

Construction & Engineering

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“Things you might not know about mediation”

We are all well versed on the “whys” and “hows” of mediation however, there is some recent case law which raises new issues which might give you pause for thought. These are outlined below.

Costs Awarded Against a Party Who Withdrew from Mediation

In the recent case of *Roundstone Nurseries Limited v Stephenson Holdings Limited* [2009] EWHC 1431 (TCC), the Court considered an application for costs arising out of the defendant's late withdrawal from a mediation. This mediation was part of the Construction Pre-Action Protocol process. In this case, the judge exercised his discretion to order the defendant to pay the wasted costs.

If the pre-action protocol is ongoing, parties would be well advised, where possible, to ensure that the mediation is characterised as part of that process, to maximise the prospect of recovering costs.

Mediator Called to Give Evidence

Prior to the case of *Farm Assist Limited (in liquidation) v The Secretary of State for Environment, Food and Rural Affairs (No 2)* [2009] EWHC 1102 (TCC), it was generally understood that the Courts would uphold a provision in a mediation agreement establishing that mediation proceedings were confidential. However, in this case the Court held that it was in the interests of justice that the mediator be called to give evidence.

The Claimant in this case was seeking to set aside the settlement reached at mediation on the basis that the settlement was entered into under economic duress. The allegations of economic duress concerned what was said and done at the mediation. The interests of justice therefore lay strongly in favour of evidence being given by the mediator of what was said and done.

Generally speaking, other than in exceptional circumstances where it is necessary in the interests of justice for evidence to be given on confidential matters, the court will uphold the confidentiality of mediation.

What now?

Mediation remains a useful tool and both the courts and other bodies encourage its use where possible.

JCT in their new Construction Management Contract go as far as stating that “*if a dispute or difference arises under the Contract which cannot be resolved by direct negotiations, each Party shall give serious consideration to any request by the other to refer the matter to mediation.*”

No method of dispute resolution can claim to have all the answers, but the rise in the number of disputes going to mediation would surely indicate its value to companies who would rather concentrate on their day job than exchange blows in court.

This Bulletin is correct to the best of our knowledge and belief at the time of going to press. It is however written as a general guide, so it is recommended that specific professional advice is sought before any action is taken. We are required by law to protect personal data.

If you would like further information on this topic, please call the person at D&W with whom you normally liaise, or the following specialist:

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