Dunnett principles emerge in South Africa: a review of *Brownlee v Brownlee*

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This is an article written in 2008 from the perspective of the legal position in England and Wales shortly after publication of the judgment in* Brownlee *and published in the UK on the CEDR website at* www.cedr.com. *A postscript has been added to update the author's thinking on this significant case in terms of current civil procedure in both England & Wales and South Africa.

Proponents of mediation in South Africa are greeting the decision of Brassey AJ in the South Gauteng High Court trial of *Brownlee v Brownlee* in Johannesburg (case number 2008/25274) as a landmark comparable to *Dunnett v Railtrack* in England and Wales. For the first time, a judge has imposed a costs sanction as a direct consequence of failure to mediate. Interestingly, the sanction in this case was imposed not on the parties but on their lawyers in a way that has not yet happened here yet so directly – the parties have borne the effect of the advice they were given. So the approach taken in *Brownlee* presents a fresh warning to the English and Welsh legal profession about what judges might do if they fail to advise their clients about mediation, something which both the Court of Appeal in *Halsey v Milton Keynes NHS Trust* and the Solicitors Code of Conduct have effectively made a professional duty.

Brassey AJ's decision on costs (from paragraph 48 onwards) occupies a substantial proportion of the judgment and repays reading – the full judgment is on the CEDR website in EDR Law - and only portions are quoted here. The case was a substantial matrimonial case, primarily involving financial provision for a stepson's private school fees, and the amount of maintenance for the wife plaintiff herself in the light of her potential earning capacity, and the inter-party adjustment of the increased value of each spouse's capital value (the South African legal concept of "accrual"), coupled with allegations of concealment of assets by the defendant to skew that readjustment.

Having ordered the defendant to pay his stepson's school fees and made decisions on the maintenance award and property adjustment school fees, Brassey AJ turned to costs, which, as he prefigured at the beginning of his judgement, was "*a matter on which I shall have quite a lot to say at the end of my judgement.*"

The judge expressed his anger at the way the case had been litigated, albeit in measured judicial terms. His first paragraph notes that *"the death of this marriage, or at least the manner in which the last rites have been pronounced over it, represents a tragedy of a particularly painful sort."* He notes the way in which "*the evidence was presented, challenged and minutely examined in argument"* during trial days which were "*sometimes seemingly endless".* While entertaining no hope that his rulings would end the acrimony between the parties, he firmly expressed the hope, "*vain though it may be, that what I say will reduce the risk of a repetition of this tragedy".* In other words, he was setting out an intention to reform approaches to such litigation so far as he could.

Turning to costs issues, Brassey AJ noted that the costs at stake in this case might be between R500,000 to R750,000 (roughly £40,000 to £60,000), commenting wryly "*that a sum of this*

nature might have been put to better use – for example, to defray the cost of private schooling for the children – goes without saying." He noted that referral for possible settlement by mediation was considered at the pre-trial conference, under a newly enforced Rule 37 which requires the parties, assisted by a judge, to try to narrow issues and to endeavour to settle the case and to record whether mediation or other ADR process has been tried. When asked in *Brownlee,* both lawyers "*had no hesitation*" in declining such a referral. The judge who handled the pre-trial conference then tried to conciliate, but ended up having to be recused, having expressed views about respective likely entitlements.

Brassey AJ then went on:

When the plaintiff was busy testifying, I asked her whether the resolution of the case through mediation had been mooted by her legal advisers. She said it had not, but she went on to explain that she thought mediation would have served no purpose. Though this was her response to a question put by me, it is ultimately a matter on which, not being an expert, she can entertain no informed belief. Mediation can produce remarkable results in the most unpropitious of circumstances, especially when conducted by one of the several hundred people in this country who have been trained in the process. The success of the process lies in its very nature. Unlike settlement negotiations between legal advisers, in themselves frequently fruitful, the process is conducted by an independent expert who can, under conditions of the strictest confidentiality, isolate underlying interests, use the information to identify common ground and, by drawing on his or her own legal and other knowledge, sensitively encourage an evaluation of the prospects of success in the litigation and an appreciation of the costs and practical consequences of continued litigation, particularly if the case is a loser.

He quoted the well-known passage concluding Ward LJ's judgment in *Egan v Motor Services (Bath) Ltd* [2007] EWCA Civ 1002, which ends:

"Mediation is a perfectly proper adjunct to litigation. The skills are now well developed. The results are astonishingly good. Try it more often";

and continued:

If mediation is appropriate in commercial cases, how much more apposite is it in family disputes. Commenting on the role of lawyers, he quotes Blieden J in the South African case of *Clemson v Clemson*

> *The Court expects attorneys acting on behalf of such people, as professional people and officers of the court, to display objectivity and sound common sense in assisting their clients. Fortunately most attorneys perform this task admirably. However there is a minority of attorneys who approach each divorce as a war between the two litigants. The rules of court and legal principles are utilised as weapons in a fight to destroy the opposition. As happens in most wars of attrition by the time the war has come to an end both sides have lost. There is now permanent hatred between the parties and their joint assets have been consumed to pay legal fees'.*

Brassey AJ then went on:

The responsibilities are especially difficult to discharge when the matrimonial bar is small and the practice of family law is so inbred. A limited number of practitioners perform the

role and, while some rub along together well enough, others rub each other up the wrong way. Acrimony between legal representatives, which can carry over from one case to the next, easily produces an over-identification with the client's cause and an attitude of win-at-all-costs. These emotions can act as a complete barrier to settlement. I cannot say whether the attorneys in the present case fell foul of this vice, but the correspondence suggests that they might have.

He then painted a picture of the kind of adversarial litigation attitudes which we might hope no longer exist in England and Wales - acrimonious and dismissive correspondence, huge trial bundles much of the contents of which are irrelevant, threats of criminal proceedings - summing up this type of forensic conduct by saying *"In a very real sense, this was a case in which, if the parties did not need mediation, the legal representatives certainly could have profited by it."*

Somewhat humblingly, Brassey AJ then refers to our experience in England by saying:

I am given to understand that in England the all but obligatory recourse to mediation has profoundly improved the process of dispute resolution. Parties resolve their problems so much more cheaply as a result and the burden on the court rolls has been considerably lightened. Informed estimates put the success rate of mediation at between eighty and ninety percent. For present purposes it is unnecessary, indeed undesirable, for me to say more about the general imperatives that favour mediation as a means of settling cases. I do not even feel the need to say much more about the need for mediation in family disputes. But I can say with confidence that the parties would have been well served if they had submitted this dispute to mediation and then fought out, if fight they must, the one or two issues of fundamental concern to them.

He then identified one particular issue resolved consensually during the course of the trial in a way that demonstrated that it was capable of being mediated. Finally, he determined the costs issue by placing a cap on what each lawyer could recover from their respective client at the equivalent of standard basis costs rather than indemnity costs and as between the parties made no order as to costs, saying that "*the failure of the attorneys to send this matter to mediation at an early stage should be visited by the court's displeasure",* also stating he "*cannot believe that the parties are blameless on this score".*

Commenting on this judgment, John Brand, partner in one of South Africa's largest law firms and a highly respected and experienced commercial and labour mediator has written:

Whilst only the attorneys were deprived of their costs, the risk now exists that parties who unreasonably refuse to mediate will also be deprived of their costs. This risk and the inherent merits of mediation will no doubt drive South African attorneys and their clients into the process and mediation will in time become an integral part of our civil justice system.

How the decision affects development of mediation in both the family and commercial context in South Africa deserves close monitoring, which commentators like John Brand will certainly provide. It will be especially interesting to see if a family decision on this will transfer across to the commercial field, where mediation in South Africa is in early stages of development, despite many years of distinguished labour mediation activity. Martin Brassey SC (equivalent to QC) was sitting as a Assistant Justice (AJ) or deputy High Court judge. He is one of the top

Senior Counsel at the Johannesburg Bar and in South Africa, and was formerly a professor of law at Witswatersrand University, and a prolific writer on employment law and, more recently, competition law. Although his status is not quite the same as the English Court of Appeal which heard *Dunnett v Railtrack,* he is clearly a senior academic and practitioner whose views are well respected in South Africa.

What light does this decision cast on the English context? Firstly, although *Dunnett v Railtrack* was not quoted in the judgment, its spirit certainly underpins it. *Dunnett* is still a binding authority in England, and there are a good number of Court of Appeal cases, including *Halsey, Burchell v Bullard, Egan v Motor Services (Bath) Ltd and McMillen Williams v Range* which serve as a warning to parties who unreasonably ignore court recommendations or inter-party proposals to mediate. *Brownlee* is perhaps most closely related to the last of these, where Ward LJ pronounced "a plague on both houses" for litigating wastefully and made no order as to costs on the appeal.

What is interesting in *Brownlee* is the discovery that at least one and probably both of the lawyers had not told their clients about mediation, and therefore had their costs capped at inter-party rates. No decision in England has to my knowledge yet drawn this kind of distinction between client and lawyer, and yet there is no reason why such an enquiry should not be made by English judges when parties give evidence before them, and then take a similar approach. Lawyers in England (as many, but not all, do) should make sure they perform their professional obligations and advise their clients fully about mediation as a possibility, being able to decide intelligently whether mediation will work in given circumstances, and also equip themselves to represent clients skilfully within the mediation process. Training in such skills is relatively rarely taken up in England and Wales, and with such risks lurking to trap those who ignore these requirements, perhaps the legal profession needs to review its training needs.

Postscript in May 2017

Re-reading Brassey AJ's judgment in *Brownlee* seven or so years after his decision still leaves me greatly impressed with his insight and ingenuity in meeting apathy and collusion between lawyers over not mediating. It still stands alone in its intervention into the retainer as between lawyer and client in penalising the lawyers in their otherwise expected costs recovery from their own client when the judge made no order as to costs between the parties. In English procedure this would be tantamount to the making of a wasted costs order. But so far no such order has still been made by an English judge. Costs sanctions for not mediating are made here when one party successfully persuade the judge at the end of a case that the other party unreasonably refused to mediate or simply ignored an invitation to mediate. If it is the losing party who succeeds on the point, costs may be reduced or no order made against the loser, despite having lost the litigated case. If the winner of litigation also wins over an opponent's refusal to mediate, then a quasi-penal indemnity costs order will be made against the loser, enabling almost all costs to be revered by the winner. It is a topic raised adversarially by one party against the other, and only very rarely by a judge of his or her own motion. Such a decision was made in the case of *McMillen Williams v Range* [2004] EWCA Civ 294, when the Court of Appeal pronounced "a plague on both your houses" when both legal teams failed to arrange a mediation, and made no order as to costs. But there was no *Brownlee* –type penalty imposed on what each legal team could recover from their clients.

When Sir Rupert Jackson was conducting his mammoth review of civil costs, he was unpersuaded that there was much need to provide for judges to consider the possibility of penalising both legal teams for not mediating, despite the *McMillen Williams* decision. One can see how the need for such a consideration should be reduced with judicial case management in place, as it has been in England & Wales since the Woolf reforms and the Civil Procedure Rules 1998 introduced it in April 1999. It is for courts to give directions as to the conduct of litigation and to police performance of them. However, it is only relatively recently that judges have regularly been including directions about mediation. However, even with case management, I believe it would not be too difficult for lawyers who wished to avoid mediating from doing so.

If (as I understand South African procedure) there is no court case management comparable to England & Wales, so that in effect once proceedings are issued there is no necessity to resort to the court for any input until application for trial is made (the situation which obtained in England before the Woolf reforms), it is obviously easy for lawyers to agree with each other not to enforce obligations or expand on procedural options if they wish to ignore them. The change to judicial case management in England wrought by Woolf was effectively on the basis that the legal profession could no longer be trusted to forward litigation in the interests of their clients, so that judges had to be given management powers to assist litigants to reach timely and affordable outcomes. Lawyer collusion over procedure was, in theory at least, no longer possible, and on the whole the legal profession would accept here that the change in procedure and indeed in engendering a more co-operative litigation culture has been beneficial.

I am told that, despite my hopes expressed at the time, *Brownlee* has not yet had any significant impact on civil practice or received any noticeable judicial support in South Africa, either as to the impetus to mediate civil claims generally or the precise mechanism used by Brassey AJ to penalize perceived unreasonable litigation conduct. Of course there have been the introduction of the Magistrates Rules as to mediation and guidance and rules for from the High Court, but there seems a long way to go still for it to become a significant adjunct to civil justice in South Africa. I would hope that *Brownlee* still might be celebrated and followed as a very far-sighted, revolutionary decision which properly reminds the legal profession and indeed the judiciary that civil justice exists to further the interests of their clients and not lawyers. Change in England on this aspect of legal practice has been driven by judicial cost sanctions for failure to advise. South Africa happens to own one of the leading decisions on that topic, often mentioned in discussions on reform here, and I do hope that it can provide a foundation to build change in its home jurisdiction.