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To mediate or not to mediate?

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Catriona Stewart discusses the possible cost consequences of delayed or abandoned mediation attempts

Can a party avoid a costs sanction if they choose not to mediate? The recent case of *Car Giant Limited and Anor v London Borough of Hammersmith* [2017] EWHC 464 (TCC), [2017] All ER (D) 104 (Mar) would indicate possibly, but only if based on well-thought grounds which are communicated to the other party.

Costs judgment

Car Giant concerned a costs judgment where the claimants had failed to beat a Pt 36 offer. The court was asked to award costs both before and after the expiry of the relevant period on an indemnity basis. The argument in support of the later period was that there had been an unreasonable delay in agreeing to mediate. The delay was from 15 May 2015 until October 2016. The court considered that it should be slow to criticise a party's behaviour where decisions such as when to mediate are matters of tactical importance where different views may be legitimately held. Car Giant had taken the view that mediation was more likely to succeed where the experts' views had been fully set out. Crucially they communicated their views to the defendants' solicitors. The court held on the evidence that this was reasonable. The judge found that had mediation taken place earlier it was unlikely to have been successful. The delay had not caused any increase in costs.

This can be contrasted with the situation that arose in *Thakker & Anor v Patel & Anor* [2017] EWCA Civ 117, [2017] 2 Costs LR 233. In that case there was a Pt 36 offer of £30,000. The offer was not accepted and was then withdrawn. The claimants were awarded £32,000 after trial. The defendants argued that, nevertheless, the claimants had failed to beat their offer and should pay their costs from the end of the relevant period. The Court of Appeal upheld the decision of the trial judge who found that the defendants should pay 75% of the claimants' costs and that the claimants should pay the costs of the defendants' counterclaim. It was held that the offer did not have the consequences of a Pt 36 offer but would be relevant if it should have been accepted within the 21 days. The judge noted that the claimants were unable to properly assess the offer at the stage it was made.

Conduct in relation to mediation

In assessing the parties' conduct in relation to mediation the trial judge noted that neither party had refused to engage in mediation. He accepted that it was not a case of simple refusal or rejection or silence. All of these would be considered unreasonable conduct meriting a costs sanction. The trial judge held that the claimants were the more proactive proposing arrangements for mediation over a six-month period. The defendants dragged their feet and refused to be flexible to enable the mediation to take place. As a result the claimants lost confidence and did not persist with the process. The trial judge held that this was a case that was suitable for mediation and had there been a mediation there was a real chance of achieving settlement. He attributed most but not all of the blame for the abandoned meditation to the defendants.

The Court of Appeal described the costs sanction as severe but not so severe that it should intervene.

Comment

These two cases illustrate that the courts will analyse the respective conduct of parties in response to a proposal to mediate. Car Giant was able to satisfy the court that the delay of 17 months was not unreasonable and successfully resisted a costs sanction. The court did require to be satisfied that had mediation taken place earlier it would not have resolved the dispute. In *Thakker* the Court of Appeal case is sending the message that where bilateral negotiations fail but mediation is obviously appropriate, both parties are required to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction.

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