MULES, MUCK SWEATS AND THE MEDIATION TROUGH – A FOLLOW UP

by Rebecca Taylor and Andrew Kearney

Many of you will have attended our hugely successful Civil Mediation seminar "Mules, Muck Sweats and the Mediation Trough" event in April of this year.

To recap – there was not even "standing room" as St John's mediators Rebecca Taylor and Andrew Kearney, with guest speakers Alistair Pye and Gary Webber and chair Sean Campbell, presented and interacted with a crowded room on a range of mediation topics.

The event was a lively 2 ½ hours, and was sold out with attendees from a wide range of practice areas, all being users or potential users of mediation – personal injury, contentious probate, property, CDR, construction and more.

A Rebalancing ?

One of the themes of our event in April was whether the Courts have gone too far towards de facto compulsion to mediate via threats of costs sanction, with at least one of our speakers expressing the view that the Court of Appeal would need to step in to restore a degree of balance in the light of some slightly surprising statements in decisions at first instance.

That may now have happened to some extent in ***Gore v Naheed & Anor*** [2017] EWCA Civ 369.

But possibly not in the most helpful way.

The case is available at http://www.bailii.org/ew/cases/EWCA/Civ/2017/369.html**.** The bulk of the judgment of Patten LJ deals with alleged obstruction of a right of way, and those whose first interest lies elsewhere may be forgiven for skipping over the first 47 paragraphs of the decision and concentrating on paragraphs 48 to 50. They are set out in full below.

The question which arose was whether the overall winner should be deprived of part of his costs for failing or refusing to respond to an invitation to mediate. An unusual case perhaps, given that it is a brave litigant these days who fails to put a cost protective tick in that particular box (a view borne out by the discussions at our April event).

Having lost, the paying party Defendants unsurprisingly relied on the PGF II case. Given some of the swingeing costs orders made in some of the reported decisions, they probably felt that they were on pretty strong ground…..

But both the Judge and the Court of Appeal disagreed. The relevant paragraphs of the decision read as follows, with the key parts highlighted –

> 48. The judge made a separate order that the claimant should have his costs of the claim on the standard basis after considering written submissions. It is clear that Mr Gore was the overall winner so as to bring into operation the general rule that he should have his costs. But the defendants submitted and now submit on this appeal that the judge should have made some allowance in their favour for the fact that Mr Gore refused to or failed to engage with their proposal that the dispute should be referred to mediation.
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> *49.* Mr McNae referred us to the decision of this Court in *PGF II SA v OMFS Company 1 Ltd* in which Briggs LJ emphasised the need, as he saw it, for the courts to encourage parties to embark on ADR in appropriate cases and said that silence in the face of an invitation to participate in ADR should, as a general rule, be treated as unreasonable regardless of whether a refusal to mediate might in the circumstances have been justified. *Speaking for myself, I have some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated. But, as Briggs LJ makes clear in his judgment, a failure to engage, even if unreasonable, does not automatically result in a costs penalty. It is simply a factor to be taken into account by the judge when exercising his costs discretion.*
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> 50. In this case the judge did take it into account but concluded that it was not unreasonable for Mr Gore to have declined to mediate. His solicitor considered that mediation had no realistic prospect of succeeding and would only add to the costs. *The judge said that he considered that the case raised quite complex questions of law which made it unsuitable for mediation. His refusal to make an allowance on these grounds cannot in my view be said to be wrong in principle.*

This was a unanimous decision – the other two judges (Lewison LJ and Underhill LJ) simply agreed with Patten LJ.

This raises a number of interesting points (which may be discussed in Muck Sweats 2 later this year), but three of particular note –

- First – it is welcome to see a failure to mediate being regarded as just one factor to be taken into account when exercising the discretion on whether to award costs and if so how much. Although query whether this will actually have much effect in practice to prevent the 'tick the box' approach which has developed as a shield against possible costs sanction.

- Second – a reminder that we should be careful what we wish for. In rowing back against PGF II the Court of Appeal may have set an unhelpful hare running - is it really the case that whether a refusal to mediate was reasonable at the time depends on whether the refuser later wins and his "rights are ultimately vindicated" ?

- And an even more worrying third point – the Judge said that the case was unsuitable for mediation as it raised quite complex questions of law…… Surely, complex cases with uncertainty are precisely the cases which we should be mediating ?

Muck Sweats 2 ?

We have been asked to consider repeating our April event, but more likely is that we will hold Muck Sweats 2 later in the year and concentrate on some of the topics on which time defeated us last time around, but of course with a look at any recent decisions such as this one. Watch out for a flyer on that in the coming months.

In the meantime this latest Court of Appeal decision maybe corrects the balance a little on de facto compulsion, but introduces even more uncertainty through unhelpful reasoning. As those who attended our April event will know, this is all fertile ground for enjoyable debate and we will certainly not shy away from it.

But on the front line of litigation does this actually help?

Probably not……keep ticking those boxes!

And keep mediating….

Rebecca Taylor and Andrew Kearney are accredited mediators, available for appointment in any civil mediation in any subject area.

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