REFUSE MEDIATION AT YOUR PERIL

Refuse Mediation at your Peril: Recent Developments

Unlike some Continental jurisdictions, English law does not yet make it compulsory to mediate civil or commercial disputes. Developments in the European context and domestically however mean that mediation is gaining in importance and anyone refusing mediation does so at their peril.

The Mediation Directive (2008/52/EC) regarding all cross-border disputes was to be implemented throughout Europe by May 2011. Under Article 6, mediation settlements should be enforceable by way of a new "mediation settlement enforcement order". Amendments are under way to implement this domestically in to the CPR. The EU has promoted the development of an online ADR system for e-commerce transactions, and recommended ADR for the financial services sector.

Closer to home, in a building dispute the Court of Appeal in Rolf -v- De Guerin [2011] re-emphasised that the conduct of parties during litigation, especially in failing to mediate or attempt other forms of Alternative Dispute Resolution, will be taken in to account in deciding the award of costs when the case is finished.

It is long established that by refusing to mediate, a party may be deprived of an order for costs it might otherwise expect to recover, Dunnett -v- Railtrack Plc (Practice Note) [2002] EWCA Civ 303. Following the Overriding Objectives introduced by in 2000, this constituted a significant variation to the rule of thumb in the common law that "costs follows the event", i.e. the successful party ought to be awarded its costs against the loser.

Halsey -v- Milton Keynes General NHS Trust [2004] EWCA Civ 576 clarified the considerations to be taken into account. This included whether a case was " intrinsically unsuitable for mediation", although this would be rare, the merits of the case, whether one side reasonably believed it had an unanswerable case, previous settlement efforts, the proportionality of mediating in terms of costs, potential delay to the court timetable and trial, and the chances of reaching settlement at mediation.

These points were taken in to account in Rolf -v- De Guerin. Mrs Rolf was the employer in a house refurbishment contract. She had at one stage claimed over £92,000 against her builder. In what would have been a paradigm case for mediation, he had refused to mediate at any stage during the proceedings. At trial, she was only awarded damages of £2,500. "Mrs Rolf was the overall winner, but only just".

Although she had won overall, in context she had actually lost on her major heads of claim, and she had recovered only a negligible percentage of her claim. As such, the trial Judge made an order for costs in favour of the Builder.

On appeal to the Court of Appeal, Mrs. Rolf argued that she had shown a genuine willingness to negotiate. Incidentally, she had made a part 36 offer agreeing to accept damages of £14,000, and the trial Judge had "fundamentally misapplied" her offer, "holding it against Mrs Rolf". On a number of occasions, she had been prepared to attempt settlement,

including mediation. However, the builder had refused to mediate until one week before trial. The Court of Appeal decided this was too late.

The builder's reasons for opposing mediation were rejected by the Court of Appeal . He had argued that by mediating, this would involve accepting “his guilt”. Also that Mrs Rolf’s main witness should be seen by the judge at trial. Furthermore the builder said “I wanted my day in Court, and I was proved correct”.

In rejecting Mrs Rolf’s overtures towards mediation or settlement, the Court of Appeal found that the builder had acted unreasonably. This "ought to bear materially on the outcome of the Court's discretion". The Court of Appeal referred to the “lost opportunities for mediation” and how “wasteful and destructive litigation can be”. Reference was also made to Lord Justice Jackson’s Review of Civil Litigation Costs; Final Report , urging mediation “in the event that conventional negotiation fails”. The Court of Appeal therefore overturned the original order for costs in favour of the builder, “and exercising a new discretion in this court” instead decided that each side had to pay its own costs.

The utility of mediation was emphasised in Fitzroy Robinson v Mentmore Towers [2009] EWHC 3365 (TCC). Mediation should not be excluded solely on the basis that fraud is alleged, and mediation would have given the parties the chance to settle, without compelling the court to find that one of two key witnesses was a liar.
The role and shape of mediation is changing. The risks of failing to consider, let alone refusing mediation are clear. This can be very expensive not only in terms of costs, but also reputation.