It is a well-established principle that serious cost consequences may flow from an unreasonable refusal to engage in alternative dispute resolution (ADR). If further support was needed for this principle it has come in the case of Phillip Garritt-Critchley & Others v Andrew Ronnan & Solarpower PV Limited [2014].

In this case HHJ Waksman QC, sitting in the Chancery Division of the Manchester District Registry, allowed the claimants to recover their costs on an indemnity basis as a result of the defendants' unreasonable refusals to mediate.

The message is clear; while the court cannot order parties to participate in mediation, refusing to engage in mediation will be a high risk strategy, even if the party in question believes it has a very strong claim or defence.

The facts

The claim related to the issue of shares - whether or not an agreement that shares would be issued was in place. In their letter before action, the claimants put the value of their claim at £280,000, although in the same letter they confirmed their willingness to engage in an appropriate form of ADR and expressed hope that "the issue of proceedings will not be necessary". The defendants did not wish to engage with the offer of mediation "at that stage".

In their allocation questionnaire, the defendants made it plain that they were not prepared to
engage in any settlement discussions and they expressly said they did not want the court to arrange a mediation in the event of a stay. The reason given was that the "parties are too far apart at this stage".

A further exchange of correspondence ensued and the claimant asked why the defendants were unwilling to mediate. The response from the defendant's solicitor was as follows:

"Both we and our clients are well aware of the penalties the court might seek to impose if we are unreasonably found to refuse mediation, but we are confident that in a matter in which our clients are extremely confident of their position and do not consider there is any realistic prospect that your client will succeed, the rejection is entirely reasonable."

When giving directions for trial the District Judge even recorded that:

"... the court considers the overriding objective would be served by the parties seeking to resolve the claim by mediation, the parties will no less than 21 days before trial file in a sealed envelope a witness statement which explains why a party refused to attend mediation."

Further requests for mediation were made by the claimants, which were refused by the defendants. In November 2013 the claimants made a part 36 offer, confirming they would settle their claim for £10,000, plus their costs to date. In December the defendants made a counter offer in part 36 form, that the claimants should discontinue their claim and pay three-quarters of the defendants' costs. The claimants responded with a request for the defendants to negotiate constructively.

The matter went to trial in January 2014, lasting four days. Before judgment was given the defendants chose to accept, out of time, the claimants' part 36 offer. The matter subsequently went before HHJ Waksman QC for him to decide, among other things, whether the claimants were entitled to their costs on an indemnity basis - on account of the defendants' unreasonable refusal to engage in mediation.

The decision

HHJ Waksman QC confirmed that the matter was one which involved deciding whether a binding agreement had been made between the parties. It was a very fact and evidence intensive matter, which he said was a classic case "where both parties needed to engage in a risk analysis as to whether their side of the coin would be accepted or not". Furthermore it was not
an all or nothing case on quantum, potentially there were a wide range of awards available in the event liability was established. It was, therefore, a "classic matter where mediation should be considered". In his view the defendants "did not approach the matter in the correct way at all".

Halsey v Milton Keynes NHS Trust [2004] is the leading authority on whether a refusal to mediate is reasonable. That case provided examples of refusals to mediate that might be reasonable - these included where a party wishes to resolve a point of law or a binding precedent would be useful. The Court of Appeal confirmed that most cases are not by their very nature unsuitable for ADR. In the present case the judge went as far as saying that the dispute was by its very nature "eminently suitable for ADR".

The parties were too far apart

It was unrealistic for the defendants to rely on their belief that the odds were so stacked in their favour there was no conceivable point in talking about settlement. No summary judgment application was made, no doubt because both sides had evidence that needed to be reviewed and considered - the case was not an "open and shut" one where it was clear the defendants would be successful.

The Court of Appeal in Halsey had expressly stated that "borderline cases are likely to be suitable for ADR unless there are significant countervailing factors which tip the scales the other way"; and as far back as 2001 the courts had held that the fact a "party believes he has a watertight case again is no justification for refusing mediation" (Hurst v Leeming [2001]).

The relationship between the parties was acrimonious

The defendants also argued that they were justified in refusing to mediate because there was considerable dislike and mistrust between the parties. HHJ Waksman did not accept this assertion - he said this was precisely the situation where the skills of a mediator may bear fruition. In his words mediators are "well trained to diffuse emotion, feelings of distrust and other matters in order that the parties can see their way to commercial settlement".

Point blank refusal to engage in settlement discussions
There had been no other attempts at settlement. The defendants had simply refused point blank to engage in any settlement discussions. The fact that the defendants thought the claimants were taking an unreasonable stance - seeking a substantial six figure sum - was not enough to illustrate the parties were too far apart to make settlement discussions worthwhile. HHJ Waksman QC expressly noted that "parties don't know whether in truth they are too far apart unless they sit down and explore settlement".

When the claimants made their late part 36 offer of settlement at £10,000 plus its costs, the defendants still refused to mediate as they said the cost of doing so at that stage was likely to cost as much as the amount of the latest offer. The judge thought this view to be misconceived, what the defendants should have done is compare the cost of a mediation against the cost of a trial - on any view the latter would be more.

The defendants' failure to engage in mediation - or any other serious ADR - was unreasonable.

The defendants tried to rely upon the PGF case (PGF II SA v OMFS Company 1 Limited [2013]) to support their contention that they had acted reasonably. The case, which we have reported on previously, did not help them.

In PGF the Court of Appeal held that, as a general rule, failure to respond to an invitation to participate in mediation (or another ADR process) was unreasonable. The defendants had responded to the claimants’ requests for mediation and they had given reasons why they did not want to engage in that process - the problem here was that the reasons for their refusal were misguided and by effectively closing off any possible ADR discussions with the claimants their conduct was unreasonable.

The claimants were entitled to recovery of their costs on an indemnity basis.

**Comment**

While the courts will not go as far as ordering parties to engage in mediation or another ADR process, this case is a clear example of the court encouraging the parties to consider settlement.

When directions to trial were ordered the District Judge expressly provided that the overriding objective would be served by the parties seeking to resolve the matter by mediation and he required the parties to explain - by witness statement in a sealed envelope - why a party had refused. The defendants should have been aware from at least that time that there was a significant chance they would be penalised in costs if they continued to refuse to engage in
ADR.

Requiring reasons to be given for a refusal to participate in mediation at the case management stage appears to be a new step - and one which would seem to be setting a party up for an indemnity costs order to be made against them, or for no order as to costs to be made even if they were successful.

Parties involved in litigation must be willing to consider mediation or another form of ADR; if they are not they will be adopting a high risk strategy for which they may be penalised. A party will need to be very sure that its reasons for refusing to mediate are reasonable; the cases suggest that a reasonable refusal will arise only in limited circumstances.

If a party steadfastly refuses to engage in mediation and believes that a decision is reasonable, an alternative form of ADR should still be considered. That decision not to engage in any kind of settlement discussions will be a very brave decision indeed.

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