Is There Any Reasonable Prospect of a Successful Mediation? Corby Group Litigation v Corby DC (Costs)

by
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1. BACKGROUND

The 18 claimants were born between 1986 and 1999 with upper limb deformities. In the 1980s Corby BC had acquired almost 700 acres of land in Corby from the British Steel Corp with a view to reclamation and redevelopment. The land was heavily contaminated. The claimants alleged that their mothers, who lived close to the land, had been exposed to toxic materials which had been given off in the course of the Council's reclamation and decontamination programme. It was alleged that this exposure had caused their deformities, the exposure having occurred during the embryonic stage of their mothers' pregnancies.

This part of the case concerned a claim for the costs of the group action. The costs claim followed the High Court's decision that 15 or possibly 16 of the 18 claims against the Council could go forward. (The "successful claimants" in each of these individual cases would now only need to establish causation and quantum against the Council.) This part of the case concerned the question of whether the costs of the group litigation should be awarded on an indemnity basis or on a standard basis.

2. THE ARGUMENTS FOR INDEMNITY COSTS

The starting point is that the decision on costs in each case is a matter for the trial judge. For a court to award costs on an indemnity basis—rather than on a standard basis—is unusual. Indemnity costs are usually awarded where there has been "morally reprehensible behaviour" on the part of the payer. But morally reprehensible behaviour is not always required; it is sufficient to justify an award of costs on an indemnity basis if there is something which takes the conduct of the paying party "out of the norm".[1]

In the *Corby*[2] case the main arguments for the application on behalf of the claimants for an award of indemnity costs were: first, that the Council had lost on every material issue; and secondly, that the Council had rejected the claimants' request for mediation.[3] On the first point Akenhead J. concluded that the claimants' claims had been of a "broad generalised nature"[4] which lacked,

> "careful analysis of how individual breaches of duty on individual projects or contracts impacted on the dissemination and dispersal of mud and dust [which were alleged to have been the cause of the birth defects] throughout the relevant period".

* *Corby Group Litigation v Corby DC* [2009] EWHC 2109 (TCC), per Akenhead J.

[1] *Excelsior Commercial v Salisbury Hammer Aspden & Johnson* [2002] EWCA Civ 879; [2002] C.P. Rep. 67, quoted in *Colour Quest Ltd v Total Downstream UK Plc* [2009] EWHC 823 (Comm), per Steel J. See also *Corby* [2009] EWHC 2109 (TCC) at [13].

[2] *Corby* [2009] EWHC 2109 (TCC).

[3] *Corby* [2009] EWHC 2109 (TCC) at [14].

[4] *Corby* [2009] EWHC 2109 (TCC) at [21].

Given this the Council "could be forgiven for believing that at the very least it had a reasonably arguable defence on the facts".[5]

This left the question of whether or not the Council had been reasonable in refusing the claimants' offer to mediate. To persuade the court that a party's refusal to agree to mediation was unreasonable, it is usually necessary for the unsuccessful party to show that there was a reasonable prospect that the mediation would have been successful.[6] This is because in most cases it will be the unsuccessful litigant who is trying to avoid the normal costs consequences of losing the case—i.e. that it will be liable for the successful party's costs. In this case, however, the onus fell on the successful claimants—since they were the parties looking for a "different to normal" costs award—to show that the Council had acted unreasonably in refusing to agree to mediation.

The history of mediation discussions between the parties in *Corby*[7] was that the Council had initially deferred any decision on mediation pending exchange of experts' reports. After the exchange of expert evidence the Council's solicitors wrote to the claimant's solicitors saying that "there was no common ground between the parties" and they had "no reason at all for the [Council] to consider that it should make any concessions". The Council refused the offer of mediation because it concluded that mediation would be "highly unlikely to be productive in reaching a conclusion". Akenhead J. concluded that[8]:

> "Given the broad nature of the Claimants' expert evidence on breaches of duty and its linkage to the dissemination and dispersal of dust and mud, I do not consider that [the Council's] position was unreasonable. Hindsight shows that [the Council] was wrong but one must judge the decision to refuse ADR at the time that it was under consideration. [The Council] had expert evidence which supported its stance on every material aspect of the Group Litigation issues and the Claimants were adopting what I have described as a 'scattergun approach'. It was not unreasonable to form the view that mediation would not have produced a settlement."

As a result the claimants' application to have their costs awarded on an indemnity basis was refused.

3. MEDIATION AS AN AID TO BETTER UNDERSTANDING

The difficulty with this is that, even where mediation does not produce a settlement, it can often help the parties to understand the issues. As Karl Mackie and Tony Allen point out,

> "even in mediations which do not settle and lead to trial ... preparation work that will have been needed to be done anyway is done at an earlier stage than otherwise, and the issues thereby usefully defined and limited".[9]

In *Corby*[10] it is clear that one of the factors that prevented the Council from understanding the weakness of its position—and hence, presumably, which prevented it from at least accepting liability for the birth defects in the successful cases in the group action (subject to proof of causation and quantum in the individual cases)—was that the claims were not sufficiently clear. If the matter had gone to mediation that would, at the very least, have led the parties to

[5] *Corby* [2009] EWHC 2109 (TCC) at [21].
[6] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002 at [28].
[7] *Corby* [2009] EWHC 2109 (TCC).
[8] *Corby* [2009] EWHC 2109 (TCC) at [23].
[9] Karl Mackie and Tony Allen, "The Costs Crisis—Mediation as a Solution? CEDR's Submission to the Jackson Inquiry into Legal Costs" (CEDR, July 2009), p.2.
[10] *Corby* [2009] EWHC 2109 (TCC).

spell out and to narrow the issues in the case; and thus to those issues being crystallised.[11] If this had happened it might then have been rather more difficult for the Council to put forward its "reasonable belief that it had a strong case" as a defence to the costs consequences of refusing an offer to mediate.[12]

4. MEDIATION WORKS

The efficacy of a "mediation type" approach to clarification of the issues—and probably also to the efficacy of reality testing, as well as to the ability of a "mediation type approach" to lead to agreement—is exemplified *in extremis* by *Hurst v Leeming*.[13] In this case Lightman J. appears to have had a "quiet word" with the claimant, a litigious solicitor who was suing a barrister for negligence, at the outset of the trial. As a result of this discussion the claimant "[accepted] (as he must) that his case was hopeless".[14] At the conclusion of the case the question arose as to whether or not the defendant should get his costs. The claimant's argument against the defendant getting his costs was that, if the defendant had agreed to the mediation which he, the claimant, had proposed:

> "[T]he mediator could have had the same frank exchange of views with him which I [Lightman J.] have had, and this would have enabled the case to be resolved without the costs involved in this action."

Lightman J. described this as "a formidable argument", and was only persuaded "quite exceptionally" in *Hurst v Leeming*[15] that the defendant was justified in taking the view that mediation was not appropriate because it had no realistic prospect of success. The argument for saying that mediation may have a reasonable prospect of success even in cases where this seems to fly in the face of the facts and of the attitude of the parties could not be shown more clearly than by the underlying facts of *Hurst v Leeming*[16]. The claimant in this case was described in Lightman J.'s judgment as a person "seriously disturbed by the tragic course of events resulting from [a particular action]": "His... judgment in respect of [those] matters... was seriously disturbed." He,

> "was a person obsessed with the injustice which he considered had been perpetrated on him and was incapable of a balanced evaluation of facts".

A person who "appeared quite unable or unwilling to appreciate the full and clear explanation given [by the defendant] in refuting his claim". A person who "prior to the present action... had already commenced two hopeless and vexatious actions". A person who "was a bankrupt and had nothing to lose in the proceedings". It is difficult to think of a litigant who would be less likely to accept the weakness of his case and to settle it at mediation; or in any way to accept the shortcomings of his case until they were finally set out in black and white in a judgment against him. And yet despite all of this Lightman J.'s "quiet word" with

[11] See also A.J. Stitt, *Mediation: A Practical Guide* (London: Cavendish 2004), p.8, who notes a similar efficacious impact of mediation.

[12] Reasonable belief in the strength of a party's case is one of the "valid" reasons for refusing an offer of mediation: "In our judgment, this statement should be qualified. 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." *Halsey* [2004] EWCA Civ 576 at [19], per Dyson L.J., giving the judgment of the court.

[13] *Hurst v Leeming* [2002] EWHC 1051 (Ch); [2003] 1 Lloyd's Rep. 379, per Lightman J.

[14] *Hurst v Leeming* [2003] 1 Lloyd's Rep. 379 at 381.

[15] *Hurst v Leeming* [2002] EWHC 1051 (Ch).

[16] *Hurst v Leeming* [2002] EWHC 1051 (Ch).

this obdurate claimant at the beginning of the action had led to him conceding his claim completely.

The fact is that mediation works[17]:

> "Do a significant percentage of cases settle at mediation? Statistics suggest they do. For cases that voluntarily go to mediation, upward of 70–80% settle."

It seems to me that, as the statistics continue to show the effectiveness of mediation as a dispute resolution mechanism, the courts should increasingly be refusing to accept the "no reasonable prospect of success" argument as a justification for litigants refusing to mediate.

[17] M.S. Gillie, "Voluntary Mediation" (1990) 26(10) *Trial* 58.