

## RECOVERING COSTS OF MEDIATION

### Roundstone Nurseries Limited v. Stephenson Holdings Limited

1st Instance - 10 June 2009

#### Facts

Stephenson Holdings Limited (Stephenson) built a concrete floor slab for Roundstone Nurseries Limited (Roundstone) at its nursery premises in Chichester in 2002. The concrete floor slab was defective. It was unclear whether there was a contract between Stephenson and Roundstone or whether Stephenson were sub-contracted by Bridge Greenhouses Limited (Bridge) who had in turn contracted with Roundstone in respect of the nursery.

Roundstone commenced proceedings in the TCC against Stephenson (and not Bridge) on 2 April 2008. Due to issues with the limitation period the pre-action protocol for the construction and engineering disputes was not complied with by the parties. For this reason, on two separate occasions the parties applied for a stay of the proceedings in order to enable them to comply with the pre-action protocol. The second stay expired on 27 March 2009.

A mediation between the parties was due to take place on 15 April 2009. However, on 9 April 2009 the legal representatives for Stephenson made it clear that they would not be attending the mediation. They argued that as Bridge had refused to attend the mediation it would therefore be a pointless exercise and a complete waste of

time for all those concerned.

Following expiry of the stay, Roundstone entered judgment in default of defence on 24 April 2009.

Stephenson thereafter made an application to have the judgment in default set aside, and in response, Roundstone sought an order that Stephenson pay the costs thrown away on an indemnity basis as a result of Stephenson's withdrawal from the mediation.

#### Decision

Judgment in default was set aside. The judge held that it was contrary to the entire basis of the CPR to allow a claimant to obtain a judgment in default against a defendant because of some technical glitch, in particular when the defendant had a real prospect of successfully defending the claim.

As a matter of principle, the costs incurred in complying with a pre-action protocol may be recovered as costs 'incidental to' any subsequent proceedings pursuant to Section 51 of the Supreme Court Act 1981. However, the judge held that the costs of a separate, standalone ADR process, particularly if the process had taken place before the proceedings had commenced,

would not normally be costs 'of or incidental to the litigation'.

The judge considered that the mediation in this case was treated by the solicitors as being an integral part of the parties' agreed attempt to comply with the pre-action protocol. There was no agreement that the cost of the mediation would be borne by each party regardless of the outcome. There was also no agreement that either party could not subsequently seek to recover those costs as part of the pre-action protocol process.

The judge concluded that in principle the costs thrown away in connection with the mediation may be recoverable as costs incidental to the litigation. In this case it was a matter of discretion to decide the extent to which these costs should be recoverable.

The judge concluded that Stephenson had been wrong to cancel the mediation at such short notice. The reasons given by the judge were:-

- The mediation was agreed as part of the pre-action protocol process and Stephenson was therefore obliged to participate in it.
- Without the mediation, there was no

way in which the pre-action protocol requirement for a without prejudice meeting between Stephenson and Roundstone could be fulfilled.

- The mediation had been agreed before there was any question of inviting Bridge to participate and should have gone ahead even without their involvement. Stephenson had identified Bridge as a potential party to the mediation as early as June 2008.
- It was not unreasonable for Bridge not to participate in the mediation because of the late service of Stephenson's expert report. It was however not appropriate for Stephenson to unilaterally cancel what would have been the completion of an eight month pre-action protocol process.

The judge therefore decided that Stephenson should pay the costs thrown away by the late cancellation of the mediation.

#### Comment

Parties do not always approach mediation with a positive attitude or with an intent to settle; instead using the procedure as a fact-finding tool. However, this case highlights the risks of treating mediation as a minor irritation, or as one of the parties did, with contempt. Consideration of ADR is an express requirement of the Professional Negligence Pre-Action Protocol. This case illustrates why it is necessary to consider ADR from an early stage and keep any decision in this regard under review. If there are any reasons why it is considered that a mediation will not achieve anything, these should be explained at the first opportunity. Lack of cooperation is likely to lead to adverse orders on costs, as in this case. The parties should also consider dealing with the issue of costs in any agreement to mediate – which could stipulate whether costs of an unsuccessful mediation should be considered part of the costs of the subsequent litigation.

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