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IS MEDIATION NOW COMPULSORY?

In recent years, mediation has been embraced by the English Courts, which view it as a useful tool with which to encourage settlement. The recent Court of Appeal judgment in ***Thakkar v Patel*** *is the latest in a series of decisions reflecting this trend. In this case, it was held that, where mediation is obviously appropriate, delay by one party in agreeing to mediate will merit a costs sanction.*

It would be going too far to argue that mediation is now compulsory in the English High Court. However, it is now something that parties to litigation must carefully consider at appropriate stages, or risk adverse costs consequences.

Introduction

Mediation has been given strong support by the English judiciary in recent years. A well-known example is the Court of Appeal decision in *PGF II SA v OMFS Company 1 Limited* [2013] EWCA (Civ) 1288; [2014] 1 WLR 1386. In this case it was held that silence in the face of an offer to mediate was, as a general rule, unreasonable conduct meriting a costs sanction, even if an outright refusal to mediate might have been justified in principle.

The recent Court of Appeal decision in ***Thakkar & ANR v Patel & ANR*** [2017] EWCA (Civ) 117 continues this trend, and emphasises that mediation proposals must be taken seriously.

Facts

It is unnecessary to set out the facts of this case in detail. Briefly, the case involved a property dispute. The claimant landlords had a claim valued at approximately £210,000 in relation to alleged dilapidations to their building. The defendant tenants had a counterclaim for approximately £42,000 for alleged overpaid rent during a period when the property was unfit for occupation.

Both parties put forward settlement offers at various points in the litigation, but the matter did not settle. They also both expressed a willingness to mediate. However, the Claimants were proactive, making arrangements and identifying possible mediators, whereas the Defendants were slow to respond, and raised all sorts of alleged difficulties. Ultimately, the Claimants concluded that the Defendants had no interest in mediating, and the dispute proceeded in due course to a full trial. The eventual costs on both sides amounted to about £300,000, more than the total amount in dispute.

First instance judgment

At first instance, both parties were awarded amounts substantially below what they had claimed. The Claimants were awarded approximately £45,000, and the Defendants approximately £17,000 of their counterclaim. As to the costs consequences of the Defendants' delay in responding to the mediation proposal, the judge held that there would have been a real prospect of settlement if mediation had taken place. Taking that into account, he therefore ordered the Defendants to pay 75% of the

Claimants' costs of the claim, with the Claimants paying the Defendants' costs of the counterclaim. This order was described in the Court of Appeal as "tough".

Court of Appeal judgment

The appeal dealt only with the question of costs. Giving the lead judgment, Lord Jackson agreed with the trial judge that there would have been a real chance of achieving a settlement if the Defendants had agreed to mediate, since:

(1) The dispute between the parties was purely about money;

(2) Both parties had shown a willingness to settle;

(3) The costs of litigation vastly outweighed the sum in dispute;

(4) Settlement negotiations between the parties had not succeeded; and

(5) In light of the above, a skilled mediator would almost certainly have been able to bring the parties to a sensible settlement.

Given the above, the Court of Appeal upheld the trial judge's costs order, and dismissed the appeal. The Court expressly referred to its desire to send out a message to parties to litigation that, where settlement negotiations fail, but mediation is obviously appropriate, delay and dragging of feet for no good reason will merit a costs sanction.

Conclusion

This is the second key Court of Appeal judgment in recent years that seeks to send out a message to litigants that they would be wise to listen to. Parties must give mediation due consideration when litigating in the English High Court and, in particular:

(a) Cannot remain silent in the face of an offer to mediate without being exposed to an adverse costs order – *PGF II v OMFS*; and

(b) Cannot delay agreeing to mediate in cases where it is obviously appropriate without, again, being exposed to an adverse costs order – *Thakkar v Patel*.

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