Costs of Cancelled "Pre-Action Protocol Mediation"can be Recoverable in Proceedings: *Roundstone Nurseries Ltd v Stephenson Holdings Ltd*

by

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1. INTRODUCTION

The court dealt with two matters: one was the setting aside of a judgment obtained in default of defence and the related costs; the other was an application by Roundstone Nurseries Ltd (Roundstone) that Stephenson Holdings Ltd (Stephenson) should pay the costs involved in a mediation (set up as part of the pre-action protocol procedure) which Stephenson cancelled unilaterally. This note deals only with the second point.

2. THE FACTS

In 2002, Stephenson had built a concrete floor slab for Roundstone. It was defective. Roundstone blamed Stephenson for the defects. Stephenson denied liability, claiming amongst other things that the defects were matters of design for which someone else, Bridge Greenhouses Ltd (Bridge), was responsible. In April 2008, Roundstone commenced proceedings against Stephenson (but not against Bridge). It appears that commencement then was the result of potential difficulties in relation to limitation of action and that there had, at that stage, been no attempt to comply with the Pre-Action Protocol. On two subsequent occasions, the parties had asked the court to stay the proceedings whilst they endeavoured to comply with the Pre-Action Protocol for Construction and Engineering Disputes, into which they wanted to incorporate a mediation. The mediation was cancelled at the last minute. Roundstone sought an order that Stephenson pay, on an indemnity basis, the costs thrown away by their late decision to withdraw from the mediation.

During the periods of stay ordered by the court it became apparent that Stephenson did not want to deliver a formal response as required by the pre-action protocol procedure but rather said they would provide it as part of their submissions in the mediation. The mediation was agreed to take place on April 15, 2009 but that date was outside the period of stay of the proceedings granted by the court and neither party sought the court's permission to extend it.

It appears that both parties approached Bridge in March seeking its agreement to attend the mediation. In response, Bridge's solicitors maintained that they required further information and documents, and in particular an expert's report from Stephenson. Whilst it does not appear that Bridge objected in principle to attending the mediation, it is clear that they required the early provision of documents as a condition of their attendance at such short notice.

Mediation position papers were exchanged on April 8, 2009 on a without prejudice basis. On the following day, just six days before the date fixed for the mediation, Stephenson's solicitors wrote to Roundstone's solicitors. They referred to the fact that Bridge would not be attending the mediation and went on:

> "In the circumstances any resolution of this particular dispute cannot be achieved without the participation of Bridge either in the form of litigation proceedings or in the mediation.

[*] *Roundstone Nurseries Ltd v Stephenson Holdings Ltd* [2009] EWHC 1431 (TCC), per Coulson J. on June 10, 2009.

> Unless you can persuade Bridge to attend on Wednesday the mediation will be a pointless exercise and a complete waste of time for all concerned.
>
> We suggest that the most appropriate course of action is for the mediation to be rescheduled to a date that is convenient to Bridge once they have had an opportunity to consider the nature of the claim against them."

Although Stephenson's solicitors sought to persuade Bridge's solicitors to change their minds, they refused. As a result, in their further letter on the same day Stephenson's solicitors made plain that Stephenson would not be attending the mediation. Roundstone sought an order that:

> "[Stephenson] do pay [Roundstone]'s costs thrown away on an indemnity basis as a result of [Stephenson]'s withdrawal from the mediation scheduled for 15th April 2009. Such costs to be summarily assessed. [Roundstone] seeks an order in the terms above due to [Stephenson]'s failure to comply with the pre action protocol and its decision not to attend a prearranged mediation on 15th April 2009."

The reference to the alleged failure to comply with the pre-action protocol was a reference back to Stephenson's insistence that, instead of providing a response to the letter of claim (as required by the pre-action protocol), they would set out Stephenson's position in the mediation position paper.

3. THE LAW AND THE DECISION

The costs of a mediation taking place before the proceedings are commenced will not usually form part of "the costs of or incidental to the litigation"[1] in order to be recoverable later as costs in the proceedings, *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd*,[2] albeit in that case the costs were not recoverable because the parties had agreed to bear their own costs. The Technology and Construction Court (TCC) Guide says that co-operation is expected where the court has made an order for ADR, and that adverse costs orders may be made. Here there was no express order of the court requiring ADR. Instead the order, in a form made at the outset of every TCC case, required the parties to comply with the Pre-Action Protocol and "thereafter to consider and adopt ADR if appropriate". As a matter of principle, costs incurred during the pre-action protocol process may be recoverable as costs incidental to the litigation, *McGlinn v Waltham (No.1)*,[3] even though, on the facts of that case, the particular pre-action protocol costs involved were found to be irrecoverable.

Therefore, the judge said that it may matter whether, as a matter of principle, the mediation on April 15, in respect of which these costs were allegedly thrown away, should be treated as part of the pre-action protocol process or a separate, stand-alone attempt at ADR. He concluded that this mediation was, and was treated by the solicitors as being, an integral part of the parties' agreed attempt to comply with the pre-action protocol process. This was clear from letters in which Stephenson's solicitors rejected the need for a letter of response under the pre-action protocol process, saying instead that Stephenson's response would be provided by way of its mediation position paper. Furthermore, the Pre-Action Protocol for Construction and Engineering Disputes is the only protocol which requires a without prejudice meeting between the parties. It is not uncommon for the parties to achieve this requirement by having the without prejudice meeting under the umbrella of a mediation. That is what happened here. There was no other proposal for a without prejudice meeting other than the mediation on

[1] Supreme Court Act 1981 s.51.

[2] *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd* [2008] EWHC 413 (TCC); [2008] 2 All E.R. 1173; [2008] 1 B.C.L.C. 722;.

[3] *McGlinn v Waltham (No.1)* [2005] EWHC 1419 (TCC); [2005] 3 All E.R. 1126; [2005] B.L.R. 432.

April 15. Again, that suggested that the mediation was being treated as part of the pre-action protocol process.

There was no agreement that the costs would be borne by each party regardless of the outcome, and no agreement that one or other party could not subsequently seek those costs as part of the pre-action protocol process. Thus, the costs in relation to the mediation in this case were capable of being sought in these proceedings, because the parties did not agree otherwise (contrary to the position in *Lobster*).

For all those reasons, therefore, the judge concluded that the costs allegedly thrown away in connection with this mediation may be recoverable in principle as costs "incidental to the litigation", in accordance with the reasoning set out in *McGlinn.* In exercising his discretion as to costs, the judge said that on April 9 Stephenson had been wrong to cancel the mediation in circumstances where the mediation was due to take place the following Wednesday, because:

- The mediation was an agreed part of the pre-action protocol process and Stephenson was obliged to participate in it.
- Absent 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 arranged before there was any question of inviting Bridge to participate, and should have gone ahead even without their involvement.
- Bridge did not participate in the mediation because of the late service of Stephenson's expert's report. It was not for Stephenson then unilaterally to cancel what would have been the completion of an eight-month pre-action protocol process.

As a result, Stephenson was ordered to pay the costs thrown away by its late cancellation of the mediation but on the standard basis, not on an indemnity basis. The judge decided that this conduct was not of the kind which triggers a liability for indemnity costs.[4] This was a bona fide, but incorrect, decision. He declined to assess those costs summarily.[5]

4. COMMENTS

This decision follows and supplements previous cases in the same area of law. The position as to recoverability in proceedings of the costs of a mediation that did not result in a settlement now seems to be:

- If the parties agree in the mediation agreement to bear their own costs of the mediation and bear their own share of the mediator's fees and expenses, those costs and fees lie where they fall and are not recoverable irrespective of when the mediation takes place, unless a mediated or other settlement agreement or court order provides otherwise (e.g. in a *Tomlin* order).[6]
- If the parties do *not* agree to bear their own costs of the mediation and bear their own share of the mediator's fees and expenses, then recoverability of the costs and mediator's fees and expenses depends on the status and scheduling of the mediation as follows:

[4] See *Reid Minty (A Firm) v Taylor* [2001] EWCA Civ 1723; [2002] 1 W.L.R. 2800 CA (Civ Div) and *Kiam v MGN Ltd (Costs)* [2002] EWCA Civ 66; [2002] 1 W.L.R. 2810.

[5] For the reasons he gave in *Bovis Homes Ltd v Kendrick Construction Ltd* [2009] EWHC 1359 (TCC); [2009] N.P.C. 84 and because of uncertainty about the mediator's fees.

[6] *National Westminster Bank Plc v Feeney and Feeney* Unreported but noted on the CEDR website at *http://www.cedr.co.uk/library/edr_law/Nat_West_Bank_v_Feeney_appeal_summary.pdf* [Accessed September 11, 2009], an appeal to Eady J. sitting with assessors in May 2007.

— Pre-action and *not* during the pre-action protocol period, costs and mediator's fees and expenses are not recoverable because they are not "costs of or incidental to the litigation".[7]
— Post-action but during the pre-action protocol procedure where the mediation occurs post-action, costs and mediator's fees and expenses may be recoverable provided it can be shown that the mediation was definitely part of the pre-action protocol process as was the position in, for example, *Roundstone*.

- Post-action, but not during the pre-action protocol procedure, costs and mediator's fees and expenses may be recoverable as costs relating to "work done in connection with negotiations with a view to settlement".[8]

[7] Supreme Court Act 1981 s.51 and *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd* [2008] EWHC 413 (TCC); [2008] 2 All E.R. 1173; [2008] 1 B.C.L.C. 722.
[8] CPR (Costs Practice Direction, Paragraph 4.6(8)) and *National Westminster Bank Plc v Feeney* [2003] EWCA Civ 950; [2003] 25 E.G. 141 (C.S.).