

## **Failure to mediate may cost you**

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The general rule in a Court action is that expenses are awarded to the successful party. What constitutes “success” may, however, not always be clear.

The recent decision in the English Court of Appeal case of Rolf v De Guerin demonstrates that the parties’ conduct in the case can be a crucial factor for the Judge awarding expenses.

The particular case in question had concerned a dispute between a home owner (Mrs Rolf) and her builder (Mr Guerin).

The relationship had broken down during the build, and Mr Guerin had eventually walked off site. Mrs Rolf had the job completed by someone else and then sued Mr Guerin for alleged defects and the costs of completion.

Mrs Rolf was, however, only awarded £2,500 of her claim (which was valued at around £92,000 at its highest) and was unsuccessful on several key issues.

What was interesting about the case was that despite some (albeit limited) success by Mrs Rolf, she was not awarded any of her expenses and, to the contrary, Mr Guerin was awarded some of his expenses.

The case was appealed solely on the issue of costs.

The judge on appeal took a different approach to the issue and ultimately held that neither party should be awarded expenses.

### **Decision**

The key factor for the Judge was how the parties had conducted the case. Mrs Rolf had, from an early stage in the proceedings, made it clear that she was willing to settle the matter.

She offered a reasonable sum and proposed mediation or even a meeting to discuss settlement.

Mr Guerin, on the other hand, ignored Mrs Rolf’s proposals until just before the case was heard (at which point he made a bogus offer).

On appeal, it transpired that one of the reasons why he had been so unwilling to mediation was that he wanted his day in Court.

The judge held that this was not an adequate response 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.”

In reaching his decision, the Judge had considered an earlier case in which the Court had pointed out that “Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are beyond the power of lawyers and courts to achieve”.

Unfortunately for both Mrs Rolf and Mr Guerin, their dispute was “a sad case about lost opportunities for mediation”.

One can only wonder what might have happened if they had mediated.

The case demonstrates the English Courts’ confidence in mediation and also serves as a clear warning that, unless the parties give reasonable consideration to settlement offers and mediation, then they may well lose their entitlement to expenses.

The English procedural rules take a more robust approach to Mediation than in Scotland.

Scottish judges are, however, entitled to take into account other issues such as parties’ conduct in awarding expenses, so it cannot always be assumed that a similar approach would not be taken north of the border as well.

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