



The costs risk of refusing alternative dispute resolution

The principle that the loser pays the winner's reasonable costs is being increasingly eroded as the courts penalise the winning party for failing to engage in alternative dispute resolution (ADR). The courts are prepared to penalise an unreasonable failure to engage in ADR, even where other rules governing costs and settlement can be used to produce an alternative result. In the 2006 case of *P4 Ltd -v- Unite Integrated Solutions plc*, the court awarded the losing party some of their costs after the winning party had refused ADR and as result denied them an opportunity to settle the case at minimum cost.

Introduction

The various forms of ADR provide a structured way for parties to settle disputes. Under the court's procedural rules the parties to a dispute are not required to enter into ADR, but they have a duty to consider whether ADR is appropriate.

The same procedural rules also provide parties to a dispute with a separate mechanism that encourages settlement through use of costs by what is known as a Part 36 offer (only defendant's Part 36 offers are relevant in this article - there are other rules regarding offers by claimants). If a Part 36 offer is rejected and the case continues to trial then there are generally two possible outcomes for the claimant:

1. if the claimant is awarded more than the defendant offers, the claimant will normally be entitled to have all of their reasonable costs paid for by the defendant (as is usual if Part 36 did not apply); but
2. if the court awards the claimant the same or less than the defendant's offer, the claimant will be responsible for the defendant's reasonable costs from the latest date that the claimant could have accepted the offer (21 days after the offer is received). The claimant will still, however, generally be entitled to its reasonable costs up to that date.

This last bullet point is important because if there is no Part 36 offer the claimant could still be entitled to all its reasonable costs even if awarded less than the original claim. This is because the court has a discretion to find that the sum awarded is enough of the original claim to deem the claimant successful and entitled to all its reasonable costs.

P4 Limited -v- Unite Integrated Solutions plc

In *P4*, at trial, the claimant was awarded less than the defendant's offer (the judge awarded the claimant £384 against an original claim for £70,000). Part of the reason for this was late production by the defendant of evidence that, in the court's opinion, provided an effective defence to the claim. The defendant, as effective winner, pushed for all their costs on an indemnity (ie increased) basis. The claimant argued that it was unjust to penalise it in this way as the defendant had (1) failed to mediate and (2) failed to disclose evidence until late in the proceedings.

The defendant would normally have been entitled to its costs from the beginning of the action, given the small amount recovered and the failure on the main issues by the claimant. The Court considered that the successful defendant's late disclosure and failure to mediate should not influence costs after the Part 36 offer.

The Halsey Guidelines and P4.

- a) **nature of the dispute.** *P4* involved disputed facts and the judge thought it was a classic opportunity for ADR and encouraged the parties to proceed on that basis.
- b) **the merits of the case.** *Halsey* recognises that claimants with weak cases could calculate that inviting mediation will force large defendants to make an offer to buy off the mediation and the risk of being penalised in costs, even if ultimately successful. *Halsey* states only a *reasonable* belief that the case was watertight would justify refusal. In *P4* the judge held that the defendant's tactics suggested they believed they were exposed on some aspects of the case.
- c) **the extent to which other settlement methods have been effected.** In *P4* the Court held that negotiation around offers to settle was no substitute for mediation. ADR requires the parties to engage with each other and with a third party. In *P4* there was no proper engagement on the issues in correspondence between the parties.
- d) **whether the costs of ADR would be disproportionately high.** In *P4* the defendant argued that mediation would be expensive compared to the sums at stake. The Court disagreed and held that the costs of mediation should also be compared to the cost of a trial and the burden on management time.
- e) **whether any delay in setting up the ADR would have been prejudicial.** the Judge criticised the Defendant for not recognising *P4*'s pre-action offer of mediation, suggesting that mediation should be in the parties' minds at that stage.
- f) **whether ADR has a reasonable prospect of success.** The judge held that the issues in *P4* related to the facts and that a meeting or mediation might have flushed out the necessary evidence from *Unite* pre-action rather than post-disclosure.

It was just, however, given that behaviour, that the claimant should have their costs up to that date.

The Court based its decision on a careful application of the *Halsey Guidelines* (see box), which set out a number of factors to aid decisions on costs following a refusal to participate in ADR. It follows that a party refusing to commit to ADR ought to consider the *Halsey Guidelines*.

Does the decision in *P4* advance the cause of ADR?

In short, yes, but to answer the question it is worth considering *Susan Dunnett -v- Railtrack plc* (in railway administration) [2002]. In *Dunnett*, the claimant lost the case but, although the defendant won, the judge ordered that each party bear their own costs. At an earlier, procedural stage the court recommended ADR, and the claimant indicated that she was amenable to the idea. The defendant, however, refused to consider it as they were unwilling to commit funds to ADR that were unlikely to be recovered. This was heavily criticised in the costs ruling – the judge felt they should have used the limited funds available on the substance of the claim rather than playing a procedural game. He warned lawyers that:

“if they turn down out of hand the chance of ADR when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequences”.

The judge held that it was inappropriate to consider the offers and made no order as to costs. The table below sets out the key differences between *P4* and *Dunnett*

P4	Dunnett
Claimant defeated on main issues but won a small point	Claimant lost Claimant litigant in person
Claimant awarded less than the Defendant's part 36 offer	No award to claimant
No specific recommendation of ADR by the Court	Judge recommended ADR to claimant, who forwarded this to the defendant.
Claimant specifically requested mediation, defendant refused it.	Claimant amenable to ADR, defendant refused it,
Defendant awarded costs after Part 36 offer. Claimant awarded costs up to Part 36 offer.	No order as to costs. Each party responsible for their own costs

The judge concluded in *P4* that the defendant's conduct up to the Part 36 offer “deprived the parties from being able to resolve this case at minimal cost.” Unlike *Dunnett*, he held that ruling no order as to costs was

inappropriate and he found that making no order as to costs up to the Part 36 offer would not do justice to the situation, "in particular to the failure (by Unite [the defendant]) to mediate."

The financial effect of the rulings is not clear as the effect of the costs ruling depends on the acceptance date of the part 36 offer and the amount of costs incurred before and after that date.

Although it is arguable that in P4 the party refusing ADR was not as heavily penalised as in Dunnett, P4 is still in line with case law that is the increasing the pressure to use ADR in a dispute. The court takes a dim view where one party denies the other the opportunity to settle the case at minimum cost. It seems that the courts are prepared to take a more robust approach on costs if ADR is unreasonably refused and this is particularly true if the same judge has recommended ADR at an earlier stage of the proceedings. While the court cannot order ADR, it is likely, based on P4 as one of a number of ADR cases, that it will continue to take a robust view on its refusal.

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