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## Case law: delay in consenting to mediation

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# Case law: delay in consenting to mediation

A recent British case, *Nigel Witham Ltd v Smith & Anor (No 2)* [2008] EWHC 12, has determined that a successful party who unreasonably delays consenting to mediation until a very late stage so that the chances of a successful mediation are poor may be subject to an adverse costs order. The claimant designer, Nigel Witham Ltd sought recovery of various unpaid fees from the defendant hotel owners, Mr Smith and Miss Isaacs. The claimant accepted that they were not the successful party but argued that there were several factors that should have been considered when determining the defendant's costs order, one of which was the defendants failure to mediate until late in the dispute resulted in extensive costs being incurred. Coulson J of the England and Wales High Court (Technology and Construction Court) ordered that the defendant's costs be reduced by 15 per cent to reflect the late abandonment of

a counterclaim but not to reflect the defendant's failure to mediate until late in the dispute.

The significant issue addressed by Coulson J was the claimant's argument that the defendant's failure to mediate until late in the dispute warranted a reduction in costs. While *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 addressed the issue of the successful party's costs after failing to mitigate at any stage of a dispute, the present case concerned a novel point as the *timing* of the mediation was challenged.

After observing that mediation too early or late could reduce the chances of settlement his Honour held that it is imperative to '*identify the happy medium*' between the two situations when initiating mediation.

His Honour noted that while there may be '*an exceptional case*' where an adverse costs order could be made against the successful party, this would

arise where a successful party unreasonably delayed consenting to mediation until very late in the dispute, when chances of success were low. However, the present case was not considered such an exception for several reasons, including:

1. The defendant had mentioned numerous times early in the dispute that mediation was a possibility provided the claimant properly set out its claim.
2. The '*critical moment*' to mediate was missed by both sides, and blame should not be placed solely on the defendant.
3. In light of the fact that the claimant had consistently expressed an '*uncompromising attitude ... with reference to its intentions to pursue an entitlement to every penny of the claim*' it was held that even if mediation been undertaken earlier, it may not have produced a different result. ●