

# An alternative route

Avi Dolties considers some of the advantages of costs mediation

**A**nyone in the legal profession will tell you that reaching settlement is not the end of the road. Following settlement, the successful party will want to recover their legal costs, but this can sometimes be a drawn-out process riddled with complex costs arguments necessitating the instruction of costs lawyers. Often the assessment of costs can turn out to be even more contentious than the substantive matter.

What if there were a way to try to contract this process, a way to walk out of a mediation without costs being left lingering?

Let's go back to basics. It is well established that in UK law, costs follow the event. Indeed, Adrian Zuckerman, professor of civil procedure at University of Oxford, in his commentary on the indemnity principle justifies costs following the event on the basis that 'a person should not be out of pocket as a result of having to seek court adjudication to vindicate his rights'.

Professor Zuckerman adduces support from Justice Dyson in *R v Lord Chancellor Ex p. Child Poverty Action Group* [1999] 1 W.L.R. 347; [1998] 2 All E.R. 755, 764: 'The basic rule that costs follow the event ensures that the assets of the successful party are not depleted by reason of having to go to court to meet a claim by an unsuccessful party.'

Pursuing one's legal costs recently hit the headlines in Sir Cliff Richard's (pictured) battle against the BBC and the South Yorkshire police. The headlines were...

- Bills for Sir Cliff versus the BBC top £1.1m: Costs soar into seven figures even though trial is not expected until next spring.
- BBC's fury at £900k pre-action legal costs of Sir Cliff Richard.
- BBC criticises Sir Cliff Richard's 'grossly unreasonable' legal costs.

Should Richard emerge victorious, he will be looking to the BBC to meet his claim for costs and vice-versa.

There are a number of points that can be extracted and reflected on in Sir Cliff's battle against the BBC and the police.

**1. The impact of legal costs on litigation** – Perhaps most interesting is the level of public attention on legal costs. While the case in its own right has gained media attention, what has really caused journalists to put pen to paper are the legal costs. To be more precise, it is the level of legal costs. Without a doubt, during the course of settlement negotiations or on detailed assessment, proportionality will need to be considered. The parties will need to engage in advocating or exempting the rules on proportionality. CPR 44.3(5) will need to be studied. Arguments and counter-arguments of the various limbs of the proportionality test will need to be considered (the sums in issue in the proceedings, the value of any non-monetary relief in issue in the proceedings, the complexity of the litigation, any additional work generated by the conduct of the paying party and any wider factors involved in the proceedings, such as reputation or public importance).

**2. The substantial level of costs** – The level of costs are clearly substantial and should Richard be successful against the BBC, as established above, he will want his costs to be met by the defendant. In view of the level of legal costs, an in-depth knowledge of costs law will be required to support the costs recovery. Conversely, for the BBC to be able to robustly reduce the level of costs being sought, a sound understanding of costs law will be vital. The genre of arguments that are likely to be addressed will be hourly rates, enhancements on hourly rates, what particular items of time are recoverable, what disbursements are recoverable and so forth.

**3. Comments on incurred costs** – Another point that surfaced was how to approach incurred costs in a budget. While PD 3E 7.4



says that the court may comment on the incurred costs at the costs management hearing, Chief Master Marsh formed the view 'that a degree of caution is appropriate when the court considers whether to make a comment about incurred costs'. Chief Master Marsh went on to say: 'To my mind there is little or no value in the court recording a general comment about incurred costs along the lines that the incurred costs are "substantial" or they are "too high". If the court wishes to record a comment that the incurred costs are "excessive" or they are "unreasonable and disproportionate" it will wish to be sure that the comment is made on a sound footing, rather than impression, because commenting is quite unlike the exercise of approving a figure per phase for future costs. The court will also wish to consider the utility of making a comment unless it is specific and well-founded.'

What Sir Cliff's case illustrates is that legal costs can often take centre stage in litigation.

It also demonstrates that in cases of this nature, legal costs are likely to be substantial. To the paying party they will clearly be too high. To the receiving party they may not be high enough!

Finally, it also illustrates that the costs aspects of a case are fraught with legal complexity. It is not a case of simply submitting a bill to the paying party and expecting a cheque in the post seven days later.

## MEDIATION

In order to resolve cost disputes of this level, the answer may lie in mediation; the increasingly popular process by which litigants negotiate with the help of a neutral and independent third party.

Mediation can offer a solution to resolving costs disputes that is

informal, cost effective, and quick. A judge at detailed assessment is limited to ruling on the law, whereas a costs mediator can assist parties to arrive at more wide ranging, creative, and potentially more advantageous solutions.

Involving a costs mediator should not be limited to the very conclusion of the claim. You may want to involve a costs mediator during the course of settlement negotiations, should legal costs be a hindrance to settlement.

A specialist costs mediator with expertise in legal costs could assist mediating costs:

- During settlement negotiations
- On conclusion of the matter prior to any bill of costs being drafted or
- Mediating the costs following the service of a bill of costs, but ahead of a detailed assessment.

Practically speaking, in a case such as the Cliff Richard matter, the legal costs are likely to be the main obstruction to settlement.

The costs mediator would allow the parties to ventilate their arguments in respect of the costs claimed, with the mediator applying the core principles of mediation to test those arguments against what would be awarded at a detailed assessment of costs.

A mediator with specialist costs knowledge would have insight on:

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- Proportionality (CPR 44.3(5))
- Retainer matters
- Rates
- Technical compliance with the CPR relating to costs
- Item recoverability in respect of time
- Item recoverability in respect of disbursements.

A mediator with such knowledge will inevitably compel parties to thoroughly study their standpoints in respect of costs, and will likely allow a settlement to ensue.

While the BBC may still proclaim to Sir Cliff that - to quote the singer's 1979 hit - *We don't talk anymore*, perhaps if both parties were to consider mediating costs, the end may be nearer.

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