Case No: HT-11-319

Neutral Citation Number: [2012] EWHC 2904 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24th October 2012

Before:

MR JUSTICE AKENHEAD

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Between:

ADS AEROSPACE LIMITED	**Claimant**
- and -	
EMS GLOBAL TRACKING LIMITED	**Defendant**

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CJ Hough & Co for the **Claimant**
David Head (instructed by **Hogan Lovells International LLP**) for the **Defendant**

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JUDGMENT

1. **Mr Justice Akenhead:** I handed down judgment in this matter on 3 August 2012. The Claimant's claim, which was for over $16 million for breach and repudiation of an agreement between the parties for the exclusive distribution of satellite tracking devices for aeroplanes or helicopters, was dismissed. The parties have submitted written submissions on costs in August and September 2012 and this is my (shorter) judgment on the various cost issues which have arisen. The Defendant has abandoned its assertion that it should be paid costs on an indemnity basis but the Claimant maintains its assertion that there should be a substantial reduction in the Defendant's costs entitlement (of at least 50%) to reflect the unwillingness of the Defendant to enter into mediation to seek to resolve the issues between the parties.

2. I will not reiterate the factual background which is fully set out in the substantive judgment. That there can be no doubt that the Claimant lost on all the key issues between the parties and that overall the Defendant has "won".

3. The Claimant issued its proceedings on 12 August 2011. So far as costs are concerned, the Claimant had the benefit of a Conditional Fee Arrangement together with a legal costs insurance arrangement. General directions were given by the Court in October 2011 whereby the trial was fixed for 2 July 2012. Witness statements were exchanged initially in March 2012, although one witness statement from Mr Silverman was served in late May 2012; rebuttal witness statements were served in June 2012. This timetable fell somewhat behind in relation to the steps to be taken in respect of experts with Mr Justice Ramsey ordering on 2 April 2012 that expert meetings were to take place by 27 April 2012, the joint memorandum of experts was to be filed by 22 May 2012 and expert reports were to be exchanged on 22 May 2012.

4. The parties have put before the Court information about what was going on behind the scenes with regard to trying to settle the case. The following materially happened in 2012:

    - 2 March: the Defendant's solicitors telephoned the Claimant's solicitors to try to initiate a settlement dialogue but the latter said that they wanted to wait for the exchange of witness statements and possibly expert reports before any discussions.

    - 2 April: Mr Justice Ramsey ordered the Claimant to provide security for costs in the sum of £100,000 by 23 April.

    - 10 April: the Defendant's solicitors wrote to the Claimant's solicitors saying that it was their client's view that the claim against them was without foundation and bound to fail but nonetheless they offered £50,000 to settle the proceedings inclusive of costs, interest and VAT. There was no acknowledgement, let alone any response.

    - 13 April: in a telephone conversation to establish whether there was any prospect of a settlement dialogue, the Claimant's solicitors showed no inclination to discuss settlement.

    - 15 May: the Defendant's solicitors telephoned the Claimant's solicitors to reiterate their client's willingness to try to settle. The latter indicated that they would take instructions and revert.

    - 31 May: the Claimant's solicitors wrote referring to the £50,000 offer as a "nuisance" payment, stating that their client and insurers had taken "extensive legal and technical advice in relation to the merits of the claim and the evidence". They suggested that "since both parties appear to be willing to discuss settlement…that an attempt should be made to resolve the dispute with the assistance of the mediator"; such a mediation would have to take place

during the week commencing 11 June 2012 due to their client's commitments. They stated that if there was no agreement to mediation their client might refer the letter to the court when considering costs.

- 1 June 2012: the Defendant's solicitors wrote back referring to the previous history (between March and 15 May (set out above)), and saying that they did not think "that mediation is likely to be a worthwhile or successful investment of time and cost" as "each side is now familiar with the other's case, and each ought to be able to assess with a reasonable degree of accuracy the relative strength of its position"; there was nothing to suggest that the Claimant would accept much less than $16 million and "absent any such indication we risk doing no more than waste time and (irrecoverable) cost when both parties should instead be focusing on the trial". Nonetheless the Defendants would "in good faith consider any reasonable offer your clients make" and they would welcome a without prejudice discussion sooner rather than later.

- 6 June 2012: the Claimant's solicitors wrote back saying that the cost of mediation could not really be a concern given the Defendant's estimated costs of about £1 million. The Claimant did not consider that its claim was misconceived, that view being "reinforced by detailed consideration of your client's factual and opinion evidence". There were "reasonable prospects of settling this matter if your client is able to recognise its liability". They suggested that a skilled mediator could help settle disputes which appeared to be incapable of resolution and that mediation was the better option than without prejudice discussions. On the same day the Defendant's solicitors wrote back saying that a formal mediation was not necessary given that it was less than three weeks before the trial and repeating their offer of without prejudice discussions.

- 7 June 2012: the Claimant through its solicitors offered to settle the case for £4,246,000 inclusive of costs and interest, the offer being open for seven days. The offer of mediation was repeated.

- 11 June 2012: following a telephone conversation that day, the Defendant offered £100,000 inclusive of costs interest and VAT in settlement; that offer was open for seven days.

Neither of these offers were accepted or apparently acknowledged. The trial took place on 2-5, 9-11 and 17 July 2012.

5. The Claimant accepts that prima facie that the Defendant is entitled to its costs but says that the Defendant acted unreasonably in refusing its request to attempt to settle the dispute in mediation. The Defendant says that it acted reasonably in all the circumstances.

6. So far as the law and practice are concerned there is no doubt that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party albeit that the court has a discretion to order otherwise (CPR 44.3 (2)).

7. The leading authority is **Halsey v Milton Keynes NHS Trust** [2004] EWCA Civ 576 in which Dyson LJ (as he then was) said authoritatively:

> "13. In deciding whether to deprive a successful party of some or all of his costs on the grounds that he has refused to agree to ADR, it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. In our view, the burden is on the unsuccessful party to show why there should be a departure from the general rule. The fundamental principle is that such departure is not justified unless it is shown (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR. We shall

endeavour in this judgment to provide some guidance as to the factors that should be considered by the court in deciding whether a refusal to agree to ADR is unreasonable…

15. We recognise that mediation has a number of advantages over the court process. It is usually less expensive than litigation which goes all the way to judgment, although it should not be overlooked that most cases are settled by negotiation in the ordinary way. Mediation provides litigants with a wider range of solutions than those that are available in litigation: for example, an apology; an explanation; the continuation of an existing professional or business relationship perhaps on new terms; and an agreement by one party to do something without any existing legal obligation to do so. As Brooke LJ pointed out in *Dunnett* at para [14]:

> "Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide."

16. In deciding whether a party has acted unreasonably in refusing ADR, these considerations should be borne in mind. But we accept the submission made by the Law Society that mediation and other ADR processes do not offer a panacea, and can have disadvantages as well as advantages: they are not appropriate for every case. We do not, therefore, accept the submission made on behalf of the Civil Mediation Council that there should be a presumption in favour of mediation. The question whether a party has acted unreasonably in refusing ADR must be determined having regard to all the circumstances of the particular case. We accept the submission of the Law Society that factors which may be relevant to the question whether a party has unreasonably refused ADR will include (but are not limited to) the following: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success. We shall consider these in turn. We wish to emphasise that in many cases no single factor will be decisive, and that these factors should not be regarded as an exhaustive check-list…

19…The fact that a party *unreasonably* believes that his case is watertight is no justification for refusing mediation. But the fact that a party *reasonably* believes that he has a watertight case may well be sufficient justification for a refusal to mediate."

8. The onus being on the Claimant in this case to establish that the Defendant acted unreasonably in refusing or not wishing to participate in mediation, I am not satisfied that the Defendant did act unreasonably, for the following reasons:

(a) There had been no willingness on the part of the Claimant to engage even in a without prejudice discussion until 31 May 2012, notwithstanding at least four attempts on the part of the Defendant to initiate the same since early March 2012.

(b) It is clear from the offer to settle which was made by it that the Claimant, for good or bad reason, had a strong view that it was entitled to substantial

compensation and that was clear also to the Defendant. The Claimant gave every appearance that it was simply not interested in a nuisance payment. There is certainly no evidence upon which I could draw the conclusion that it would have been interested, even through the good offices of the mediator, in settling its claim at that level.

(c) The Defendant was at all times prepared to engage in without prejudice discussions with the Claimant and there appears to have been little or no good reason why that approach should not have been tried in March, April, May or indeed June 2012 at least on a "nothing ventured, nothing gained" basis. At the very least such an approach would have "bottomed out" where the parties were likely to have stood. That would have helped.

(d) The lateness within the trial programme of the mediation suggestion coming from the Claimant was a material factor, coming as it did just before the double bank holiday Jubilee weekend and with less than 20 working days before the trial, when doubtless great efforts were being made to prepare for the trial. Without prejudice discussions would have been quicker, cheaper and less intrusive into trial preparation than a mediation which, even if it lasted only a day in itself, would have diverted solicitors and counsel by more than one day because they would have had to prepare for the mediation. Mediation would also have cost substantially more than without prejudice discussions, which was not immaterial in the light of the Claimant's impecuniosity highlighted by the security for costs order.

(e) I do not consider that the Defendant acted unreasonably in believing that it had a very strong case both on liability, causation and quantum. Of course, it is easy in the light of a judgment which was strongly in its favour for it to argue that this is the case. However, the factors set out in the judgment, particularly at Paragraph 128 that the Defendant had not ceased to manufacture the SAT-111, at Paragraph 136 that the SAT-221 project had not got to the stage of producing a product or a derivative and at Paragraph 147 that estoppel simply did not apply would have been particularly obvious to the Defendant by June 2012. There were very real difficulties also apparent in the Claimant's case on repudiation (see Paragraph 149 to 151 of the judgment) and the damages claim was demonstrably overstated (worth no more than about $400,000 rather than the $16 million claimed). It might be said that a good mediator would have been able to "work on" the Claimant to accept what would in effect be a nuisance offer but, in the context of this case, with the sensible solicitors and counsel (who the Claimant did engage in this case), I have no doubt that without prejudice discussions would probably have achieved the same result or at least got to the same stage. I very much doubt having seen Mr Karlsen in the witness box that he would ever have accepted a nuisance offer, which is all that would have been available either in mediation or in without prejudice discussions. I do not in any sense blame Mr Karlsen who I did not and do not believe was or is dishonest, but he clearly and very obviously wholly believed in the Claimant's case and would have found it very hard to accept a small six-figure sum inclusive of costs, which would have left the Claimant nothing after costs had been paid out on its side.

8. There should therefore be a costs order in favour of the Defendant whereby its costs, assessed on a standard basis, are to be paid by the Claimant.

9. The Defendant also seeks an interim payment on account of its costs entitlement. Following well established authority and practice (**Mars UK Limited v Teknowledge Ltd** [2008] EWHC 226 Pat and **Beach v Smirnov** [2007] EWHC 3499), such an interim payment should be required. Although the Defendant suggests that its costs in the result were closer to £1 million, it puts forward a figure of £877,000 as its estimate of costs, as relied upon on the security of costs application, and seeks 60% of that. In my judgment, that is a realistic basis of assessment and I order that an interim payment on account of costs in the sum of £525,000 be made by the Claimant to the Defendant. I also order that

there be a payment out to the Defendant of the sum of £100,000 paid into court by the Claimant by way of security for costs, together with any accrued interest, as part payment of its costs entitlement.

10. Finally, the Defendant seeks an order for the payment of interest on its costs from the date on which such costs were paid pursuant to CPR 44.3(6)(g). I do not consider that there is any reason why the Court should not award interest where a party has had to put up money paying for its legal costs and has been kept out of that money in the meantime. I therefore make an order as sought with the rate of interest at 1% over Bank of England Base Rate.