A recent decision of the High Court has affirmed that in the English jurisdiction parties to litigation can be penalised on costs where they unreasonably refuse an offer to mediate the dispute.

This issue was considered in the case of PGF II SA v OMFS Company and another [2012] EMHIC 83 (TCC). The underlying case related to a commercial property dispute. However, the principles concerning the award of costs are applicable to all civil law cases in the English jurisdiction, including shipping disputes.

The background to this particular claim can be summarised briefly. Proceedings were issued to resolve a contractual dispute between parties to a commercial property lease. During the course of the proceedings the defendant made an offer to settle the claim pursuant to Part 36 of the Civil Procedure Rules (‘CPR’). As discussed in detail in earlier website articles - Part 36 - What is the Effect of a Counter Offer and Latest Developments in Part 36 Offers - Certainly At least Part 36 of the CPR contains procedures for making an offer to settle a case and sets out the costs implications arising from making an offer under those rules. On the same date that the Part 36 offer was made, the claimant invited the defendant to enter mediation with a view to agreeing an amicable settlement. The Part 36 offer was not accepted by the claimant and the defendant did not respond to the invitation to mediate. Subsequently, on the eve of the trial the claimant became aware that the defendant intended to amend its claim submissions to rely on a different construction of the contract. In view of this the claimant chose to accept the Part 36 offer that had been made by the defendant nine months earlier. This concluded the substantive element of the claim with only the question of legal costs to be decided.

The fundamental principle underpinning the award of costs in the English jurisdiction is that the successful party to the litigation is usually entitled to recover their reasonable costs from the unsuccessful party. This is, in effect, the default position. However, judges have wide powers of discretion when determining costs orders and when exercising that discretion will take into consideration the conduct of the litigants.

Part 36 of the CPR expands upon this basic principle and provides the courts with guidance on how costs should be attributed in certain circumstances when an offer is made in accordance with the terms of Part 36. Pursuant to these rules, when a Part 36 offer to settle the case is accepted by either party, the defendant is liable to pay the costs of the proceedings up to the date of the offer. If the offer is accepted after the expiry of the period (the minimum period is 21 days) in which the offer must be stated to be open for acceptance, the offeree is liable to pay the offeror’s costs for any intervening time between the end of the period that the offer was open for acceptance and the date of acceptance.

Applying those rules to the circumstances of this case would ordinarily lead to the claimant being awarded its costs up to the expiry of the 21 day period after the offer was made. Furthermore, the defendant (as the offeror) ought to have been entitled to recover its costs from the expiry of the 21 day period to the date of acceptance of the offer.

In this case the claimant disputed that the defendant was entitled to payment of costs for this period of time because of the very late change to the defendant’s stated case and for the defendant’s unreasonable refusal to mediate the claim. In essence, the claimant asked the court to reverse the normal rule under Part 36 for the payment of costs for the period of time between the making of the offer and its acceptance. In coming to a decision the court considered each of the reasons that the claimant suggested warranted a departure from the normal costs principles.

The court rejected the claimant’s contention that the late change to the defendant’s case constituted conduct that would persuade the court to depart from the standard rules of Part 36. The court acknowledged that the rules allow the court to take into account the information available to the parties at the time the offer was made, amongst other things, when determining whether it is just and reasonable to apply the standard costs rules stipulated in Part 36. However, the court rejected the claimant’s suggestion that the defendant’s late change in argument constituted information that was not available to the claimant at the time of the offer so that the claimant was deprived of the ability to adequately assess the merits of the offer. The change in the defendant’s case was based upon a revised interpretation of wording in the contract rather than on any new factual information. Therefore, the relevant wording was available to each party at all times and available for similar interpretation at the time the offer was made.

The court then turned its attention to the claimant’s second argument, being that the defendant unreasonably refused to mediate. In support of their position the claimant sought to rely on the decision of Hasley v Milton Keynes NHS Trust [2004] EWCA Civ 576. In that case the court stated the principle that a party may be deprived of its entitlement to costs where they have unreasonably refused to mediate. In addition, the claimant argued that the mediation would have had reasonable prospects of success.

On the other hand the defendant adduced several reasons why it did not unreasonably refuse to mediate. First, the defendant referred to a previous mediation between the parties concerning a separate dispute. Second, that sufficient information, including experts’ reports, had not been exchanged at the time of the offer to enable the defendant to mediate. Third, it was not right to infer that the defendant refused to mediate on the basis of its failure to respond to the invitation; and fourth, that there was no prospect that mediation would have been successful.

The court was not persuaded by the defendant’s arguments. Concerning the conduct of the previous mediation, the court rightly pointed out that those proceedings were subject to without prejudice privilege and thus it could not consider anything that occurred within them. Furthermore, the court did not agree that unavailability of a particular expert’s report would necessarily prevent mediation from having a reasonable prospect of success. It pointed out that if this was a genuine concern it should have been raised by the defendant at the time. The court went on to say that it was reasonable to infer that the defendant’s failure to respond to the mediation offer was a refusal to mediate. Finally, the court stated that it is not necessary to establish that a proposed mediation would have been successful. It is sufficient to show that the mediation would have had reasonable prospects of success. The court found that this was a dispute that had reasonable prospects of settling following mediation. Taking these issues into account the defendant was deemed to have unreasonably refused the offer to mediate. On this basis the court chose to depart from the standard rules of Part 36 by refusing to award the defendant their costs from the date of the expiry of the 21 day period following the offer.
the order to the date of acceptance by the claimant. The court made no order for costs for that time and so each party had to bear their own costs that were incurred during that period of the proceedings.

The decision underlines both the commitment of the English courts to alternative forms of dispute resolution in order to reduce costs and save court resources and is a reminder that parties that unreasonably refuse this option risk being penalised on costs.

Article by Gareth Thompson (gareth.thompson@simsl.com)

© 2020