

Mediation Costs Traps **Mediation Costs Traps - 2 recent cases.**

Can you really have a successful day at a mediation, ending with a Tomlin Order that your client receive damages and costs, and then find that your client has to pay your costs for preparing and attending the mediation together with half of the mediator's fee?

Is it right that the costs of a pre-proceedings mediation might not be recoverable?

The responsibility for the mediation costs as between the parties is a matter for negotiation with the usual starting point being that each side pays its own costs and half of the mediation costs. The mediation agreement should deal with the issue. The mediation costs are often dealt with as part of the final settlement terms. There are, however, a number of complications and, as the following cases demonstrate, they may have significant cost complications.

National Westminster Bank Plc v Thomas Feeney and Linda Feeney [2006] EWHC90066 (Costs) and [2007] (Costs Appeal).

Eady J. confirmed, helpfully, that:

“...as a matter of general principle, costs incurred in a mediation would form part of the costs of the action just as any reasonable costs of negotiation would (see Costs Practice Direction para.4.6(8)).”

This is consistent with Eagleson v Liddell [2001] EWCA Civ 155, where the Court of Appeal allowed mediation costs and Chantrey Vellacott v The Convergence Group plc, Convergence Group International SA and Mr and Mrs Robinson [2007] EWHC 1774 (Ch), but see below)

The case, however, is also a pitfall for the unwary: **the successful party did not recover the mediator's costs or its costs for preparing for and attending at the mediation.** This was because:

- (a) the mediation agreement entered into by the parties on the mediation provider's standard terms was on the basis that the mediator's fee would be borne equally by the parties who would bear their own costs;
- (b) the Tomlin Order agreed when between the parties when settlement was reached at the mediation did not deal explicitly with the costs of the mediation; and
- (c) it was held that the Tomlin Order did not alter the contractual mediation agreement.

How can the trap be avoided? Firstly, agree costs arrangements before the mediation. In particular, consider how costs will be dealt with if no settlement is reached. Also, ensure that any agreement is reflected in the agreement to mediate. (See the extract of the Expedite Resolution Mediation Agreement below). Secondly, deal with

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Mediation Costs Traps costs as part of any negotiated settlement and ensure that the Tomlin Order explicitly confirms any agreement reached.

Lobster Group Ltd v Heidelberg Graphic Equipment Ltd
[2008] EWHC 413 (TCC)

Coulson J. confirmed the Feeney decision: a Tomlin Order will not override an agreement that each side pay its own costs in an agreement to mediate unless it does so explicitly.

The judge went on to find that the **costs of a pre-proceedings mediation would not be recoverable**. His starting point was to consider whether the pre-action mediation costs were “costs of and incidental to” the court proceedings within the meaning of S.51 of the Supreme Court Act 1981. (This provides, essentially, that costs of and incidental to proceedings in the High, County and certain other courts shall be in the discretion of the court.) Coulson J. said:

“I do not consider that the costs of the pre-action mediation are likely to be recoverable in these subsequent proceedings,..... There are a number of reasons for that view.

“16. First, unlike the costs incurred in a pre-action protocol, **I do not believe that the costs of a separate pre-action mediation can ordinarily be described as “costs of and incidental to the proceedings”**. On the contrary, it seems to me clear that they are not. They are the costs incurred in pursuing a valid method of alternative dispute resolution. Those costs were incurred in a form of dispute resolution which had no connection to these proceedings, and which here took place 2.5 years before the proceedings even started. As a matter of general principle, therefore, I do not believe that the costs incurred in respect of such a procedure are recoverable under s.51.”

The writer has always taken the view that, mediation, like without prejudice discussions, is something to be encouraged as a matter of public policy, particularly where it takes place pre proceedings. This view is consistent both with the overriding objective and the decisions referring to Costs Practice Direction para.4.6(8) above.

Is Lobster is going to be authority for the general principle that costs are not going to be recoverable for pre-proceedings mediations on the grounds that they are not costs of incidental to the proceedings? If it is, lawyers acting for parties intending to mediate pre-proceedings will need to be careful to make contractual arrangements for costs that properly represent the parties intentions.

Expedite Resolution’s provisions about costs in the current Mediation Agreement

These provisions place the onus on the parties to negotiate the costs arrangements

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Mediation Costs Traps that they believe to be appropriate. Nevertheless they do not simply provide, as in Feeney, that each side will pay their own. Instead there is a presumption that, unless it is displaced by the parties' agreement, the costs be costs in the case.

The following provisions are extracted from the Agreement which may be found on the **Procedure** page of the website.

- 1.(a) The Company shall be remunerated for the services provided by the Mediator in connection with the Mediation in accordance with the Remuneration Schedule in Appendix 1 ("the Fees").
- 1.(b) The Parties will share equally and will be liable together and separately to the Company for the Fees and payment shall be made according to the terms in Appendix 1. No part of the remuneration shall accrue to CPRe.
- 1.(c) Each party will pay its own legal costs and disbursements (expenses) in respect of the Mediation.
- 1.(d) Notwithstanding the above
 - I. the Parties shall be at liberty to agree (and to incorporate into any written Settlement Agreement or Tomlin Order) such terms on costs as they think appropriate;
 - II. there will be a presumption that, unless it is otherwise agreed or otherwise ordered by the court, the Fees and all expenses, legal costs and disbursements in respect of the Mediation will, as between the Parties, be costs in the case (that is, paid by the party who loses the action to the party who wins the action, if an order for costs is made in that party's favour);
 - III. whatever agreement the Parties may reach on costs as between themselves, paragraphs E.1.(a) and 1.(b) above shall continue to govern the liability of the Parties to the Company regarding the Fees.

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