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ARE MEDIATION COSTS RECOVERABLE?

Jonathan Ross, Head of Property Litigation at Forsters LLP, reports on a recent case and draws some conclusions.

In *Roundstone Nurseries Limited -v- Stephenson Holdings Limited* (10 June 2009), the Court considered whether it had jurisdiction to award costs in relation to a mediation that had failed.

The Background

Roundstone had commenced proceedings against Stephenson in the Technology and Construction Court in April 2008. The claim relates to a defective concrete floor slab. Stephenson deny any liability and, amongst other things, allege that they were only acting as a sub-contractor and that Bridge Greenhouses was responsible for the design of the slab.

The parties agreed to mediate in accordance with the Pre-Action Protocol for Construction and Engineering Disputes and the Court stayed the proceedings on 19 September 2008 to allow them to do so. The mediation hearing was finally fixed for 15 April 2009.

Roundstone served their expert's report on Stephenson in December 2008 and Stephenson then made it clear that it was laying the blame on Bridge Greenhouses and they would also have to attend the Mediation if it was to stand any chance of success.

Stephenson did not serve its expert's report in response until 7 April 2009 but, by that time, Bridge Greenhouses had already made it clear that they would need more time to consider this report and they would not attend the Mediation.

Notwithstanding that the parties had already exchanged mediation position statements and invested considerable time and effort in connection with the Mediation, Stephenson pulled out of the Mediation hearing on 9 April 2009 and suggested it be re-scheduled at a later date when Bridge Greenhouses would be ready to attend.

As Stephenson had not filed any Defence and the stay had expired, Roundstone sought and obtained Judgment in default of Defence on 24 April 2009. The Court had no difficulty in setting aside the Judgment on Stephenson's application as it thought Roundstone had acted unreasonably as it knew Stephenson was intending to defend and had a basis for doing so. The Court ordered Roundstone to pay the costs of the setting aside of the Judgment but Roundstone sought the wasted costs of the Mediation. The Mediator had already been paid £4,000 for the mediation.

The Law

The costs of a Mediation that takes place outside a Protocol or Proceedings are not usually recoverable and the parties often agree that they will share the costs. Mediation costs incurred dealing with a Protocol or pursuant to a Court direction may, however, be recoverable as costs incidental to the litigation provided the parties have not agreed otherwise.

As the Mediation was part of the parties' agreed attempt to comply with the Protocol, and the particular Protocol in question requires the parties to meet, the Court considered the mediation was part of the Protocol and costs could be recovered as part of the litigation. The parties had not agreed to share the costs regardless of the outcome and so had left it open to the Court to treat these costs as incidental to the proceedings.

The Court then held that Stephenson were wrong to pull out of the Mediation. The parties had agreed to proceed in this way and the Protocol required them to meet and the Mediation was the appropriate method for doing so. It had been agreed upon before any question of Bridge Greenhouses attending

had arisen and it was Stephenson's own conduct in serving their expert evidence so late that caused them not to proceed with it as Bridge Greenhouses would not attend given their delay.

The Court declined to award costs on an indemnity basis as they thought Stephenson had acted in good faith and had simply made an incorrect decision. The Court also refused to assess the costs summarily as it considered that the extent of the wasted costs would not be known until the Mediation took place and the Mediator's fees, in particular, were finalised.

Conclusion

The Court is very keen to promote ADR and will readily punish by way of an order as to costs any party who does not agree to mediate or fails to comply with what is required. In *Fitzroy Robinson Limited -v- Mentmore Towers Limited* (7 July 2009), the same Judge as in the Roundstone case, Mr Justice Coulson, criticised the parties for not having sought to mediate even though there were such substantial differences between them as they could, at least, have succeeded in narrowing the issues between them.

There is no reason why the parties have to agree to share the costs of a Mediation and a claimant who is likely to succeed should certainly think twice before doing so.