MILLS & REEVE

briefing

24 April 2012

The hazards of litigation: a reprise

Refusing to mediate can be reasonable

On 23 April the Court of Appeal handed down its judgment in the matter of *Swain Mason v Mills & Reeve*.

This litigation has followed a tortuous course, with the trial commencing three times and two trips to the Court of Appeal. Its progress to trial and the first instance judgment were the subject of an earlier briefing. The judgment clearly illustrates that Mills & Reeve was justified in rejecting a bad claim, which was based on hindsight. The court also agreed that Mills & Reeve should not have been penalised in costs for refusing to mediate.

Background

Mills & Reeve were retained by Mr Swain and his daughters, who were selling their interest in Swains International Plc to the rest of the management team. The judge at trial found that:

> "the scope of the retainer extended to the defendant giving Mr Swain and his daughters advice as to the tax consequences flowing from the MBO, but not to advising them on how the transaction fitted into their personal financial and tax planning positions".

Shortly after completion of the management buy-out, Mr Swain died while in hospital where he was due to have a heart procedure. The case against Mills & Reeve is that following receipt of an email exchange prior to the completion of the MBO, which was blind copied to Mills & Reeve and mentioned the procedure, Mills & Reeve were under an additional duty to advise on the tax consequences should Mr Swain die as a result of the procedure.

The trial judge held the email exchange was copied to Mills & Reeve due to an issue being raised that had a bearing on the terms of the MBO, adding that:

> "there is nothing to suggest that Mr Swain had any particular intention to convey the information [about the heart procedure] contained in that email to [Mills & Reeve]. On the contrary … it appears to be pure happenstance that the chain included the information about the heart procedure."

The judge observed also that the email exchange was copied to the corporate finance partner involved in the transaction, not the tax lawyer with whom Mr Swain had been corresponding directly, and that there was nothing in that email to indicate that the heart procedure was anything other than a routine procedure.

In these circumstances, the judge ruled as follows:

> "Given the manner in which the information about the heart procedure was conveyed to Mills & Reeve, and given that the information so conveyed did not suggest that the procedure was anything other than routine,

> I do not consider receipt of the email can have triggered any duty on the part of Mills & Reeve to advise Mr Swain and his daughters as to the Tax Consequences if he were to die during the procedure."

The judge added that even if there had been a duty to advise as to the tax consequences of death, the claimants had "no coherent case" as to what Mr Swain would have chosen to do.

When dealing with costs, the judge adopted an issues-based approach, allowing Mills & Reeve only 50 per cent of its costs. Significantly, the judge said the following in respect of Mills & Reeve's refusal to mediate what it regarded as a bad claim at every level:

- One of the advantages of mediation would be that, if successful, there was avoided the risk to the defendant of being exposed to what the judge called "collateral reputational damage".
- On the question of whether alternative dispute resolution would have had a reasonable prospect of success, his conclusion was that there was a real possibility, had there been a mediation, both parties would have gained a "better understanding of the weaknesses in their own case"; and that it was "not unrealistic" to suppose mediation might have produced a settlement although he concluded it was more likely than not it would have been unsuccessful.
- The prospect of a successful outcome was not so unrealistic as to justify Mills & Reeve's "intransigent refusal at every stage even to contemplate the possibility of mediation."
- Mills & Reeve's "attitude in simply refusing even to contemplate the possibility of mediation on the grounds that the claim was utterly hopeless was an unreasonable position to take".
- The refusal to mediate was a factor that he took into account in allowing Mills & Reeve only 50 per cent of its costs.

The judge gave permission for the claimants to appeal. He refused Mills & Reeve leave to appeal his costs order, but the Court of Appeal subsequently gave permission.

The Court of Appeal's judgment

The claimants' appeal was dismissed. The Court of Appeal confirmed that Mills & Reeve was not in breach of duty in failing to advise on the tax consequences of death. Its retainer was limited to advising as to the tax consequences of the MBO only. This was not affected by the happenstance receipt of the news that Mr Swain was to undergo a heart procedure.

As regards costs, while sympathetic with a number of the arguments put forward by Mills & Reeve, with one exception it did not interfere with the judge's discretion; to do so would invite disgruntled litigants generally to appeal costs orders to the Court of Appeal.

The exception is in relation to Mills & Reeve's refusal to mediate. In this connection, Davis LJ, with whom Lord Neuberger, Master of the Rolls, and Richards LJ agreed, said as follows:

> "I am much more troubled by the judge's approach as to conduct and in particular by his holding it against the defendant, in terms of costs, that it declined to enter into mediation or any other form of alternative dispute resolution.
>
> There are, I think, three objections to the judge's approach:

1 First, the judge had in terms found that the defendant had been "vindicated" in its assessment of the strength of the claimants' case so far as breach of duty was concerned. Thus its position, maintained throughout, had been shown to be justified on a matter which would have been (and was) determinative of the case in its favour.

2 Second, quite what "weaknesses" in the respective cases would have been revealed in a mediation is not explained by the judge. I note that it is also not said, if identified, their revelation could have led to a mediated settlement.

3 Third, I do not understand why avoidance of "collateral reputational damage" to the defendant should have been considered a relevant factor in this case, counting against the defendant. A settled professional negligence claim is capable, in some instances, of leaving behind reputational damage. Some professional defendants may, entirely reasonably, wish publicly to vindicate themselves at trial in respect of claims which will have been publicly aired by the commencement of proceedings. It is a matter for them. It would be unfortunate, speaking generally, if claimants in cases of this kind could be encouraged to think such a consideration as identified by the judge could enhance their bargaining position."

Davis LJ added he had concerns about the judge's assessment, that the possibility of a mediated settlement was "not unrealistic". He said:

> "At all stages the parties in reality were a 100 miles apart. The claimants had sought £750,000 and costs by Part 36 offer served shortly before the first trial. The defendant's best offer had never been more than a "drop hands" approach (before proceedings). Its assessment of the strength, or rather weakness, of the claimants' pleaded case on breach of duty never altered. It is difficult to see, given the circumstances, how a mediation could have had reasonable prospects of success. Moreover, in such circumstances I do not think it right to style critically the defendant's refusal to agree to a mediation as "intransigent". Nothing changed in this particular case (unlike many cases) to necessitate a re-evaluation on the question of liability. A reasonable refusal to mediate does not become unreasonable simply by being steadfastly, and for cause, maintained…
>
> The fundamental question remains as to whether it had been shown by the unsuccessful party (the claimants) that the successful party (the defendant) had acted unreasonably in refusing to agree to a mediation. In my view, that could not be shown here; and I therefore think the judge was wrong to bring into account, adversely to the defendant, the defendant's attitude to mediation in deciding what costs overall should be awarded."

The Court of Appeal exercised the discretion afresh and increased from 50 per cent to 60 per cent the costs award in Mills & Reeve's favour.

Conclusion

When confronted with a bad claim based on hindsight, Mills & Reeve rejected it. The Court of Appeal's recent judgment shows that it was justified in doing so.

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