



## Courting Mediation

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The courts will generally be in favour of alternative dispute resolution and will often encourage parties to resolve disputes by mediation.

In the recent case of [\*Danske Bank and Stephen Tallant v S.C. \[2018\] IECA 117\*](#), the Court of Appeal considered an appeal where the High Court had refused to order that proceedings be adjourned to facilitate mediation.

### Background

In this case substantial sums of money had been borrowed from Danske, the loans being secured on certain commercial properties. In subsequent family law proceedings, the husband was ordered to make maintenance payments to his wife over a six year period, the payments to be secured out of the rental income of the properties. A judgment was secured by Danske against the husband and a receiver was appointed.<sup>1</sup> The Bank claimed that it was entitled to receive all the rental income and the wife challenged that, saying that she was entitled to the rent until all the maintenance had been paid to her.

The Bank sought to be joined to the family law proceedings and considerable delays occurred in those proceedings. Fresh proceedings were issued to establish the rights of the various parties. The day before an application was due to be heard, the wife,

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<sup>1</sup> For simplicity sake we will refer to Danske and the receiver, together, as “the Bank”.

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without first having informed the Bank, sought to have the matter referred to mediation. The High Court directed that the wife put her request in writing and directed that if the Bank refused to go to mediation, then the wife could apply to the court for an order adjourning the proceedings to enable the parties to consider mediation.

The Bank refused to consent to mediation and referred to a previous settlement meeting. It suggested that a further settlement meeting would take place before the matter was due back in court. The wife issued a Motion for the day after the proposed settlement meeting, seeking to have the case adjourned to allow for mediation. The Bank argued that the issuing of the Motion caused them to doubt the wife's sincerity as regards mediation. The Bank also took exception to the fact that the wife had obtained an *ex-parte* order from the High Court, allowing short service of the Motion, without advising the court that a settlement meeting had been arranged.

What the Bank was seeking to do was to have the rental income - which continued to be paid to the wife - protected until a decision was ultimately made as to the parties' entitlements.

### Amenability to mediation

The Court of Appeal referred to the landmark decision on mediation in [\*Atlantic Shellfish Ltd v Cork County Council\* \[2015\] IECA 283](#) which established the principles to be applied when considering whether proceedings should be adjourned to allow the parties consider mediation.

One of the main aspects for consideration by the court is the manner in which the parties have conducted the litigation up to the date that they brought the application. The court, having considered the history of the matter, including the previous unsuccessful settlement meetings, decided that while the dispute could be amenable to mediation, mediation was not appropriate at that stage and it directed the delivery of further pleadings aimed at narrowing the issues.

The wife argued that she had acted reasonably and expressed the view that while the settlement meetings had been unsuccessful, the assistance of an experienced mediator could facilitate a settlement. The Bank argued that the wife sought to have her entitlements guaranteed, regardless of other issues such as her estranged husband's inability to pay the maintenance and the Bank's rights under the mortgages. Issues had arisen in obtaining payment of rents from tenants. The Bank indicated that if the rent was being held in escrow pending the outcome of any mediation then its position on mediation might change.

The Court of Appeal considered that time was of the essence and that the Bank had acted reasonably in seeking an injunction to protect the rent pending the final outcome. It considered that the wife had delayed in dealing with the proceedings and had delayed in seeking mediation. It considered that "perhaps the most crucial aspect is that there was no agreement whereby the rent

roll would be protected in an agreed manner” and the granting of the request to adjourn to consider mediation would have resulted in further delay.

The Court, referring to *Atlantic Shellfish*, stated that it should only exercise its discretion if it considers it appropriate to do so having regard to all the circumstances of the case. The *bona fides* of a party inviting a court to exercise its discretion would also be scrutinised and a relevant issue would be whether the applicant did not genuinely believe in the application or made it for tactical reasons only to put pressure on the other party which may have a greater exposure to costs.

## Conclusion

Courts generally favour the resolution of disputes by alternative dispute resolution, including mediation and often unilaterally prompt parties to consider alternative dispute resolution. However, if one party resists mediation then the courts will only exercise their discretion to adjourn proceedings under Order 56A of the Rules if they consider it appropriate to do so having weighed up all of the *Atlantic Shellfish* considerations. These include:

- ▣ the potential for alternative dispute resolution to bring about a resolution of the dispute,
- ▣ the timing of the application,
- ▣ the moving party’s conduct of the litigation to date and its *bona fides* and motivations in seeking mediation.

A party applying to a court for an order under Order 56A must be acutely aware that the granting of the relief is discretionary and therefore the result cannot be predicted with any certainty.

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