“Am I Being Unreasonable?”: A Refresher on Mediation

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PRACTICES International Arbitration, Alternative Dispute Resolution, International

Introduction

The courts have long desired to direct more parties towards mediation, which they believe is an underutilised resource for the resolution of disputes. In the ebb and flow of judicial decisions over the years, judges swing from positive encouragement of mediation to imposing sanctions for unreasonable failure to mediate. The recent case of *Richards and others* v *Speechly Bircham LLP and others* [2022] EWHC 1512 provides a useful indication of the current judicial approach.

Mediation under English law

The starting point under English law is that parties cannot be forced to mediate against their will. In *Halsey* v *Milton Keynes General NHS Trust* [2004] EWCA Civ 576, the Court of Appeal concluded that the court has no jurisdiction to force the parties to mediate, relying on Article 6 of the European Convention on Human Rights:

> *“It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court … it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of Article 6.”*

The courts’ attempts at encouraging mediation have met with little success. Despite repeated attempts at extolling the virtues of mediation, in terms of the potential time and costs saved compared to litigation, mediation remains unpopular, at least between commercial parties. This judicial frustration was vocalised by Sir Alan Ward, giving the judgment of the Court of Appeal in *Colin Wright* v *Michael Wright Supplies Ltd* [2013] EWCA Civ 234:

> *“[The first instance judge] attempted valiantly and persistently, time after time, to persuade these parties to put themselves in the hands of a skilled mediator, but they refused. What, if anything, can be done about that? You may be able to drag the horse (a mule offers a better metaphor) to water, but you cannot force the wretched animal to drink if it stubbornly resists. I suppose you can make it run around the litigation course so vigorously that in a muck sweat it will find the mediation trough more friendly and desirable. But none of that provides the real answer.”*

The modern judicial trend has therefore been to impose costs sanctions on parties for unreasonably failing to mediate. The court in *Halsey* identified a non-exhaustive list of considerations when determining whether a party acted unreasonably in refusing to mediate. These are commonly known as the ‘Halsey principles’.

These principles include consideration of the merits of the case. If a party reasonably believes he has a strong case (for example, where he believes he would have succeeded in an application for

summary judgment) he may act reasonably in refusing mediation. The nature of the dispute must also be taken into account, such as whether the parties require the court to determine issues of law or construction of a contract.

The costs of the mediation must also be taken into account. Even if the costs of the mediation would be small compared to the costs involved in litigating a dispute, the courts must still weigh up whether those costs would be usefully incurred, taking into account all the other factors.

Richards* v *Speechly

This brings us to the *Richards* decision, and the Commercial Court's most recent application of the *Halsey* principles. The Claimants, the founders of a communication company, had commenced proceedings against the Defendant solicitors for providing negligent advice. The Defendants lost at trial and were ordered to pay the Claimants approximately £1.5m in damages.

Ordinarily this would mean that the Defendants (the unsuccessful party) would pay the Claimants' (the successful party) costs on the 'standard basis', meaning that their legal costs could only be recovered if they were proportionate and reasonably incurred.

However, the Claimants argued that due to the Defendants' unreasonable refusal to mediate, the Defendants should pay the Claimants' legal costs on the 'indemnity basis', meaning that there would be no requirement that the costs incurred be proportionate in order to be recovered. In practice, parties will often recover 60-70% of their costs on the standard basis, and close to 100% of their costs on the indemnity basis.

In support of this argument the Claimants relied on four separate offers to mediate they had made to the Defendants, three of which were made before the claim was issued.

The Defendants' responses to the Claimants' offers to mediate, or participate in some other form of alternative dispute resolution ("ADR") process, were as follows:

1. First offer: the Defendants did not consider that a mediation would be productive or cost effective at that stage. They set out that they would keep the merits of some form of ADR under review once full disclosure of documents had been given.

2. Second offer: the Defendants responded that there was no point in engaging in mediation as the claim was doomed to fail.

3. Third offer: the Defendants reiterated their position that there was no point in a mediation because the claim was entirely without merit.

4. Fourth offer: the Defendants again responded that there was little point in having a mediation over an unmeritorious claim. That response also referred to the expense of a mediation and indicated that the Defendants would be prepared to have a short without prejudice call between solicitors to explain why a settlement offer of £500,000 made by them the previous month would not be increased.

The Defendants resisted an order for costs on the indemnity basis by saying their approach to mediation was not unreasonable and that, in any event, an unreasonable refusal to mediate is only one facet of a party's conduct to be taken into account when determining costs.

Mr Justice Russen, giving the judgment of the court, was quick to find that the Defendants' refusal to mediate was unreasonable. It was clear the Defendants' justifications for failing to mediate, such as that the claim was doomed to fail and had no merit, were unreasonable, given that the Claimants were successful at trial.

Neither was the Defendants' proposal to wait until after disclosure of documents had been made, reasonable. The parties could cooperate to disclose important documents in preparation of a mediation. Finally, the Defendants had been wrong to use the costs of the mediation as a reason to refuse to participate. Their legal costs of going to trial were over ten times what it would have cost to prepare for a mediation.

Having concluded that the Defendants had unreasonably refused to mediate one might have thought that cost sanctions were sure to follow, but the judge moved on to consider the Defendants' second argument. Their contention was that even if they had unreasonably refused to mediate, that was only one factor to be taken into account in determining the appropriate order for costs, and that, overall, the Defendants' behaviour was undeserving of costs sanctions.

In support of this argument they cited the Court of Appeal decision in *Gore* v *Naheed* [2017] EWCA Civ 369, which states

> *"… a failure to engage, even if unreasonable, does not automatically result in a costs penalty. It is simply a factor to be taken into account by the judge when exercising his costs discretion …"*

The judge considered this to be binding authority and considered other relevant factors in the case. The most important of these was that the Claimants had not been completely successful at trial. Their claim was for approximately £4.3m, of which £1.5m had been awarded. Further, the settlement offers made by the Claimants were for amounts greater than the £1.5m awarded at trial.

In Russen J's view this tipped the balance against awarding indemnity costs to the Claimants. He concluded:

> *"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."*

The judge placing the word 'sanction' in quotation marks is appropriate, as this was no sanction at all. The Claimants were entitled to recover their costs "*down to and including trial*" on the standard basis in any event, and that position remained unchanged despite the court's finding that the Defendants had unreasonably refused to mediate.

Comment

The efficacy of using costs sanctions to persuade parties to mediate is still up for debate. In October 2021, the Civil Mediation Council responded to the Ministry of Justice's call for evidence on dispute resolution in England and Wales, stating:

> *"The CMC is not aware of any statistical evidence of the threat of costs sanctions as a driver of parties to mediation. The majority of CMC members do believe that the threat of costs sanctions pushes people to mediate, although this view was not universal."*

Whatever the true position, the decision in *Richards* will only serve to further undermine the threat of costs sanctions as an effective tool to persuade parties to mediate. The somewhat confusing message from the court seems to be that it is increasingly difficult to argue that a failure to mediate is reasonable, but that any such unreasonable failure may well go unpunished depending on a wide range of other factors.

On the first point, the judgment in *Richards* reaffirms that the courts have little time for many of the reasons parties commonly give for refusing to mediate. The merits of the dispute are usually less one-sided at trial than parties, and their lawyers, anticipate. Parties are encouraged to be pragmatic about mediating before the formal, and costly, steps of disclosure have taken place. Arguments on costs are usually dismissed, as the costs of mediation usually pale in comparison to the costs of taking a dispute to trial.

There will of course be certain situations where it is still reasonable to refuse to mediate, such as when the dispute really is one-sided and one party is entirely correct in their arguments. This will usually only apply to straightforward claims, such as claiming an unpaid debt. Mediating in those circumstances would be a waste of everyone's time and money, as one party can be confident in their entitlement. Such cases will, however, be rare. Some form of ADR will be appropriate for most disputes.

On the other hand, a party's unreasonable refusal to mediate is less significant if the courts are slow to impose sanctions. In *Richards*, the primary reason for not imposing a sanction was that part of the Claimants' claim failed, but that will often be the case in litigation. Indeed, the precise aim of a mediation is to cut away the parties' weaker claims and settle the dispute on the basis of each party's strongest arguments. A party should not be punished for retaining part of their claim at trial, which they may have abandoned, given the opportunity, as part of good faith negotiations during a mediation.

It may be that the judge thought that the prospect of awarding indemnity costs was too harsh a punishment for the Defendants' unreasonable refusal to mediate. If so, the courts have wide discretion to award costs, and a lesser sanction could have been imposed. By imposing no sanction at all, the courts are in danger of signalling that their protestations against unreasonable refusals to mediate are simply idle threats.

Neither is the approach in *Richards* easy to reconcile with previous judicial statements on the topic. In *Thakkar* v *Pate*l [2017] EWCA Civ 117, for example, Jackson LJ, giving the judgment of the Court of Appeal, stated:

> *"The message which the court sends out in this case is that in a case where bilateral negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction."*

As it stands, a party cannot assume that another party's unreasonable refusal to mediate will result in a costs sanction. For a party to protect their position on costs, the best approach remains to make a without prejudice settlement offer for an amount that the party is confident they will at least match if the dispute reaches trial.

Under the “Part 36” system in English courts, costs sanctions will automatically be imposed against a party that fails to beat such an offer at trial. Although disputes in arbitration do not have the same automatic imposition of sanctions for failure to accept a reasonable settlement, it remains perhaps the most important factor when arbitrators decided on whether a costs sanction should be imposed.

Deciding on the precise terms of the settlement offer is of course the difficult part (which the Claimants got wrong in *Richards* to their cost) and is an area where experienced lawyers will be able to assist parties in achieving the desired outcome.