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Nat West Bank v Feeney

Appeal heard by Eady J sitting with assessors

14 May 2007

This case concerned the costs of a counterclaim which was resolved by a Tomlin order following mediation. In respect of the mediation, the parties entered a mediation agreement which contained standard terms stating that the mediator's fee would be borne equally by both parties and that each party would bear its own costs. Guidance notes to the mediation agreement indicated that if the parties wished the costs of the mediation to be taken into account in any court orders if there was no settlement at the mediation they should amend the standard terms accordingly. No such amendment was made in this case. The Defendants were legally aided.

The Tomlin order made following the mediation made provision for the Claimant to pay the Defendants' costs of the counterclaim, waived the Claimant's entitlement to costs under various interim orders relating to the counterclaim and ordered a legal aid assessment of costs but did not deal explicitly with the costs of the mediation itself.

The costs judge held that, as a matter of general principle, costs incurred in a mediation would form part of the costs of the action just as any reasonable costs of negotiation would (see Costs Practice Direction para 4.6(8)). However, the mediation agreement in this case indicated the intention of the parties that such costs would not be recoverable unless expressly made so as a result of the mediation and therefore allowed them only as against the Legal Services Commission (costs which the Legal Services Commission would recoup by way of the statutory charge from the compensation payable to the Defendants under the Tomlin order). Full details of the contractual provisions in this case are set out in the costs judge's decision ([2006] EWHC 90066 (Costs)).

On appeal counsel for the Defendants sought to argue that the mediation agreement did not, and should not be read as, restricting the result the parties might arrive at by way of mediation. Therefore the provisions of the Tomlin order took precedence and, since these did not restrict the definition of costs, the Defendants' costs of mediation were included by necessary implication.

The Judge dismissed the appeal: the mediation agreement was binding on the parties and to argue that it was effectively discharged by the Tomlin order was reading too much into the Tomlin order. In the result the one half of the mediator's fee paid by the Defendants was not recoverable from the Claimant, nor were any of the Defendants' costs of attending on the mediation.

By consent, the Claimant's costs of the appeal were summarily assessed and ordered to be set off against the costs otherwise payable to the Defendants.