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Mediation – Voluntary in name only?

The concept of mediation is familiar to many of us as a voluntary way to resolve civil disputes, however, as with many areas of civil law, the voluntary nature of mediation is not as straight forward as it may appear. This article reviews the civil procedure rules and case law surrounding mediation to provide insight into the courts' current views and what may be on the horizon.

To give some context, it is useful to look back at a little history of the English civil justice system. In 1996 Lord Woolf produced a report entitled 'Access to Justice' in which he provided over 300 recommendations to revolutionise the civil justice system. This report stated that the use of Alternative Dispute Resolution ("ADR") should be encouraged by the courts and introduced the principle of pecuniary cost orders being made if a party unreasonably refuses ADR. The report formed the basis of The Civil Procedure Rules 1998, which have been continuously developed since they came into force in 1999. The overriding objective of the Civil Procedure Rules ("CPR"), as set out at CPR 1.1, is to enable the courts to deal with cases justly and at proportionate cost. CPR 1.3 goes on to state that it is the duty of the parties to help the court in this regard. Further, section 2.1 of the Technology and Construction Court ("TCC") guidance discusses the TCC Pre-Action Protocol. This section sets out that its purpose is to encourage the frank and early exchange of information to enable parties to avoid litigation and agree to a settlement of the claim before the commencement of proceedings. The TCC guide states at section 7 that ADR is encouraged but confirms that the use of ADR remains voluntary.

ADR covers a wide range of methods to resolve a dispute outside the courts, from negotiation, in its simplest form, through to arbitration. The Glossary to the CPR defines ADR as a *'collective description of methods of resolving disputes otherwise than through the normal trial process."* However, in Halsey v Milton Keynes[1], the judge opined that references to ADR are usually understood as being references to *'some form of mediation by a third party"*.

What is mediation?

Richbell (2008)[2] describes mediation as a *'flexible process within a framework of joint and private meetings where the mediator helps the parties clarify the key issues and construct their own settlement"*. One of the key differentiations between mediation and other forms of ADR is that the disputing parties are always in control of mediation proceedings. Any settlement that is reached is done so by the parties and not the third-party mediator. The mediator can only help the parties to step outside of their adversarial framework and entrenched positions to reach a settlement but cannot enforce a settlement.

HKA's 2020 CRUX report[3], which investigated the causation of disputes globally, found that just 4% of the disputes recorded in the UK attempted mediation. By comparison, the same research found that globally, 25% of disputes recorded attempt mediation. This suggests that the UK is

[1] Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576, [2004] WLR 3002.
[2] Richbell, D (2008) *Mediation of construction disputes.* Oxford: Blackwell.
[3] https://www.hka.com/crux-insight/

somewhat behind the curve in the use of mediation. This may be due to the wide availability of statutory adjudication in this jurisdiction, but 19% of the UK projects recorded did end in litigation with just 5% of these projects attempting mediation, suggesting that there is certainly scope for increased use of mediation. Notwithstanding, the courts are demonstrably keen to see the proportion of disputes attempting mediation to increase in line with the CPR and the TCC Pre-Action Protocol.

Cost Sanctions

The primary "stick" that the courts have at their disposal to induce parties to mediate prior to litigation is the threat of cost sanctions. CPR 44.4(3) requires the court to have regard to the efforts made before and during the proceedings to try and resolve the dispute when determining the issue of costs. The courts have interpreted this to include efforts at resolving the case through ADR, meaning any unreasonable refusal to mediate may give rise to cost sanctions against the refusing party.

In order to understand what is meant by "unreasonable", a review of case law is necessary. The cases of Cowl v Plymouth City Council[4] and Dunnett v Railtrack plc[5] showed strong support for the use of ADR, but the widely recognised starting point for establishing if a dispute is suitable for mediation is Halsey v Milton Keynes. In this case, the court accepted that ADR processes, such as mediation, do not offer a panacea and are not appropriate for every case. However, they did go on to establish a non-exhaustive list of factors that ought to be addressed when determining whether a party's refusal to mediate was unreasonable. This is important as if it is found that a party has unreasonably refused to mediate it invariably deems that mediation was suitable and cost sanctions may be applied.

The first of the factors expounded in Halsey was "the nature of the dispute". The court set out that certain types of disputes including; a requirement for a point of law to be resolved for which a binding precedent would be useful, cases whereby injunctive relief is required, allegations of fraud and other commercially disreputable conduct would not be suitable for ADR. The decision in Couwenbergh v Valkova[6] somewhat contradicted the ruling in Halsey that fraud cases were not suitable for mediation.

The second factor set out in Halsey was "the merits of the case". The court explained this to be when a party reasonably believes that it has a watertight case it may be justified to refuse to mediate. The court set out that this was important to avoid a party with a fragile case inviting mediation as a tactical ploy to force the other party to partake in mediation or be at risk of a costs order, even if successful at trial. The court went on to state that it is insufficient for the party to believe they have a watertight case, as many believe leading into litigation. Instead, the test is as to whether they should have reasonably believed that they had a watertight case. This then goes to the sufficiency and robustness against which their case has been tested, for which great reliability is often placed on law firms and independent Experts.

[4] [2001] EWCA Civ 1935, [2002] 1 WLR 803.
[5] [2002] EWCA Civ 303, [2002] 1 WLR 2434.
[6] [2004] EWCA Civ 676.

A further consideration set out in Halsey was a question as to whether the cost of mediation would be disproportionately high in comparison to litigation. Ultimately, this will rarely be the case. Litigation and arbitration are time consuming and expensive processes that take a long time to achieve an outcome. A report by the London Court of International Arbitration (2016,p9)[7] showed that the average duration of an arbitration valued at less than US$1,000,000 was nine months and would cost on average US$32,000 in arbitration costs. This is in addition to the costs of legal representation and the time invested by the parties. By comparison, some groups in the UK now offer a mediation service, for claims of less than £250,000, for a fixed fee of £600. Further, mediations often take no more than a day, and the cost is shared equally between the parties. Although there will be some additional costs to prepare for the mediation, these will be minimal in comparison to costs of preparation for arbitration or litigation. With an ever-growing offering of low cost, fixed fee, mediations, it would be challenging to justify a refusal to mediate as a result of the cost being disproportionately high. This factor was tested in the case of NGM v BAE[8] whereby the costs of litigation for both parties amounted to £500,000 on a £3,000,000 claim. It was established that the cost of mediation would have been in the order of £50,000 and would not, therefore, have been disproportionately high.

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The Halsey decision also set out the question as to whether the mediation has a reasonable prospect of success, as a further factor. This consideration has been applied in numerous cases, including Critchley v Ronnan[9]. It was decided that even when parties are opposed on a binary issue, failing to consider mediation would be unreasonable. Further, in PGF II SA v OMFS[10] the defendant argued that the disputants were too far apart to engage in mediation successfully. However, the Court of Appeal disagreed and took the view that there was no unbridgeable gulf between them. A study by CEDR (2018)[11] found that 89% of mediations resulted in a settlement. Of these, 74% of cases achieved a settlement on the day of mediation. These results suggest that mediation is a very successful form of ADR, and even if disputants do not think it has a prospect of success, it has a great possibility to succeed. The judge in Critchley confirmed that mediators *'are well trained to diffuse emotion, feelings of distrust and other matters in order that the parties can see their way to a commercial settlement".* The court would consider even disputes that are very emotive for both sides as being suitable for mediation. However, it should be noted that in Hurst v Leeming[12], which predates both of the aforementioned cases, it was found that the defendant was reasonable in his opinion that, because of the character and attitude of the claimant, mediation had no prospect of success.

[7] https://www.lcia.org/media/download.aspx?MediaId=596
[8] Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd (No 2) [2014] EWHC 3148 (TCC), [2015] 3 All ER 782.
[9] Garritt-Critchley v Ronnan [2014] EWHC 1774 (Ch), [2015] 3 Costs LR 453.
[10] PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288, [2014] 1 WLR 1386.
[11] https://www.cedr.com/wp-content/uploads/2020/01/ The_Eighth_Mediation_Audit_2018.pdf
[12] [2001] EWHC 1051 (Ch), [2003] 1 Lloyd's Rep 379.

Similarly, in McCook v Lobo[13] the court found that the case would not have had a realistic prospect of success. It is unclear how the courts would deal with such cases today. A further relevant case was that of Askey v Wood[14] . It was found that when the parties do not know what quantum figure is to be apportioned, mediation would be a sterile exercise and therefore seen as unsuitable.

There have been further developments since Halsey, but the factors raised by the courts in that case have remained central to the courts' decisions. Ultimately, each case is reviewed on its merits. Notwithstanding, the courts have set a high bar when considering reasonableness, meaning that even if one of the above factors does apply, the court may not agree that the refusal to mediate was reasonable.

Contractual agreement to mediate and court orders

In addition to cost sanctions, it is also essential to consider that some contracts include a requirement to undertake mediation before progressing to litigation. In this case, the courts will enforce mediation clauses providing they are unequivocal and include a process or a set of rules such as the CEDR mediation rules. In Wah v Grant Thornton[15], the court found that the mediation clause was unenforceable as it was too equivocal in terms of the process to be followed and the parties' obligations. Further, in Sulamerica v Ensea Engenharia[16], the obligation to seek to have the dispute resolved amicably by mediation was found to be unenforceable due to a lack of certainty.

If a clause is found to be enforceable, the courts are likely to stay proceedings to allow mediation to take place in line with CPR 3.1.2(f). In the absence of a clause compelling the parties to mediate, the courts may grant a stay based on a request of either party or by its own accord under CPR 3.1.2 (f) or 26.4.2. It is noteworthy that such a stay does not force the parties to embark upon mediation. Further, the courts may issue an ADR order that directs the parties to consider ADR or even make contact with a mediator. However, still neither of these forces the parties to go beyond considering mediation.

Potential developments in the law

It has long been suggested that compelling disputants to undertake mediation may violate Article 6 of the European Convention on Human Rights (ECHR) which states "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". For the avoidance of any doubt, the ECHR is somewhat unrelated to the European Union and as such the UK remains a signatory to it, despite Brexit. Notwithstanding the above discussion, in the case of Wright v Michael Wright[17], it was suggested that it might be time to review this rule as other jurisdictions operating under the convention, such as Italy, have the option to compel disputing parties to attempt the use of ADR. Although the law in

[13] [2002] EWCA Civ 1760, [2003] ICR 89.
[14] [2005] EWCA Civ 574.
[15] Wah v Grant Thornton International Ltd [2012] EWHC 3198 (Ch).
[16] Sulamerica CIA Nacional De Seguros SA and others v Enesa Engenharia SA and others [2012] EWHC 42 (Comm); [2012] EWCA Civ 638.
[17] Wright v Michael Wright (Supplies) Ltd [2013] EWCA Civ 234.

England and Wales has not developed since this case, there have been signals from the courts that there is potential for consideration to be made.

In 2019 the Court of Appeal reviewed whether the courts could mandate an Early Neutral Evaluation ("ENE") without the parties' approval. The court established that it could as it did not obstruct a party's access to the court but added a step in the process which could result in a fair and sensible resolution of the dispute. Following this case, in McParland v Whitehead[18], the judge, Sir Geoffrey Vos, raised the question of whether the court might also require parties to engage in mediation despite the Halsey decision. Ultimately the judge was not required to open up this element of the law on this occasion; however, it appears that mandating mediation is undoubtedly in the contemplation of the courts.

In summary, at this time mediation very much remains a voluntary process. Still, any party wishing to avoid mediation in favour of litigation must tread carefully to avoid cost sanctions being imposed by the courts. I consider it is also reasonable to believe that, at some point, the courts will begin to adopt the model used in other jurisdictions and make mediation a mandatory pre-requisite under certain circumstances.

If you require any further information, please contact Oliver Spence at oliverspence@hka.com.

[18] McParland and Partners ltd v Whitehead [2020] EWHC 298 (Ch).