



Mediation – a costs trap for the unwary

[First published in the Personal Injury Brief Update Law Journal PIBUL]

My most memorable mistake, as a trainee solicitor (an articled clerk in old money) was one afternoon when, having won a close fought interlocutory application in Berwick upon Tweed County Court, I returned to the office and was questioned about my performance. I had savoured my victory during the long drive back to the office as I covered the entire length of Northumberland. Untrammelled joy was instantly replaced by dismay following one short question from the partner: "And you had no problem in getting an order for costs?" Ah....., I had been so pleased with the result of my advocacy that the task of then seeking an order for costs had completely escaped my attention. Forgetting about costs is often an expensive mistake and one which most practitioners make only once.

The mediation costs trap

This article outlines a costs trap, reviews recent case law and emphasises the need to give careful consideration to all of the costs of the mediation and the terms of the Mediation Agreement before the day of the mediation.

Consider this scenario. A mediation took place, after the commencement of proceedings, on the basis of CEDR's then current model mediation agreement. The agreement contained standard terms stating that the mediator's fee would be borne equally by both parties and that each party would bear its own costs (see box 1). Settlement was duly reached at the mediation and a Tomlin Order was agreed; this provided for the unsuccessful party to pay for the successful party's costs in relation to the case (as one would expect). The Tomlin Order did not make any reference to the mediation.

Question: does the loser pay

- (a) the winner's costs in relation to preparing for and attending at the mediation?
- (b) the winner's half of the mediation fee?

These were broadly the questions (albeit in a slightly more complicated form) that the court faced in *National Westminster Bank Plc v Thomas Feeney and Linda Feeney* [2006] EWHC90066 (Costs) and [2007] (Costs Appeal). The court said that the winner had to pay its own preparation and attendance costs as well as bearing half of the mediation fee? Why? The answer is:

- (i) The mediation agreement, a contract, so provided.
- (ii) Guidance notes to the mediation agreement indicated that if the parties wished the costs of the mediation to be taken into account in any court orders if there was no settlement at the mediation they should amend the standard terms accordingly. No such amendment was made in this case.
- (iii) The Tomlin Order was silent about these matters and did not mention the mediation at all.

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So, the Tomlin Order did not trump the contract represented by the mediation agreement and each side had to bear its own costs and half of the mediation fee. The parties could, on reaching settlement of the claim, have agreed a Tomlin Order providing for the mediation costs to be costs in the case – but they had not done so. Even if the winner had proposed such an amendment, however, the losing party might not have agreed (and relied on the mediation agreement to buttress his argument).

Avoiding the trap

How do you avoid the trap?

Firstly, by giving proper consideration to the costs clause in the mediation agreement well in advance. In a commercial dispute, where there are claims and counterclaims and the most likely outcome on costs is for the parties to “drop hands” and pay their own costs, the wording in box 1 should suffice. If the matter is in or heading towards litigation, and the desire is to have mediation costs as costs in the case (which is what would usually happen with costs in the event of a “without prejudice” meeting) then wording of the type adopted in boxes 2 – 5 may be more appropriate. It is important to get the wording in the mediation agreement right for, if the case does not settle, it is the agreement that will govern the situation and, following Feeney, the mediation agreement will trump a Tomlin Order that is silent on the issue.

Secondly, by giving careful consideration to the costs provisions of any Tomlin Order or settlement agreement. Having reached settlement, possibly following exhausting negotiations, it is important to make the right provisions on costs. What order do you seek? What are the precise terms of the mediation agreement? For example, CEDR’s recently revised wording (box 2) provides that the court may treat the mediation costs as costs in the case – it is not an agreement that they will be costs in the case. The wording of the clauses used by Expedite Resolution and Trust Mediation (boxes 3 and 4) is based on a presumption that mediation costs will be costs in the case; do the parties wish the presumption to apply, or not? Finally, the approach of ADR Group is different again. It provides (box 5) that the fees of ADR Group (including the mediator’s fees) shall be borne equally by the parties, unless otherwise agreed and the parties costs for preparation and attendance will be costs in the case unless otherwise agreed; do the parties stick by the agreement or do they seek to agree otherwise? The case cannot be regarded as settled until agreement is reached on these matters and properly recorded.

Another wrinkle – costs in pre-proceedings mediations and the curious case of Lobster

In Feeney, the court held that:

“as a matter of general principle, costs incurred in a mediation would form part of the costs of the action just as any reasonable costs of negotiation would (see Costs Practice Direction para. 4.6(8)).”

This finding is consistent with *Eagleson v Liddell* [2001] EWCA Civ 155, where the Court of Appeal allowed mediation costs and *Chantrey Vellacott v The Convergence Group plc, Convergence Group International SA and Mr and Mrs Robinson* [2007] EWHC 1774 (Ch).

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Coulson J, however, threw up a rather curious point in *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd* [2008] EWHC 413 (TCC) and this might have significant implications for costs in pre proceedings mediations. Coulson J. was considering mediation costs as one aspect of an application for security for costs. He was clearly troubled both by the amount of the costs and the fact that they had been incurred some considerable time prior to the issue of proceedings. His starting point was to consider whether the pre-action mediation costs were “costs of and incidental to” the proceedings within the meaning of S.51 of the Supreme Court Act 1981. (This provides, to paraphrase, that costs of and incidental to proceedings in the High, County and certain other courts shall be in the discretion of the court.) Coulson J. said:

“I do not consider that the costs of the pre-action mediation are likely to be recoverable in these subsequent proceedings,..... There are a number of reasons for that view.

“16. First, unlike the costs incurred in a pre-action protocol, I do not believe that the costs of a separate pre-action mediation can ordinarily be described as “costs of and incidental to the proceedings”. On the contrary, it seems to me clear that they are not. They are the costs incurred in pursuing a valid method of alternative dispute resolution. Those costs were incurred in a form of dispute resolution which had no connection to these proceedings, and which here took place 2.5 years before the proceedings even started. As a matter of general principle, therefore, I do not believe that the costs incurred in respect of such a procedure are recoverable under s.51.”

Conclusion

The parties who do best at mediation are often those who have prepared most thoroughly. Practitioners need to prepare their position on costs before the mediation agreement is signed and to be aware of (a) the range of potential outcomes that may arise from a mediation and (b) the costs implications of each outcome. It is basic methodical groundwork, not rocket science. The lawyer who deals only with the merits of the case on the basis that a costs draftsman will deal with all of the costs issues at the end of the case is living dangerously!

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Tim Wallis, mediator and solicitor, is a director of Trust Mediation Limited, a specialist personal injury mediation provider, chair of the ADR Committee of the Civil Justice Council, a member of the Civil Mediation Council, and a director of Expedite Resolution Limited, which specialises in mediation in the insurance and commercial sectors and provides “how to make best of use mediation” training services. This article is partly based on material originally published in the ADR section of Sweet and Maxwell’s “The Litigation Practice”.

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