

THE MOVE TO MEDIATION – LITIGATION PERIL AND THE COSTS SANCTION*

by Paul Newman, Barrister (Hugh James, Cardiff)

1. Litigation sometimes gets out of hand. A notable example of litigation, which backfired, was Mowlem's *Carlton Gate* claim. According to *Contract Journal*, 10th August 1995:
"What is amazing is that Mowlem continued its battle even after declaring a £123,000,000 loss for 1993. On what quality of legal advice? Some might ask. One lawyer speculated: "You always try to give the client some good news in the early days". Perhaps that's what... did, and a bandwagon was set up."
2. Since 1999 the Courts have discussed the use of adverse costs' orders as a sanction against parties who wrongfully refuse to mediate. Let us look at a couple of cases.
3. On the 11th May 2004 the Court of Appeal made its important decision in *Halsey –v- Milton Keynes General NHS Trust* [2004] EWCA (Civ) 576. The facts of the *Halsey* case were straightforward. Mr. Halsey had died whilst being treated in hospital. His widow alleged his doctors had been negligent. She was unsuccessful, following which the NHS Trust asked for costs. Mrs. Halsey relied on letters written to the NHS Trust, suggesting mediation. All endeavours to achieve mediation between the parties had been repelled by the NHS Trust on the basis that the Trust had formed the view that it had a good defence to the claim. From Mrs. Halsey's perspective, the NHS Trust had been unreasonable and ought to be denied its costs following the rejection of the first mediation offer. She failed to persuade the first instance judge that she was correct. The second, consolidated case, *Steel –v- Joy & Halliday* concerned two road accidents. The claimant was injured twice, once in 1996 and again in 1999. Both defendants admitted liability and the question for the court was whether the second defendant had caused the claimant to suffer any more damage. During the litigation, the first defendant wrote to the second defendant suggesting mediation. The second defendant refused on the basis that mediation was inappropriate as the dispute was a question of law that the court had to decide. The second defendant was later successful on the matter of causation and asked for costs. The first defendant argued that the failure to mediate meant that a conventional costs' order was inappropriate. In dealing with both cases the Court of Appeal (Dyson LJ in particular) formulated a number of guidelines, which might assist parties. These were:
 - Courts should actively encourage mediation but without compelling the parties to do so. Issues of law might not be suitable for mediation.
 - Lawyers should always consider with their clients whether disputes are suitable for ADR.
 - Although the CPR permit a judge to make a cost order against the successful party, to deprive a successful party of some or all of his costs on the grounds that he has failed to agree to mediation, is an exception to the general rule that costs should follow the event. The unsuccessful party must satisfy the court that the successful party acted unreasonably in refusing to agree to mediate. The defendant may have made a reasonable offer, which the claimant decided to reject. The cost of mediating might have been disproportionately high and / or delayed any trial. Would mediation have been largely a futile exercise?
 - The party who refuses to consider mediation is always at risk of incurring an adverse costs order, especially if the court has made an order requiring the parties to consider ADR. However, a claimant might simply propose mediation in circumstances where that party's case was unreasonably weak and seek to maximise the chances of a 'nuisance' payment from the defendant.
 - Public bodies and large organisations should be treated in the same way as all other litigants. For cases suitable for mediation, then it is likely that a party refusing to agree to mediation will be acting unreasonably.
 - Mandatory mediation would run a risk of falling foul of the general protections afforded to human rights under appropriate legislation.

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4. The Court of Appeal dealt with the reluctant party in *Burchell –v- Bullard* [2005] EWCA Civ 358. This had all the hallmarks of the classic small building dispute. Mr and Mrs Bullard employed Mr Burchell to construct two large extensions for them at their house in Bournemouth. The parties had anticipated four stage payments, the third of which was to be when the roof was on with the final payment being made on completion. The third stage payment of £13,540.99 was never paid. Mr and Mrs Bullard alleged that there were defects in the work carried out. Mr Burchell ended up consulting his lawyers, who did not leap into the role of the rottweiler. They took a course of action, which Lord Justice Ward later commended in the Court of Appeal. They conceded there was an argument so the obvious way forward was to talk about it. In his judgment (paragraph 3) Lord Justice Ward said “[the solicitors] wrote sensibly suggesting that to avoid litigation the matter be referred for alternate dispute resolution through ‘a qualified construction mediator’. The sorry response from the respondents’ chartered building surveyor was that ‘the matters complained of are technically complex and as such mediation is not an appropriate route to settle matters.’”
5. Mr Burchell’s solicitors issued proceedings on the 5th February 2002, claiming £18,318-45. The householders’ counterclaim topped £100,000. Mr Burchell’s roofing sub-contractor was sucked in too. After a 5-day trial in Bournemouth County Court Mr Burchell obtained judgment for £18,327-04. Mr and Mrs Bullard won on the counterclaim to the extent of £14,373-15 (or as Lord Justice Ward remarked later ‘15% of the counterclaim’). Following adjustments for VAT and interest Mr Burchell received the princely sum of £5,025-63. Presumably everyone took a deep breath as the Recorder turned to costs. Applying what the Recorder took to be the law he decided that the defendants should pay the claimant’s costs on the claim with the claimant paying the defendants’ costs on the counterclaim, i.e. let the costs follow the event. The sub-contractor lost to the extent of £79-50. The claimant was liable for his costs too. The claimant appealed. He should (a) have received the costs of the counterclaim; or if not (a) certainly (b) those of the roof element with no order as to costs on the remainder of the counterclaim and in any event (c) the sub-contractor’s costs. Mr Burchell had even continued to offer mediation by unsuccessfully seeking the participation of Mr and Mrs Bullard in the Court of Appeal Mediation Scheme.
6. In giving judgment Lord Justice Ward acknowledged that trial judges have a wide discretion and appeals are difficult from their decisions on costs. The Recorder took as his starting point that costs should follow the event on each of the claim and counterclaim, which Lord Justice Ward thought to be understandable. He agreed with the Recorder that the conventional starting point nowadays was often an issue-by-issue analysis to work out the winner on each of those discrete issues. Both Lord Justice Ward and the Recorder rejected this as a useful starting point in the circumstances of the case.
7. Lord Justice Ward decided to deal with costs, identifying the following factors as relevant –
 - That costs follow the event remains a core principle of civil litigation.
 - The claimant recovered slightly more than his original claim. He was not guilty of exaggeration.
 - The defendants exaggerated their counterclaim.
 - The defendants had been more muddled in their case management (particularly experts) than had the claimant.
 - Some review of the parties’ willingness to pursue particular issues was necessary.
 - Had there been any admissible offers or payments into court?
 - Could mediation have played a useful role and were the defendants unreasonable in rejecting mediation?
8. Mr and Mrs Bullard had in rejecting mediation taken a brave decision:
“...it seems to me, first, that a small building dispute is par excellence the kind of dispute which, as the recorder found, lends itself to ADR. Secondly, the merits of the case favoured mediation. The defendants behaved unreasonably in believing, if they did, that their case was so watertight that they need not engage in attempts to settle. They were counterclaiming almost as much to remedy some defective work as they had contracted to pay for the whole of the stipulated work. There was clearly room for give and take. The stated reason for refusing

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mediation that the matter was too complex for mediation is plain nonsense. Thirdly, the costs of ADR would have been a drop in the ocean compared with the fortune that has been spent on this litigation."

9. Lawyers did not escape the judge's wrath:
"...The [legal] profession can no longer with impunity shrug aside reasonable requests to mediate... [the] pre-action protocol for Construction and Engineering Disputes...expressly requires the parties to consider at a pre-action meeting whether some form of alternative dispute resolution procedure would be more suitable than litigation. These defendants have escaped the imposition of a costs sanction in this case but defendants in a like position in the future can expect little sympathy if they blithely battle on regardless of the alternatives."

WHY MEDIATE?

10. Case selection for mediation can be tricky but more so in the context of choosing the right moment. Do you need to have proceeded some way with litigation or can you opt in even pre litigation? The danger in leaving it too late is the fact that substantial legal fees may have been wracked up. The principal need is to ensure that there is sufficient information 'on the table' to give mediation a chance. The following factors may assist a party in making that decision whether to litigate or mediate:

- Do the parties have and want to maintain a commercial relationship?
- Do the parties have a 'settlement' culture?
- Have the parties been through an ADR process before (preferably successfully).
- Do both parties have a mutual interest in a quick resolution of the dispute?
- Do both parties recognise that litigation or arbitration mean (a) an unacceptable drain on their managerial time, (b) expense and (c) long drawn out and unpredictable proceedings?
- Does either party wish to avoid the publicity that litigation may bring them?
- What do the parties wish to achieve? Do they want their day in court, where they can sound off about 'principles and justice'? Do the parties understand that mediation may provide them with one way to have their day in court, acting as a form of catharsis, carried out in the most cost effective way possible?
- Have the parties already tasted litigation or arbitration in other disputes and seen the downside of litigation?
- How good will the witnesses be at trial? How good or complete are the available documents? Does the other side have a possible ace up their sleeve? Can the parties afford a full trial?
- Has enough documentation been exchanged between the parties to give mediation a realistic chance of succeeding? Are there full pleadings, expert reports and witness statements in existence?
- What are the parties' costs to date? What is the costs' projection to trial and beyond?

Mediation may not work:

- Where the dispute is centred largely on law rather than fact and established precedent strongly favours one party over the other.
- Where one of the parties wishes to establish a clear legal precedent. An employer might eventually see the attractiveness in sorting out a sex discrimination case at 'local' level without the creation of a precedent. The Equal Opportunities Commission may support the applicant and see little 'public' benefit in a 'one-off' deal with a particular employee.
- One party wishes to delay the resolution of the dispute for as long as possible. Most lawyers have or have had clients, who use lawyers to manage their business debts. If robbing Peter to pay Paul fails they create tenuous defences to resist payment. As such, settlement has little in it for them.
- Either one or other, or even both, of the parties are not acting in good faith. Conceivably the insolvent party might wish to see how little he can get away with paying.

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- One or other of the parties believes that litigation will be a complete vindication of their position. In truth, those motivated by 'principle' may back down a long way if they are forced into mediation and reality test with a strong mediator.
- There is inequality of bargaining position between the parties. At face value, this seems apparent in a large number of cases, e.g. the small sub-contractor and the rather larger main contractor. Often it is only in the private mediation sessions that the mediator learns that there is a factor, which may redress the balance to some degree.
- Where the position of one of the parties is strongly influenced by a particular individual within that organisation. Behind most litigation there is a driving force. In the construction industry this may be a managing quantity surveyor, who has a position to protect. Perhaps he knows there were errors in the original tender and the project was unprofitable beyond the 'negative margin' already known to his team, even without considering responsibility for various delays and the like. However, his quantity-surveying director has expectations from the project and must report to Board. The managing quantity surveyor can use litigation to bury the mistake for as long as possible. He may leave before the issue becomes a particularly 'hot potato', having perhaps swapped his Mondeo car key for one to a BMW elsewhere. If he remains with the team he can always blame the lawyers in due course. A reputable firm of construction law solicitors simply failed to deliver and let him down.
- Where one or other of the parties is a public body answerable to the district auditors or similar. Many such bodies claim they cannot negotiate because the settlement will not be transparent and logical.
- Where a client has the benefit of insurance to defend the claim. In the early days of ADR there was a fear that insurers never compromised or did deals. The reality was always different. Insurers attached great weight to the loss adjuster's comments, meaning that settlement was often achieved. Nowadays many professional indemnity insurers will permit mediation for a wide range of professionals from solicitors to consulting engineers, accountants and surveyors.
- Where one of the parties will be reluctant to close a deal in the form of a Tomlin Order or other legally enforceable document.

11. Lawyers

- can advise their clients on their legal rights, which do remain significant. Only a properly informed client can decide how far to go in not asserting his legal rights.
- can advise their clients in the choice of a suitable dispute resolution procedure. Everyone knows about litigation. Some know about arbitration. However, other semi formal dispute resolution methods exist – adjudication, expert determination, early neutral evaluation (get a retired judge to make a non binding assessment). Modern lawyers should be disputes' advisors, rather than good old-fashioned 'one track' litigators.
- can assist clients in the preparation of cases for ADR. Many clients have 'lives to lead' and prefer to leave mind numbing detail to others. Lawyers remain good at collating information into a workable and literate package and should be able to ask the 'right' questions.
- can represent their clients during mediation meetings and mini-trials. Formal advocacy is not required. However, clear thought, concision and persuasiveness are useful skills. As such, many solicitors, who would be fazed at the prospect of appearing in court, will find mediation 'advocacy' manageable. The value in appearing as 'advocates' in mediation is not lost on the Bar, with many barristers advertising their skills in the alternative advocacy requirements of mediation.
- can assist clients to prepare and complete appropriate settlement agreements, which are legally enforceable. It surprises many just how much time is devoted to getting the wording 'just right' in settlement agreements. Again, the lawyers' attention to detail and concern with the 'what if' scenario can ward off future problems of interpretation.

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- can assess what documentation should be prepared and possibly exchanged prior to the mediation sessions. Lawyers are well used to the disclosure exercise in litigation and know what is sensibly required to inform the mediator.
- can carry out a risk assessment of the likely outcome if the matter were to be pursued via litigation or arbitration. Many solicitors will have obtained counsel's opinion early in the case if only to cover their own backs. Has counsel provided a crassly optimistic assessment of the possible outcome?
- can consider any general policy considerations, or the requirement for legal precedent, which render litigation in the High Court more advantageous to the client.
- can assess if the dispute were to be litigated or arbitrated in the traditional way, is either party likely to have witness problems - witnesses who are now working overseas or for other employers, witnesses who may be hostile to a former employer, witnesses whose co-operation will be expensive to buy, witnesses whose performance in court is likely to be poor.
- can decide if the documents in such a mess or lacking in completeness as to render recourse to litigation or arbitration undesirable.

THE MEDIATION PROCESS

12. Differentiate between Court Scheme Mediations and Private Mediations. The former take place in Court buildings and are time limited (3 hours) because of constraints on the use of the facilities and rarely exceed three hours. Sometimes the parties buy additional time at an alternative venue. Private mediations (where the parties may specifically choose the mediator, rather than necessarily rely on a nominating body, such as CEDR or ADR Group to assist the Court, often take place in a lawyer's office or that of another professional. Private mediations are often earmarked to last in excess of three hours (although some simple ones are time-limited) and may last the whole day, not infrequently into the early hours of the following day. In private mediations the lawyers and other consultants may have thought long and hard what written statements may be placed before the mediator and how much disclosure of documents should be implemented.
13. Court based mediation has few rules but some similarities with private mediation. Often the mediator will receive no more than the original Particulars of Claim, the Defence and the parties' sometimes very brief position statements, setting out their list of wants. The parties may choose to provide him with expert reports or other information. In private mediation the parties may agree a Bundle for the mediator's use.
14. Most mediators contact the parties a week or so before the mediation by telephone - (a) to introduce themselves and (b) to find out how familiar the parties and their lawyers / advisors are with mediation. During these telephone conversations the mediator will emphasise that mediation is (a) confidential and without prejudice and (b) offers a range of settlement opportunities that litigation lacks. The mediator may explain the role of lawyers and advisors, which is particularly significant if the lawyers / advisors are new to mediation. Come the mediation session the mediator may well seek to ensure that the lawyers / advisors play second fiddle to the clients.
15. **Authority to settle?** - Towards the end of the telephone interview the mediator may seek the following confirmation from the lawyers. Who is attending the mediation? Does the party attending have authority to settle? This is an important consideration. The mediator will be keen to confirm that his contact point is not a 'middle-ranking' or perhaps more junior employee, with no knowledge of the file and no authority to settle. An insurance-backed defendant often does not attend the mediation. Indeed, his insurers too are often absent with only the lawyer present. Will the lawyer have sufficient flexibility in his instructions? Some parties may choose to represent themselves, on occasions believing they can flannel their way through mediation. This can be a BIG mistake.
16. In principle, court mediations last three hours. The parties may need longer to settle when the court cleaners fire into action at 6pm, with the vacuum cleaner, or start switching off the lights and setting the alarm. Assuming the parties can find alternative accommodation – perhaps the offices of one of the

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lawyer's - it would be a pity for one party to be available to give the matter additional time on the mediation day, but not the other party. Therefore, the mediator may confirm that neither of the parties has a personal commitment on the mediation day. With a lawyer in attendance, a party might assume that it will be fine to slip out of the mediation after perhaps two hours to get ready to celebrate a wedding anniversary or similar. To lose the lay party may not necessarily be fatal but only if the mediator is satisfied that the lay party is available by telephone for the provision of additional instructions.

17. **The capacity to settle** - Authority to settle is only part of it. The capacity to perform any settlement is also important. Presumably a private individual can and will make his own decisions but those decisions may have financial consequences – possibly the payment by him of money to another party. If this is a possibility then the mediator may care to broach the 'what if' question. Depending on the amount possibly due, how would the lay party fund it? In so doing the mediator will obviously wish to show such tact as not to alienate the lawyer by creating the impression the mediator has formed a view on the merits. The underlying concern is a real one. The party may come, because of the later mediation, to a realisation that a payment by him of £20,000 is, in the particular circumstances, a good result. Late in the day, the lawyer and his client may wish to avoid scrabbling around to find a loan. Better for the lawyer and his client to be real and to know before the mediation how the client will fund a possible settlement under the terms of which the client is called upon to dig deep into his pocket.
18. **The opening session - explaining the process to the parties** - Assuming the parties appear at the agreed place and time and that the anticipated rooms are available, the first matter a mediator will attend to is that of explaining the process to the parties. The explanation will include:
 - The process is entirely voluntary and the parties may leave at any time.
 - The process is non-binding.
 - The mediator's role is as a facilitator. He is not there to judge the parties.
 - The mediator is there to reality test the views of the parties. He may ask questions, which parties may feel shows he is taking sides but he is not.
 - The mediator is not there to answer questions such as how one party may fare in court if no agreement is reached.
 - Anything said to the mediator in the individual sessions remains private and confidential unless that party specifically authorises the mediator to disclose it to the other party.
 - If the parties reach a binding agreement, then any agreement will be incorporated into a 'Tomlin' Order, which will become a court order.
 - The procedure for running the mediation.
 - The timetable for the allotted time slot of three hours.
19. All mediators have their own style. During the opening joint session the mediator will explain the purpose of mediation and his role. He will emphasise that he is not there to advise the parties - they have their lawyers / advisors for that. He is not a magician. It is the parties' responsibility to work hard and to achieve a solution, which they find acceptable. The mediator may also remind the parties that few people leave a mediation entirely happy. Successful mediation often occurs when the parties are not unhappy and perhaps chastened by seeing the strength of the other side's case. The mediator may care to emphasise the importance of the parties remaining open-minded. He will allow each of them to make an opening statement, which because of the time constraints in court-based mediation must be short, possibly no more than 5 minutes. The mediator will seek the parties' active confirmation that they are there in good faith, wishing to negotiate seriously to achieve settlement.
20. **The timetable** - Sticking to a timetable is extremely important. Therefore, the mediator will inform the parties how he wishes to divide up the available time. The parties must be allowed time to vent their feelings before the process of negotiation occurs. One of the basic lessons of mediation is that it is not

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about the avoidance of dispute and conflict. Rather, it is about putting the conflict along well-defined channels so that people are able to express themselves as they see fit and, in essence, to get matters off their chests. Often it results in a degree of clarity if the parties are first able to vent their feelings. However, mediators will not indulge parties beyond a certain point. Some lawyers find it surprising when mediators alter their tone after about 2 hours in the County Court becoming firmer with the parties, indicating that the time to talk figures has now arrived.

21. On occasions, parties have spent so long cosseted with their lawyers, avoiding direct communication that some mediators choose to leave them in the room for 5-10 minutes or so to allow them to talk potentially to narrow the differences between them. Of course, no mediator wishes to see the parties engaged in a 'slanging' match. Therefore, the mediator may remain to ensure that the emotive level is reduced. For instance, if mutual recriminations begin to get out of hand, he may, rather than criticise the parties direct, indicate that he is beginning to lose the drift of what they are saying. At that juncture, this gives them the opportunity to take a deep breath, calm down and address their comments in a more rational manner.
22. **Meeting the parties** - Once the opening session is concluded, the mediator interviews the parties in their individual meeting rooms. The purpose is to permit the mediator to gain a clear understanding of the position of the parties. Alone with the mediator the parties may be more frank about their positions. For the mediator, this can be stressful. If the mediator antagonises the participants, with a misunderstanding of issues or, the wrong choice of language, he has an enormous hill to climb. He has to:
 - Exude confidence rather than arrogance.
 - Never display condescension.
 - Show an appropriate level of concern.
23. Showing concern can be dangerous. If, for instance, the mediator has displayed such apparent empathy with the claimant, that the claimant wrongly concludes that they mediator is endorsing the claimant's perceptions, the claimant may become even more intransigent in his demands.
24. In order to break the ice, the mediator may start by asking the particular party how they feel the joint session went. The mediator may also enquire whether the party feels that the correct information was placed 'on the table' during the opening session. Case exploration and the transition to a detailed discussion of negotiating options are tricky. If not done deftly or unless the claimant is particularly keen to place his requests immediately 'on the table' a party may resent the mediator's attempts to stop the party's flow and direct the conversation towards settlement. The techniques, which the mediator may deploy, include stating – *"I would like to explore in greater detail..."*, *"I do not fully follow..."* and *"... might benefit from further exploration"*. This is, in some senses, the soft approach. If that approach is exhausted the mediator may adopt a harder line - *"Of course, this mediation is running in tandem with the litigation. If you do not conclude the mediation today successfully, then you will be back in Court. As your lawyers have indicated (I am sure) to you the purpose of the Court is to test evidence. You make a number of statements in your position statement. Are you confident that you will be able to back these up at trial? Do you have the witnesses available?"*
25. Mediators use other techniques to direct a party towards the negotiating phase. A mediator may ask fairly nonchalantly what the position is on legal costs to date and how much will be spent taking the matter to trial. If the claimant suggests a figure, which objectively may be ludicrous as a basis of settlement, the mediator may deal with the matter in an oblique way - *"I am interested to hear that you feel that the case merits a payment of £.... What are your reasons for that? How do you feel the defendant will react?"* The claimant may well concede that the defendant will find the sum absurd, at which stage the mediator might ask the claimant why he thinks the defendant will take that view. The mediator may remind parties that settlement probably requires both claimant and defendant to move. The claimant must reduce his expectations whereas the defendant will need to be more generous in his assessment of the claimant's case.

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26. **Facilitating agreement** - Part of the mediator's role is to shuttle between the parties, imparting information and revealing one party's emotions to the other as instructed. In this, he will seek to use neutral language. For instance, he may say - "*I have had a frank discussion with the claimant. It appears that the claimant is upset or concerned about ...*" "*The claimant believes a settlement of £.... is justified. The claimant's reasons for this are...*" This gives the other party thinking time. The mediator might invite the defendant to consider if he might make something of the claimant's figure given time to reflect.
27. If the individual sessions and 'shuttle' diplomacy are failing to narrow the gap between the parties, the mediator may choose to convene a further joint session and read the parties the 'riot act'. The language can be quite surprising - "*I thought you came here in good faith to negotiate and we seem to be getting nowhere*". Some mediators are more cautious, emphasising that it is the parties' decision whether to move forward or not. "*If you have hit a blockage, then we can either adjourn the mediation to allow you all to think about things, or simply call it a day and let the judge decide.*" This may lead parties to consider the uncertainty litigation will mean if they abandon the process, which they control. The mediator may invite the parties to look again at their legal costs and risk assessment. If either party then announces that he has counsel's opinion, which offers him a 70% chance of success at trial, the mediator may ask how the party feels about the 30% risk factor?
28. Where agreement has proved impossible, most mediators still like to finish on a 'high' note. They may therefore review with the parties the progress, if any, which has been made, seeking to identify any bridgehead to further negotiations by congratulating the parties on the progress to date. To establish a sense of good will and the presence of something to build on is vital for continued negotiations. Sometimes the mediator will allow the dust to settle, simply stating that parties are free to continue negotiating but he will contact each of them by telephone during the next few days in order to ascertain what progress, if any, has been made and what further assistance, if any, he can offer.
29. But if the parties have 'cracked' it the final task is to copy the settlement agreement for each of the parties and their lawyers.

NON CONTENTIOUS LAWYERS AND MEDIATION

30. Contractual mediation clauses are now common –
 - 1 "*The Parties have entered into this Agreement in good faith and will do all that is within their power to avoid formalised disputes occurring between them. As such, the Parties value the principle of amicable negotiations. If it becomes reasonably apparent that amicable negotiations between the Parties will be insufficient to resolve any dispute and / or difference which arises between them, then the parties will actively consider use of an appropriate ADR technique to be administered by ---- . Such resort to ADR shall not limit or prejudice the rights of either of the Parties to commence or pursue any necessary or appropriate proceedings in any Court of competent jurisdiction.*
 - 2 *Except as otherwise provided for in this Agreement, any and all disputes arising under or in connection with Agreement shall be referred to the exclusive jurisdiction of the English Courts for resolution in accordance with English Law.*"
31. Mediation is an open-ended process. It does not necessarily result in settlement. By agreeing to engage in ADR the parties are doing no more than agreeing to negotiate. English law holds that an agreement to negotiate is unenforceable. Lord Denning MR stated in *Courtney and Fairburn Limited -v- Tolaini Brothers (Hotels) Limited* [1975] 1 WLR 297¹ that such agreements were "*too uncertain to have any binding force*". The House of Lords allowed no relaxation in *Walford and Others -v- Miles and Another* [1992] 2 AC 128. According to Lord Ackner:

"An agreement to negotiate has no legal content" and "... good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations."

¹ at pages 301-302

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32. A Commercial Court judgment of Mr Justice Colman J gave bite to ADR clauses.² Disputes arose between the parties under a global framework agreement. Clause 41.2 of their agreement required the parties to attempt ADR:

"The Parties shall attempt in good faith to resolve any dispute or claim arising out of or relating to this Agreement or any Local Services Agreement promptly through negotiations between the respective senior executives of the Parties who have authority to settle the same pursuant to Clause 40.

If the matter is not resolved through negotiation, the Parties shall attempt in good faith to resolve the dispute or claim through an Alternative Dispute Resolution (ADR) procedure as recommended to the Parties by the Centre for Dispute Resolution. However, an ADR procedure which is being followed shall not prevent any Party or Local Party from issuing proceedings"

33. First, the claimant argued the clause was unenforceable because it was uncertain. Second, the claimant asserted that the obligation to mediate was inconsistent with the right to litigate. The second point failed to impress the Judge:

"The dispute resolution structure to be found in clauses 40 and 41 of the GFA leaves no doubt that when the parties negotiated that agreement it was the mutual intention that litigation was to be resorted to as a last resort... The mere issue of proceedings is thus not inconsistent with the simultaneous conduct of an ADR procedure, such as mediation..."

34. ADR clauses could be binding:

"There is an obvious lack of certainty in a mere undertaking to negotiate a contract or settlement agreement, just as there is in an agreement to strive to settle a dispute amicably... That is because a court would have insufficient objective criteria to decide whether one or both parties were in compliance or breach of such a provision. No doubt, therefore, if in the present case the words of clause 41.2 had simply provided that the parties should "attempt in good faith to resolve the dispute or claim", that would not have been enforceable.

However, the clause went on to prescribe the means by which such attempt should be made, namely "through an (ADR) procedure as recommended to the parties by (CEDR)"... Thus, if one party simply fails to co-operate in the appointment of a mediator in accordance with CEDR's model procedure or to send documents to such mediator as is appointed or to attend upon the mediator when he has called for a first meeting, there will clearly be an ascertainable breach of the agreement in clause 41.2."

*"For the courts now to decline to enforce contractual references to ADR on the grounds of intrinsic uncertainty would be to fly in the face of public policy as expressed in the CPR and as reflected in the judgment of the Court of Appeal in *Dunnett v. Railtrack*..."*

USEFUL LINKS TO THE PROVIDERS

ADR Group

Website <http://www.adr.org/>

CEDR

Website <http://www.cedrsolve.com/>

Chartered Institute of Arbitrators

Website <http://www.arbitrators.org/>

Mediation UK

Website www.mediationuk.org.uk

LawWorks (pro bono)

Contact mediate@probonogroup.org.uk

The Environment Council

Website www.the-environment-council.org.uk

² *Cable & Wireless Plc –v- IBM United Kingdom Limited* [2002] All ER (D) 277

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Royal Institution of Chartered Surveyors

Website www.rics.org.uk

National Family Mediation

Website www.nfm.u-net.com

Solicitors Family Law Association

Website www.sfla.org.uk

UK College of Family Mediators

Website www.ukcfm.co.uk

American Arbitration Association

Website www.adr.org

The Canadian Foundation for Dispute Resolution

Website www.cfdrr.org

Centre de Mediation et d'Arbitrage de Paris

E-mail cmap@cmap.asso.fr

CPR Institute for Dispute Resolution

Website www.cpradr.org

JAMS Washington DC

Website www.jamsadr.com

International Chamber of Commerce (ICC)

Website www.iccwbo.org

Hong Kong Mediation Council

Website www.hkiac.org

LEADR

Website www.leadr.com.au

World Intellectual Property Organisation (WIPO)

Website <http://arbitrator.wipo.int>

Court Service

Website www.courtservice.gov.uk

Legal Services Commission

Website www.legalservices.gov.uk

Department for Constitutional Affairs

Website www.dca.gov.uk

National Council for Voluntary Organisations

Website www.ncvo-vol.org.uk