Major guidance on costs punishment for those who won’t mediate

*DSN v Blackpool Football Club Limited* (2020) EWHC 670 QB. *(BAIILI)*

**Facts**

When DSN was aged 13 he attended coaching sessions at Blackpool FC run by Frank Roper, who was a volunteer assisting Blackpool FC. Roper sexually assaulted him, and many years later DSN brought a claim against the club. DSN made three settlement offers, all of which were rejected by the club out of hand on the basis that it had a good defence, even though the court had ordered the parties to consider ADR including mediation.

The Court ruled that **t**he club was vicariously liable for Roper’s actions, and it was ordered to pay £19,000 in compensation. DSN applied for indemnity costs which the club argued were unfair.

**Held**

1. The defendant by its solicitors had been ordered to make a statement of its reasons if it refused to enter into an ADL process. The reason given by the solicitor was simply that the defendants were confident in the strength of their Defence (which failed!). The Court ruled that the defendants had given inadequate reasons for their conduct. The Judge commented *“no defence, however strong, by itself justifies a failure to engage in any kind of alternative dispute resolution”.*
2. Furthermore, even if their case had been strong, the defendants’ inadequate statement of its reasons, and its responses to the claimant’s settlement offers would still have fallen short of an acceptable level of engagement with the possibility of settlement or ADR; and this justified an award of “indemnity costs”, (i.e. costs at a much higher level than usual). An interim award of £200,000 was ordered.

**Comment**

This case raises an urgent issue for litigation solicitors; how far should an adviser go in warning the client that a refusal to mediate or negotiate is very risky? Fortunately, the judgement sets out a really useful list of the positive reasons to engage with the other side:

* Experience has shown that disputes may often be resolved in a way satisfactory to all parties, including parties who through an ADR discover that they are able to resolve claims against them which they had considered not to be well founded.
* Settlement allows solutions which are potentially limitless in their ingenuity and flexibility, and which do not necessarily require any admission of liability, or even a payment of money.
* Even if they do involve payment of money, the amount may compare favourably (if the settlement is timely) with the irrecoverable costs, in money terms alone, of an action that has been successfully fought.
* What is more, the costs of an action will not always be limited to financial costs, however. A trial is likely to require a significant expenditure of time, including management time, and may take a heavy toll on witnesses even for successful parties which a settlement could spare them.
* As to admission of liability, a settlement can include admissions or statements which fall short of accepting legal liability, which may still be of value to the party bringing a claim. Blackpool FC had missed an opportunity to acknowledge and accept that the Claimant had been sexually abused by Roper. DSN was not primarily motivated by money, he just expected the club to want to engage and to understand what had happened.