solutions Ltd v C Brewer & Sons Ltd* [2003] EWCA Civ 939, [2003] All ER (D) 196 (Jul). He sent a copy to the judge. On 23 December 2004 the judge heard further arguments from counsel. On 17 February 2005 he reviewed his judgment and decided to make no order for costs. The trial judge said this about the guidance in *BCT So*ftware Solutions Ltd v C Brewer & Sons Ltd:

"As to guidance to be found in the BCT Software case for the judge who has been so foolhardy as to decide to exercise his discretion, I apprehend it is this.

(1) If the judge is unable to decide who is the winner or loser on any particular issue or overall without in effect trying the action he should make no order as to costs, although there is no convention that he should do so.

(2) There is likely to be difficulty in deciding who is the winner and loser in more complex cases without embarking on a trial, for example, cases involving a number of issues and claims for discretionary equitable relief.

(3) In straightforward cases it will be reasonably clear from the terms of settlement who has won or lost.

(4) Often neither side has won or lost."

The trial judge concluded that the undertaking had been given without admission of liability. Clearly, once the undertaking had been given, an injunction was not necessary. Further, the claimant abandoned its claim for damages. It was certainly not obvious who had won and who had lost. The Court of Appeal was firmly of the view that the trial judge's revised decision to make no order for costs could not be interfered with.

Accordingly, the position is that in cases where the issue of costs is straightforward the parties will probably recognise that and deal with it in the compromise. In all but straightforward compromises a judge is entitled to say to the parties, "if you have not reached an agreement on costs, you have not settled your dispute. The action must go on, unless your compromise covers costs as well" (see *BCT Software Solutions Ltd v C Brewer & Sons Ltd*, para 6, per Lord Justice Mummery).

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