

## Advice to mediate - the statutory duty of solicitors in Ireland

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The case of Jacqueline Byrne, Patricia Hyslop, Kathleen Kerrigan and Anne Grant Arnold is a reminder to solicitors of the statutory duty to inform the plaintiff of the option to mediate, prior to issue proceedings. This case sets a precedent that failure to comply with Section 14 of the Mediation Act 2017 will be taken into account by a judge on the question of costs.

### Background to the case

This decision arose in the context of a cost hearing regarding two interlocutory motions in proceedings relating to an intestate estate. The decision looks at whether the failure to comply with Section 14 the Mediation Act 2017 was relevant to the question of costs.

Section 14 imposes an obligation on solicitors to advise clients to consider mediation. It also requires them to give information about the advantages of resolving the dispute without litigating and the benefits of mediation. Section 14 of the Mediation Act 2017 further requires that the originating document, which commences the proceedings, is to be accompanied by a statutory declaration sworn by the solicitor confirming compliance with those obligations. If it does not, the court is empowered to adjourn the proceedings to facilitate provision of the declaration. In the instance in question, the plaintiffs' solicitor had not complied with the obligations of Section 14.

### Details of the ruling

Judge Kennedy looked at the powers relevant to the award of costs in proceedings, specifically Sections 168 and 169 of the Legal Services Regulation Act 2015 and Order 99 of the Rules of the Superior Courts. However, Judge Kennedy noted that the award of costs of motions prior to a final determination on the merits are not always clear-cut. He then considered how the Law Reform Commission and the courts have endorsed the desirability of alternatives to litigation. He then looked at Section 14 of the Mediation Act 2017.

Section 14 of the 2017 Act requires every solicitor issuing proceedings on behalf of a client to advise their client in the terms mandated by the provision and to swear and file a statutory declaration confirming that they have done so. The statutory requirements were not met on this occasion. Section 14 does not oblige plaintiffs to mediate. Nor does it oblige their lawyers to tell them to do so. In some cases, litigation may be deemed necessary to protect the client's position. Section 14 does not prevent solicitors from warning the client if they consider that mediation may be inappropriate, premature or unlikely to succeed in the particular circumstances. However, a plaintiff's solicitor must advise the client to consider mediation.

The statutory duty is to explain the option, facilitating an informed decision by the client, allowing them to consider alternatives to litigation (since ultimately it is the client who must decide how to proceed). While the solicitor must inform the client of the possibility of mediation and its benefits as mandated by section 14, the solicitor is entitled to supplement that advice where appropriate with any countervailing views as to the feasibility of mediation in the circumstances.

Risks or downsides must also be considered. The client's strategy should assess the potential advantages and disadvantages of its options, including negotiating or mediating (and the timing of any initiative). Clients may conclude that mediation is not appropriate in particular circumstances or at particular points. Section 14 facilitates an informed choice.

## Judge's remarks on the case

Judge Kennedy noted that "For obvious reasons, the Oireachtas seldom interferes in lawyer/client relationships. Section 14 protects clients by ensuring that they are fully informed as to options which may, *inter alia*, reduce their exposure to cost and risk. The provision also advances the public interest, discouraging unnecessary recourse to the courts (and legal expense) and promoting alternatives which may lead to outcomes which can be in the interests of all parties. The provision thus facilitates the earlier, cheaper, resolution of disputes. The public interest is demonstrated by the fact that the Oireachtas has imposed the extraordinary requirement of a statutory declaration by the Plaintiff's solicitor confirming compliance and the stipulation that litigation subject to the provision (i.e. most civil claims) cannot proceed without the declaration".

Judge Kennedy felt that the Courts should take some account of a material breach of section 14 and that he should have regard to the failure to comply with the statutory precondition to issuing proceedings, a provision introduced as a public interest measure to avoid unnecessary litigation and to avoid unnecessary recourse to the courts. Such a default is a relevant consideration when exercising the statutory discretion as to costs. He held that the Plaintiffs were entitled to their costs on the motions and that any reduction by reference to the two factors should be limited. For the reasons outlined, he awarded the Plaintiffs' 95% of the "party and party" costs on each application. The 5% reduction was intended to reflect the Plaintiffs' defaults, primarily with regard to section 14, but also in delivering their Statement of Claim.

## Key takeaways

The decision is noteworthy, as it underscores how the courts utilise cost implications to guide litigants towards what they consider appropriate behaviour. In this instance, the issue was a failure to comply with the obligations set out under section 14 of the Mediation Act 2017. The High Court criticised this non-compliance, even within the context of interlocutory motions, and sequentially dismissed the justifications given for it.

Ultimately, those involved in litigation, along with their advisors, should be aware that non-compliance may not only lead to an adjournment of proceedings, as outlined in the Mediation Act 2017, but could also have financial repercussions. The 5% cost reduction in this case, along with the potential for reductions up to 15% and the threat of more severe consequences in the future, should encourage practitioners to comply with the Mediation Act. For more information about this case or other related matters, please contact one of our team via their contact details below.

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