

Group Briefing

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Courts alive to disingenuous applications to mediate

KEY CONTACTS



ANDREW LENNY
PARTNER, HEAD OF LITIGATION

+353 1 920 1140
andy.lenny@arthurcox.com



ELIZABETH UPTON
SENIOR ASSOCIATE

+353 1 920 1133
elizabeth.upton@arthurcox.com



SINÉAD REILLY
PROFESSIONAL SUPPORT LAWYER

+353 1 920 1151
sinead.reilly@arthurcox.com

While very supportive of genuine proposals to resolve disputes outside of the court room, the courts are alive to the possibility that some parties may seek an adjournment seemingly to facilitate mediation, but really for tactical purposes. The courts scrutinise contested applications to mediate, and look to the motives and intentions of the party seeking mediation.

COURT RULES

The Mediation Act 2017 and court rules allow the courts to adjourn legal proceedings so that the parties can engage in mediation or other forms of alternative dispute resolution (ADR). A party who refuses an invitation by the Court to mediate, without good reason, may later be penalised in costs.

'OUT OF THE BLUE' MEDIATION

The High Court, and Court of Appeal, recently refused an application to adjourn proceedings to allow the parties to mediate where the application was brought in somewhat unusual circumstances (Danske Bank v SC).

In refusing the application, the Court had regard to the:

- » conduct of the litigation;
- » stage of the proceedings
- » potential effect of an adjournment on the proceedings;

- » likely success of the mediation; and
- » bona fides of the application.

THE BACKGROUND

Danske Bank obtained judgment against a borrower for €5.7 million. In separate family law proceedings, the borrower's estranged wife obtained an order for maintenance against rental income from certain properties in his name. The bank issued proceedings against the wife, claiming that it was entitled to the rental income from these properties. It also sought an interlocutory injunction to ring-fence the rental income pending the determination of the full dispute.

When the matter came before the High Court, the wife's counsel asked the Court to adjourn the proceedings to allow the parties to mediate. This request came completely 'out of the blue': there had been no suggestion of mediation, either in conversations or correspondence with the bank, prior to this.

This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

THE CONDUCT OF THE LITIGATION

The High Court made it clear to the wife that before making an application to the Court, she had to engage with the bank to see if it was willing to go to mediation.

Subsequently, and on the bank's suggestion, the parties agreed to have a settlement meeting, instead of a mediation. But without notice to the bank, the wife issued a court application for mediation, which was due to be heard by the High Court the day after the settlement meeting. The wife obtained permission from the Court for short service of the application on the bank, but did not tell the Court about the settlement meeting that had been arranged.

This wife's conduct raised questions as to whether she genuinely wanted to resolve the dispute or whether her true objective was to get an adjournment to delay the proceedings, while continuing to receive a portion of the rent.

THE STAGE OF THE PROCEEDINGS

The proceedings were at a very early stage and the application for the interlocutory injunction had not been heard. The High Court and the Court of Appeal took the view that it was more appropriate that the parties deliver their pleadings and try to narrow the reliefs sought before seeking a court adjournment to facilitate mediation.

**THE POTENTIAL EFFECT OF AN
ADJOURNMENT TO FACILITATE
MEDIATION**

The proceedings had been previously adjourned by a number of months to facilitate the wife in filing her papers, and even then she did not file her papers until the day before the matter was first before the High Court. The wife continued to receive a portion of the rent roll during this time.

The Court accepted that time was of the essence, and that it was reasonable for

the bank to seek an injunction to secure the rent roll pending the determination of the full dispute.

THE LIKELY SUCCESS OF MEDIATION

The prospect of mediation being successful at such an early stage in the proceedings was questionable, particularly as the parties had already attended two settlement meetings with their solicitors and counsel, but had failed to resolve the issues in dispute.

THE BONA FIDES OF THE APPLICATION

The Court of Appeal had particular regard to the wife's motives in bringing the application. Referring to the Atlantic Shellfish case, it reiterated that the Court will not grant an application for mediation where it is satisfied that the party seeking mediation has no real interest in mediating the dispute, and is only bringing the application for tactical reasons.

arthurcox.com**Dublin**

+353 1 920 1000
dublin@arthurcox.com

Belfast

+44 28 9023 0007
belfast@arthurcox.com

London

+44 207 832 0200
london@arthurcox.com

New York

+1 212 782 3294
newyork@arthurcox.com

Silicon Valley

+1 650 943 2330
siliconvalley@arthurcox.com