

Effect on costs of unreasonable behaviour at mediation

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We are beginning to see more cases on issues related to mediation coming through the courts, but *Malmesbury and others v Strutt and Parker* [2008] EWHC424 (QB) had passed me by. It was a large and complex case, involving allegations of negligence in relation to leases for land at Bournemouth Airport, to be used as a car park- as we all know to our cost, an airport car park is a huge income earner.

After the conclusion of the case, there were issues about costs. Following the decision on liability, there was a mediation set up in relation to damages. The claimant put forward a very large figure at the mediation, and refused to move from it.

The judge, Mr Justice Jack, said as follows, "I consider that the claimants' position at the mediation was plainly unrealistic and unreasonable. Had they made an offer which better reflected their true position, the mediation might have succeeded. It would be wrong to say more. As far as I am aware the courts have not had to consider the situation where a party has agreed to mediate but has then taken an unreasonable position in the mediation. It is not dissimilar in effect to an unreasonable refusal to engage in mediation. For a party who agrees to mediation but then causes the mediation to fail by reason of his unreasonable position in the mediation is in reality in the same position as a party who unreasonably refuses to mediate. In my view it is something which the court can and should take into account in the costs order in accordance with the principles considered in *Halsey*".

So an unreasonable stance at mediation can affect the outcome on costs as may an unreasonable refusal to mediate. Plainly however, this is not straightforward, for two reasons. Firstly, it is unclear how the judge came to know of positions adopted at mediation- mediation is supposed to be a confidential process. There is no explanation of who told him, or why. Secondly, what is unreasonable conduct at mediation, and how does one avoid looking at positions without applying hindsight? It is likely to have to be very obviously wrong to fall foul of the judge's strictures.

Perhaps the answer is that there was agreement between the parties to disclose what took place at mediation. If so, the lesson is to think long and hard before agreeing to such disclosure, especially if you have just lost badly.

Thanks to Nigel Frost of Jeffrey, Green Russell for pointing out this interesting reference.

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