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Mediation: a salutary tale

Having your "*day in court*" can prove expensive, even for the successful party in a dispute, as the Defendant in *Rolf v De Guerin* [2011] found out, quite literally, to his cost.

In *Rolf v De Guerin* the Defendant was unwilling to participate in mediation, despite frequent requests from the Claimant to do so. It transpired that the Defendant's reasons for refusal were that if he engaged in mediation he would have had to accept "*his guilt*" and that he "*wanted (his) day in court*". After winning at trial the Defendant then said that his win proved that he had been right to refuse to mediate.

However, in his judgment, Rix LJ made reference to, "*a proper judicial concern that parties should respond reasonably to offers to mediate or settle and that their conduct in this respect can be taken into account in awarding costs*".

Part 44 of the Civil Procedure Rules (CPR) contains the general rules about costs in litigation and outlines the court's discretion in this regard. Part 44(5) of the CPR outlines the factors that the court should take into account when deciding what to do about costs orders. These include the conduct of all the parties, including the conduct before, as well as during, the proceedings and the efforts made, if any, in order to try and resolve the dispute.

The case of *Dunnett v Railtrack Plc* [2002] is authority for the proposition that such conduct can include the reasonableness of a party's response to a call for mediation. This is especially true where the court itself has suggested or recommended mediation, though that was not the case in *Rolf v De Guerin*.

The Defendant in *Rolf v De Guerin* won his case (marginally) but despite this, the court held that his refusal to mediate constituted unreasonable behaviour for the purposes of CPR Part 44(5) and it therefore exercised its discretion and made no order as to costs. Consequently despite winning his case the Defendant recovered no costs from his opponent. This was made all the more painful for him by the acknowledgement by the court that mediation may not have produced a solution in this particular case in any event.

It is therefore important for litigants and their legal advisers to consider the potential consequences of a refusal to engage in mediation, or other forms of alternative dispute resolution. Mediation should be seriously considered and an invitation to participate should not be disregarded or ignored, even if the prospects of a successfully mediated settlement are considered poor.

It should also be borne in mind that, as Brooke LJ said in *Dunnett v Railtrack Plc*, "*skilled mediators are now able to achieve results satisfactory to both parties in many cases that are quite beyond the power of the lawyers and courts to achieve*."

Mediation may be able to explore alternative solutions that are not possible or available through the courts and yet of great importance to the parties.

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