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UPDATE

Sanctions for failure to engage in ADR: will Guernsey follow the High Court's lead?

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In what is the latest in a slew of English High Court and Court of Appeal cases setting out adverse costs consequences for unreasonable failure to engage in Alternative Dispute Resolution (ADR), Turner J's judgment in *Laporte v the Commissioner for the Police of the Metropolis* [2015] EWHC 371 (QB) reaffirmed the obligation on parties to engage seriously with the process of ADR.

Although Guernsey is not subject to the ever increasing focus of the English Civil Procedure Rules (CPR) on controlling costs after the Woolf and Jackson reforms, this should serve as a reminder that the Royal Court will not look favourably on a party who refuses to consider ADR. Indeed, LB Southwell QC stated in *Woodbourne Trustees Ltd & Generali Worldwide Insurance Company Limited*, (Unreported) (a case in which the parties did engage in mediation, but the Defendant was penalised on costs for its failure to respond to an offer with a reasonable counter-offer) that we are, 'in an age in which reasonable conduct is expected of all civil litigants'.

Legal background

The CPR in England and Wales impose a duty of 'active case management' on the Court, and this includes encouraging ADR where appropriate. This is reinforced by a number of pre-action protocols, which all contain provisions requiring parties to take appropriate steps to resolve their disputes by ADR. The general rule as to costs is established by CPR 44.2(2), which states that the unsuccessful party should be ordered to pay the costs of the successful party. However, the court retains a discretion under CPR 44.2(1) and 44.2(2)(b). The relevant factors which the Court must take into account in exercising its discretion are listed in CPR 44.2(4).

Earlier case law has established that an unreasonable refusal to engage in ADR can justify the Court's departure from the general rule (*Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 (CA)). Furthermore, the Court held that the burden is on the unsuccessful party to show that such refusal was unreasonable, and set out a number of factors which would tend to show unreasonableness. This non-exhaustive list included:

- the nature of the dispute;
- the merits of the case;
- the extent to which other settlement methods have been attempted;
- whether the costs of ADR would be disproportionately high;
- whether delay caused by ADR would have been prejudicial; and
- whether ADR had any reasonable prospect of success.

The *Halsey* case was discussed in *PGF II SA v OMFS Co 1 Ltd* [2014] 1 WLR. 1386, which found that there was 'no recognition in the Halsey case that the court might go further, and order the otherwise successful party to pay all or part of the unsuccessful party's costs. While in principle the court must have that power, it seems to me that a sanction that draconian should be reserved for only the most serious and flagrant

failures to engage with ADR'. An example of such failures suggested by the Court was the refusal to engage where the Court had specifically encouraged it.

The facts of the *Laporte* case

The *Laporte* case stemmed from an earlier case against the Metropolitan Police for damages for assault and battery, false imprisonment and malicious prosecution, as well as a declaration that the Claimants' human rights had been breached.[1] The Claimants were unsuccessful in their claim, but had attempted on several occasions to arrange mediation to attempt to narrow the issues or settle the case. On at least one occasion, the Court ordered the Defendant to respond to the Claimants' offer of mediation, and the Defendant failed to do so. The Claimants also made Part 36 offers, to which they received no response.

Additionally, the Claimants contended that the Defendant had failed to respond to the letter of claim as required by the pre-action protocol.

The Court's decision

The Court, finding that there was a reasonable chance that ADR would have succeeded in whole or in part, disagreed with the Defendant's assertions that any offer of ADR would have required a money offer, and that the Claimants' approach to the process was purely tactical. It addressed the other factors listed in *Halsey*, and found that the Defendant had failed, without adequate justification, to engage in ADR, which had a reasonable prospect of success. Taking this and other circumstances into account, the Court refused the Defendant's application for an indemnity costs order, and only awarded the Defendant two thirds of its costs, assessed on the standard basis.

Application to Guernsey

While the pre-action protocols and the codified rules as to costs in the CPR do not apply in Guernsey, the Royal Court Civil Rules, 2007 (the Rules) are based on the overriding objective to deal with cases justly. This includes saving expense and proportionality. Rule 1(3) requires the Court to give effect to the overriding objective when exercising its powers under the Rules, and Rule 1(4) requires parties to assist the Court in furthering the overriding objective. Read in that context, the Court's discretion under Rule 82(1) to 'make such order as to the costs of the proceedings, or of any stage or application in the proceedings ... as the Court thinks just' implies that a failure to engage in ADR may be treated in a similar manner as in England and Wales.

The Royal Court considered the issue of costs orders in Guernsey Judgment 44/2014 – *Jefcoate and Spread Trustee Company Limited et al* (Unreported). Although it did not directly rule on the parties' submissions as to the failure to engage with ADR, the Court stated that it had 'taken account of the parties' various offers of settlement and other matters of interaction outside the trial in reaching this result'. Therefore while, in the absence of a formal procedure for costs sanctions in such cases, Guernsey may be less draconian in applying sanctions than the English courts in such cases, costs sanctions should still be seen as a significant risk for parties (even if successful) who cannot demonstrate that they have taken active steps to consider and, if appropriate, engage in ADR.

[1] *Laporte & Anor v the Commissioner for the Police of the Metropolis* [2014] EWHC 3574 (QB).

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