TO MEDIATE OR NOT: A COSTLY QUESTION

By **Stephen Turner & Ilana Gilbert**

In *Thakkar v Patel* (2017), the Claimants failed to beat the Defendants' settlement offer, yet recovered 75% of their costs. Is this fair? The Defendants thought not and appealed. The Court of Appeal confirmed this ruling.

Facts

The Claimants leased a building to the Defendants and it was used as a school. Thieves stole lead from the roof. It rained. The school was unusable from the water damage. The Claimants sought £210,000 for dilapidations and the Defendants sought compensation of £41,875 for rent during the period that the school was unfit for habitation as a result of the water damage. Initially the parties seemed to want to settle. In July 2011, the Defendants offered £30,000 plus costs with a drop hands on the counterclaim which the Claimants did not accept but made a Part 36 offer to accept £86,400 in August 2011. The Defendants then withdrew their offer and the case was stayed to enable alternative dispute resolution.

Both parties expressed a willingness to mediate. The Claimants were proactive and the Defendants were slow to respond to letters and raised difficulties. Nearly a year later no progress had been made on a mediation date and by October 2012, directions were given to progress matters for a trial in October 2013. The Trial was part heard and the Claimants made a Part 36 offer to accept £40,000 in February 2014. The Defendants rejected this and the Trial resumed with a net award (taking account of the counterclaim) of £28,183.52 due from the Defendants together with a subsequent award of interest.

The Trial Judge noted that the Defendant's original offer of £30,000 was "well judged" but that it could not have the usual costs consequences of a Part 36 Offer as it had been withdrawn. The offer remained relevant to costs (under CPR Part 44.2(4)(c)) if it should have been accepted within 21 days, but on the facts the Claimant did not have sufficient information to assess the offer at that time.

The Trial Judge then considered the failed mediation. Although the Claimants called off the process, the Defendant was "unenthusiastic" and "less keen to participate". There would have been a real prospect of settlement if a mediation had taken place and the Trial Judge ordered the Defendants to pay 75% of the costs with the Claimants paying the costs of the counterclaim.

Court of Appeal

The Court of Appeal agreed with the Trial Judge that both parties were in a similar position concerning their knowledge of the Claimants' claim but only the Defendants had knowledge of their counterclaim and were better placed to assess litigation risk. The Court of Appeal affirmed the Claimants were reasonable.

The Court of Appeal then addressed mediation and agreed that the Claimants "took proactive steps", whereas the Defendants had "dragged their feet and delayed for so long that the claimants lost confidence in the process". The Court of Appeal gave five reasons why a mediation would have had a real chance of settlement:

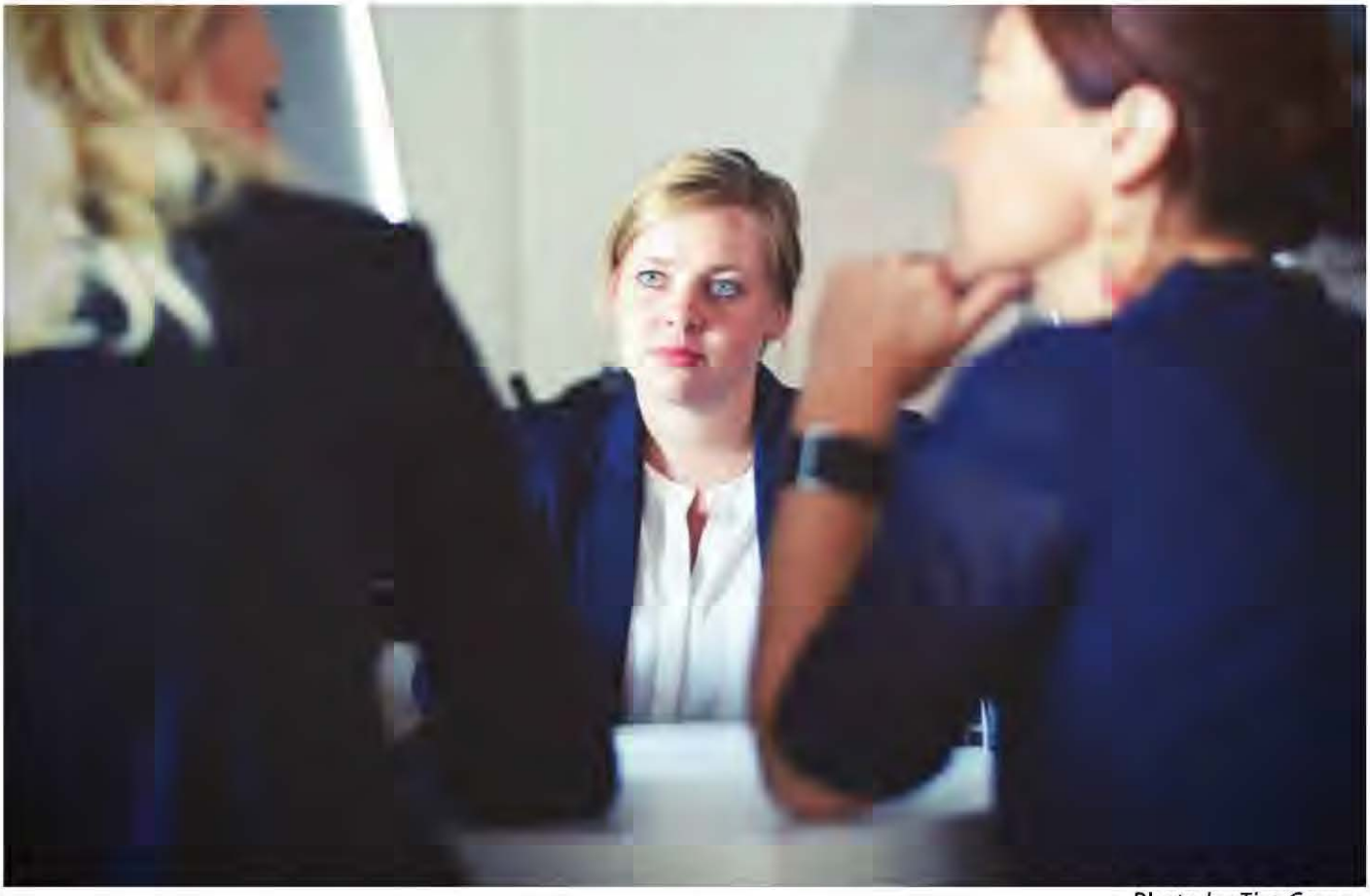

Photo by Tim Gouw

1. It was a purely commercial dispute.

2. The monetary gap between the parties' respective positions was not that large.

3. The costs were greater than the sum in dispute.

4. Bilateral negotiations had been unsuccessful.

5. Any mediator would have let the parties have their say and point out the gap was narrow whilst costs would escalate.

The Court of Appeal found that the vast majority of the litigation costs would have been saved if there had been a settlement in August 2012.

The Court of Appeal then went on to consider the case of *PGF II SA, v OMES Company 1 Limited* (2013). In PGF II the Court of Appeal held that silence in the face of an offer to mediate was unreasonable conduct meriting a costs sanction. The Court of Appeal in Thakkar went further and explained its reasoning as follows:

"The message which this court sent out in PGF II was that to remain silent in the face of an offer to mediate is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed. The message which the court sends out in this case is that in a case where bilateral negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction. In the present case, the costs sanction was severe, but not so severe that this court should intervene."

Summary

The clear message is that prevarication will lead to cost sanctions. Parties should be slow to reject attempts at mediation, particularly where the cost to the parties of pursuing a matter to trial is high when compared against the sums at stake, and even if the parties might otherwise be more reluctant to mediate because of the recent case of *Savings Advice Limited v EDF Energy Customers PLC* (2016) in relation to costs. Whilst not directly relevant to

the decision in Thakkar, it raises an interesting question in relation to the extent to which statements made in mediation can be disclosed.

We often think of mediation and the documentation produced during the mediation process as entirely cloaked by "without prejudice privilege" which must remain confidential absent an agreement by the parties to waive that privilege. This principle (as well as the fact that all discussions must remain confidential) is usually expressly stated in the mediation agreement itself. In Savings Advice, the defendant had made statements of the costs that would be incurred in pursuing a case to trial in mediation correspondence. The claimant subsequently accepted an offer of settlement but there was a dispute over the costs that it could claim, including the premium for After the Event insurance, which was calculated by reference to the defendant's costs. The insurer had used that estimate in calculating its premium. However, the defendant subsequently stated that its costs would have been at a level lower than it had indicated in the mediation. In assessing the defendant's liability for the insurance premiums, the Court held that "without prejudice privilege" protects a party from the disclosure of admissions or concessions made in negotiations – but not the costs information contained in correspondence as that was purely factual information relating to After the Event insurance. The court further held that whilst the discussions were confidential, the court was at liberty to order disclosure where that was necessary in the interests of justice. The court held that the confidentiality clause in question allowed disclosure of the costs information and the use of the term "w.p. save as to costs" on the defendant's correspondence only served to highlight the intention of the parties. The rationale for unravelling the "cloak of mediation" was set out as follows:

"In my judgment it is imperative that when parties enter into a formal mediation or informal negotiations for settlement of a claim that they do so in the full knowledge of their opponent's costs. The amount of the costs of litigation condition any subsequent negotiations or mediation that may follow."

Whilst this decision very much turned on its particular facts, the circumstances in which a party to a mediation may seek to challenge the scope of the privilege and confidentiality of the communications may be increase and give rise to greater uncertainties when advising clients.

Nevertheless, mediation remains a useful and efficient mechanism for dispute resolution and functions when each party accepts they are facing risk, but do bear in mind the following:

1. Confidentiality of the mediation – in the post Savings Advice Limited world, it is preferable to carefully limit the exceptions to the duty of confidentiality and avoid writing correspondence that is "without prejudice save as to costs".

2. If there is a genuine reason not to mediate, then that can be defensible. Otherwise be cautious about refusing to engage in the process.

3. Silence in the face of an invitation to participate in ADR is unreasonable and can attract a costs penalty (*PGF II SA v OMFS CO 1 Ltd* (2013))

4. Time sensitivity: an early mediation can be successful before the parties become entrenched in their positions.

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