



## Mediation: is it ever reasonable to decline a request to mediate?

by Jeremy Glover, Partner

In light of recent court cases many might agree that the answer to this question is “no”. That said, Sir Alan Ward in the case of *Wright v Michael Wright Supplies Ltd*<sup>1</sup> commented that:

*“You may be able to drag the horse (a mule offers a better metaphor) to water, but you cannot force the wretched animal to drink if it stubbornly resists. I suppose you can make it run around the litigation course so vigorously that in a muck sweat it will find the mediation trough more friendly and desirable. But none of that provides the real answer. Perhaps, therefore, it is time to review the rule in *Halsey v Milton Keynes General NHS Trust* ... Perhaps some bold judge will accede to an invitation to rule on these questions so that the court can have another look at *Halsey* in the light of the past 10 years of developments in this field.”*

So as a starting point, it is important to remember that the courts cannot<sup>2</sup> compel a party to mediate. One of the reasons that the court does not have jurisdiction to order parties to mediate against their will is it would be a violation of Article 6 of the European Convention on Human Rights. However, there is no doubt that the current judicial climate is such that, whilst parties cannot be forced to settle their disputes by means of ADR, they are strongly encouraged to attempt to do so. This all flows from the case of *Halsey v Milton Keynes General NHS Trust*<sup>3</sup> where Dyson LJ said:

*“Parties sometimes need to be encouraged by the court to embark on an ADR. The need for such encouragement should diminish in time if the virtue of ADR in suitable cases is demonstrated even more convincingly than it has been thus far. The value and importance of ADR have been established within a remarkably short time. All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR. But we reiterate that the court’s role is to encourage, not to compel. The form of encouragement may be robust...”*

This pro-ADR climate is firmly reflected in the CPR, the Pre-action protocols, the TeCSA ADR Protocol, Lord Jackson’s ADR Guide and the 3rd Edition of the TCC Guide, which came into effect on 3 March 2014. Section 7 of the TCC Guide reinforces the importance of *Halsey* and places an obligation on legal representatives to ensure that their clients are fully aware of the benefits of ADR. It also makes express reference to arguments on costs associated with a party’s unreasonable refusal to mediate. Parties and those advising them have been warned. Section 7 of the TCC Guide notes that:

*“7.1.1 The court will provide encouragement to the parties to use alternative dispute resolution and will, whenever appropriate, facilitate the use of such a procedure...*

*In most cases, ADR takes the form of inter-party negotiations or a mediation conducted by a neutral mediator... The parties are advised to refer to the ADR Handbook.*

*7.1.3 Legal representatives in all TCC cases should ensure that their clients are fully aware of the benefits of ADR and that the use of ADR has been carefully considered prior to the first CMC.*

1. [2013] EWCA Civ 234  
2. Yet.  
3. [2004] EWCA Civ 576

- 7.2.1 *ADR may be appropriate before the proceedings have begun or at any subsequent stage. However the later ADR takes place, the more the costs which will have been incurred, often unnecessarily. The timing of ADR needs careful consideration.*
- 7.4.1 *Generally. At the end of the trial, there may be costs arguments on the basis that one or more parties unreasonably refused to take part in ADR. The court will determine such issues having regard to all the circumstances of the particular case. In Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576; [2004] 1 WLR, the Court of Appeal identified six factors that may be relevant to any such consideration:*
- (a) the nature of the dispute;*
  - (b) the merits of the case;*
  - (c) the extent to which settlement methods have been attempted;*
  - (d) whether costs of the ADR would be disproportionately high;*
  - (e) whether any delay in setting up and attending the ADR would have been prejudicial; and*
  - (f) whether the ADR had a reasonable prospect of success.*

Further parties should consider the merits of ADR at an early stage. Paragraph 5.4 of the Construction Pre Action Protocol makes it clear that parties should review whether “some form of alternative dispute resolution would be more suitable than litigation at the pre-action meeting.”

In *Burchell v Bullard*, [2005] EWCA Civ 576 Ward LJ said:

*“The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued. With court fees escalating it may be folly to do so. I draw attention, moreover, to para 5.4 of the pre-action protocol for construction and engineering disputes, which I doubt was at the forefront of the parties’ minds, it should preferably apprise 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 action 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.”*

However, parties should not assume that the courts will always accede to a request for a stay to the court timetable to enable there to be a mediation. In the case of *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd*<sup>4</sup>, it was suggested in this case, that a three or four month stay for ADR be built into the court timetable. As Mr Justice Coulson said, often at a CMC, one or more of the parties will seek a stay of the proceedings whilst they endeavour to resolve their disputes by way of mediation or some other form of ADR. There can either be an application for an immediate stay, or for a stay further down the line, sometimes after disclosure or after the exchange of witness statements or expert’s reports. Mr Justice Coulson further noted that:

*“The judges in the TCC set great store by ADR. Disputes like this one are time-consuming and therefore expensive to fight out in the traditional way. Even if the court adopts all the various techniques for reducing the trial to a minimum (such as ‘hot-tubbing’ the experts*

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4. [2014] EWHC 3546 (TCC)

*and carefully timetabling the cross-examination), trials are often unwieldy and cost-inefficient. Expert's fees often account for a large proportion of the costs. A professional mediator, engaged at the right time in the process and in the right spirit of cooperation by the parties, will often be able to resolve the most intractable case and save everyone a good deal of money, time and effort. The TCC lists in London would be impossible to operate without the good work of mediators and others involved in the ADR process."*

As a consequence, when setting directions, especially for the trial of a large TCC case, the court will allow a reasonable period between each step in the process, so that the parties not only have sufficient time to take that step, but also have an opportunity to reflect and consider their positions before incurring the next tranche of costs. Such a period is usually long enough, in all but the most complex cases, to allow the parties to engage in ADR between those two steps, if they are agreed that this is a sensible course. The Judge explained that the purpose of this is to facilitate the ADR process at each stage of the litigation, whilst also keeping at the forefront of its consideration the requirement to put in place a cost-efficient and sensible timetable to lead up to a fixed trial date.

This means that it is usually inappropriate for the court at a CMC to build in some sort of special "window" of three or four months in order that the court proceedings can be put on hold whilst the parties engage in ADR. Such a course inevitably delays the trial date by the period of the "window". That delay will then inevitably increase the costs of the case.

In the case here, there was a dispute about when the "window" should be. That made the suggestion less appropriate. The claimants say they need disclosure before they can engage in a meaningful mediation. As assignees, their position was readily understandable as they will not have seen, let alone have been party to, much of the contemporaneous documentation. As the Judge noted:

*"Not only is it inappropriate for the court to decide a dispute as to precisely when the parties should mediate (it is a consensual process so that must always be a matter for the parties), but it is wrong in principle for the court to fix a 'window' for ADR at a time when at least one significant party – in this case the claimants – positively does not want it."*

The typical approach of the TCC according to Mr Justice Coulson at least in large cases is this:

*"A sensible timetable for trial that allows the parties to take part in ADR along the way is a sensible case management tool. A stay or a fixed 'window' is likely to lead to delay, extra cost and uncertainty, and should not ordinarily be ordered. The same applies, a fortiori, if the stay or the 'window' proposed is opposed by a significant party to the litigation. It has to be recognised that the requirements of ADR, on the one hand, and sensible case management to lead up to a prompt trial date, on the other, can sometimes be at odds: what is appropriate for one process may not be appropriate for the other. At a CMC, I take the view that, to the extent that there is such a clash, sensible case management must come first.*

*As I have already stressed, none of this is designed to undermine the importance of ADR, or the adverse costs consequences that may be visited on those parties who do not engage in that process... It is simply to emphasise that parties must take all proper steps to settle the litigation whilst at the same time preparing the case for trial. It is not an either/or option."*

Three of the more compelling reasons why parties are well advised to consider mediation are:

- (i) It might work;
- (ii) A refusal to mediate may well carry a costs penalty; and
- (iii) Achieving a settlement through a private and confidential process such as ADR would avoid the (potentially adverse) publicity of a trial.

### When will the courts apply sanctions? Recent case law

It is clear from any review of the court decisions that followed *Halsey* that the courts encourage ADR and regularly impose sanctions. In *Rolf v De Guerin* [2011] EWCA Civ 78, a small building dispute, which Rix LJ characterised as a “*sad case about lost opportunities for mediation*”, it appeared that Mr De Guerin wanted his “*day in court*”. This in the view of LJ Rix was not “*an adequate response to a proper judicial concern that parties should respond reasonably to offers to mediate or settle and that their conduct in this respect can be taken into account in awarding costs*”.

Parties who express an unwillingness to mediate must at least provide reasons as to why at the time. A court will not look favourably on reasons raised for the first time, to justify a failure to mediate, when the question of costs comes to be considered. In *SPGF II SA v OMFS Co & Anr*<sup>5</sup>. Mr Recorder Furst QC noted that:

*“the court should be wary of arguments only raised in retrospect as why a party refused to mediate or as to why it cannot be demonstrated that a mediation would have had a reasonable prospect of success. First such assertions are easy to put forward and difficult to prove or disprove but in this case unsupported by evidence. Secondly, and in any event, it is clear that the courts wish to encourage mediation and whilst there may be legitimate difficulties in mediating or successfully mediating these can only be overcome if those difficulties are addressed at the time. It would seem to me consistent with the policy which encourages mediation by depriving a successful party of its costs in appropriate circumstances that it should also deprive such a party of costs where there are real obstacles to mediation which might reasonably be overcome but are not addressed because that party does not raise them at the time. I have little doubt that that is the position here, namely that any such inhibitions to mediation could have been overcome at the time.”*

Silence in the face of a request to mediate will almost certainly be considered to be both a refusal and an unreasonable refusal. Briggs LJ provided fresh judicial support for the *Halsey* decision again in the case of *PGF II SA v OMFS Co & Anr*<sup>6</sup> noting that:

*“In the nine and a half years which have elapsed since the decision in the Halsey case, much has occurred to underline and confirm the wisdom of that conclusion, reached at a time when mediation in particular had a track record only half as long as it has now. . .*

*. . . this case sends out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR, even if they have reasons which might justify a refusal, or the undertaking of some other form of ADR, or ADR at some other time in the litigation. To allow the present appeal would, as it seems to me, blunt that message. The court’s task in encouraging the more proportionate conduct of civil litigation is so important in current economic circumstances that it is appropriate to emphasise that message by a sanction which, even if a little more vigorous than I would have preferred, nonetheless operates pour encourager les autres.”*

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5. [2012] EWHC 83 (TCC)

6. This time, on appeal. [2013] EWCA Civ 1537

What matters is the actual position at the time a request to mediate was refused. Was that refusal reasonable in all the circumstances then existing, not on the basis of what actually happened when a dispute came to court. In *Corby Group Litigation v Corby District Council*<sup>7</sup> Mr Justice Akenhead said this:

*"Hindsight shows that CBC [the council] was wrong but one must judge the decision to refuse ADR at the time that it was under consideration. CBC had expert evidence which supported its stance on every material aspect of the Group Litigation issues and the Claimants were adopting what I have described as a "scatter gun approach". It was not unreasonable to form the view that mediation would not have produced a settlement"*

### Recent developments

There have been two recent cases concerning a successful party's unreasonable refusal to engage in mediation.

*Phillip Garritt-Critchley v Andrew Ronnan and Solarpower PV Ltd*<sup>8</sup>

In this case, the claimant successfully applied for its costs to be paid on an indemnity basis rather than a standard basis, due to the defendants' unreasonable failure to mediate. The case had gone to a 4-day trial, but settled before the judgment was handed down. When asked in correspondence why they were not willing to mediate, the defendants' solicitors had said that:

*"Both we and our clients are well aware of the penalties the court might seek to impose if we are unreasonably found to refuse mediation, but we are confident that in a matter in which our clients are extremely confident of their position and do not consider there is any real prospect that your client will succeed, the rejection is entirely reasonable."*

In particular HHJ Waksman QC made a number of key findings, including the following:

- (i) This was an action of a typical kind where the allegation was whether a binding agreement had been made or not. It was a very fact-intensive and evidence-intensive exercise where the court would have to judge the credibility of the witnesses and look at the importance of contemporaneous documents. Accordingly, the defendants could in no way be certain that their position would be accepted by the court and this was, therefore, a case which was suitable for mediation.
- (ii) This was not an all or nothing case on quantum where the parties would have to agree that if liability was established the obvious amount of damages was £X.
- (iii) This was a case where there was ample room for manoeuvre within the range of possible quantum scenarios, thereby making it ideal for mediation.
- (iv) The defendants rejected mediation on the basis of there being no middle ground on liability. This was a binary issue and it was often the case that there was no middle ground on liability. The Judge decided that *"to consider that mediation is not worth it because the sides are opposed on a binary issue, I'm afraid seems to me to be misconceived."*
- (v) The defendants' statement that they were confident that no agreement will ever be reached was rejected by the Judge, who stated: *"Given the nature of this dispute, it does not seem to me to be realistic for someone... to say that all the odds are so stacked in his favour that there is really no conceivable point in talking about settlement. Indeed if that had been his view then it is surprising that no application for summary judgment was ever made, which it was not."*

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7. [2009] EWHC 2109 (TCC)

8. [2014] EWHC 1774 (Ch)

- (vi) The defendants' position that they had "extreme confidence" was not a reasonable position to take and nor was it a satisfactory reason to reject mediation.
- (vii) The defendants maintained that there was considerable dislike and mistrust between the parties and that this was highly relevant to the decision not to mediate. The Judge commented that: *"it is precisely where there may be distrust or emotion between the parties, which it might be thought is pushing them down the road to an expensive trial, where the skills of a mediator come in most usefully. They 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."*
- (viii) This was not a case where there had been other settlement attempts made so that the party resisting mediation could say: *"Well we've had very lengthy and detailed round table discussions, they have not gone anywhere and it's not sensible to spend any more money on the case."*
- (ix) In the Judge's view: *"Parties don't know whether in truth they are too far apart unless they sit down and explore settlement. If they are irreconcilably too far apart, then the mediator will say as much within the first hour of mediation. That happens very rarely in my experience."*

#### ***Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C41) Ltd<sup>9</sup>***

In Part 8 proceedings Mr Justice Ramsey ruled in favour of BAE. In relation to costs NGM accepted the principle that BAE was entitled to its costs to be assessed on a standard basis if not agreed, but argued that those costs should be reduced by 50% by reason of BAE's unreasonable refusal to mediate the dispute. Following the Halsey case, courts can (and do) penalise parties who are considered to have unreasonably refused a request to mediate.

NGM said that because of their long-standing and continuing commercial relationship, NGM approached BAE on several occasions at management level to try and resolve the dispute amicably but those efforts were "spurned". NGM's claim was about money and that whilst it was necessary to construe two agreements, the issue of interpretation did not alter the financial basis for the claim which made the case suitable for mediation.

BAE was convinced that if a mediation had taken place, the case would not have settled. The in-house lawyer commented that if he had thought there had been a realistic possibility of there being a settlement which would have plainly been in the legal and commercial interests of BAE, he would have strongly recommended it. BAE said they rejected mediation for proper and sensible reasons. The dispute was about contractual interpretation so that the outcome was "all or nothing" in that if NGM were right it would recover in excess of £3 million, but if it were wrong it would receive nothing. As a result of legal advice received from solicitors and leading counsel, BAE was confident of its legal position and was aware that NGM was a successful company which could afford to litigate and could afford to lose and that this meant that it had no reason to settle the case for financial reasons.

Each time NGM contacted BAE suggesting mediation, an assessment was made. On each occasion, BAE concluded that mediation did not have a prospect of leading to a resolution of the dispute. BAE was not prepared to countenance paying a sum of money on the basis of the commercial relationship which, if anything, tended the other way. If BAE paid money on what it considered to be an unmeritorious claim, this might lead to

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9. [2014] EWHC [2955] (TCC)

other unmeritorious claims and may have wrongly provided NGM with the view that BAE was not prepared to defend itself in cases where it had strong grounds for doing so. BAE thought that the mediation had been suggested in order to put BAE under pressure to make a settlement payment with respect to a claim which BAE considered had no real prospect of success. BAE therefore considered it unreasonable to expend resources on a mediation. Mr Justice Ramsey considered that this was a case like many others, where points of construction were major issues at the centre of a financial claim. In all such claims a skilled mediator can assist the parties in resolving the dispute by finding a solution to disputes which each party would regard as incapable of being settled and would be unable to settle without such assistance.

In terms of the merits, this was a strong case by BAE. It was not a borderline case or one which was suitable for summary judgment. It was a case where BAE reasonably considered that it had a strong case. This provided some if limited justification for not mediating. This was not a case where there was an offer to mediate and no response or, where the parties did not have some communication with a view to settlement. There were for example, two occasions when attempts to settle were made and an exchange of “without prejudice save as to costs” offers. BAE offered to settle on the basis of no payment, with each party bearing their own costs. This was an offer which, if it had been accepted by NGM, would have put NGM in a better position than it now found itself in, in terms of the outcome of the hearing. NGM has received no payment and accepts that it will have to pay BAE 50% of its costs. This factor was neutral or marginally in BAE’s favour in its impact when assessing the refusal to mediate.

The costs of mediation may well have been of the order of £40k in comparison with the overall costs incurred by both parties which are said to total about £500k. The claim was for some £3m. The costs of ADR cannot be said to be disproportionately high. There were two parties who had a commercial relationship. One party, NGM, clearly felt aggrieved, while the other party, BAE, clearly felt that it had the right to act as it did. Therefore this was just the kind of situation where a mediator could assist the parties in resolving the dispute and avoiding wasted management time and soured relationships even if, because they were large commercial entities, the effect would not be so long-lasting.

The Judge therefore concluded that this was a case, the nature of which, was susceptible to mediation and where mediation had reasonable prospects of success. However, BAE reasonably considered that it had a strong case. On that basis was it unreasonable for BAE to reject NGM’s offer to mediate? The Judge concluded that it was. Whilst BAE’s view of their claim provided some justification for not mediating, other factors showed that it was unreasonable for BAE not to mediate the dispute. Where a party to a dispute, which has reasonable prospects of being successfully resolved by mediation, rejects mediation on grounds which are not strong enough to justify not mediating, then that conduct will generally be unreasonable. That was the position here.

However, there was another factor in play here – BAE’s offer to settle. NGM did not accept this. Consequently it was not appropriate to penalise BAE in costs for its failure to mediate.

#### **Is it ever reasonable to refer an offer to mediate?**

So if BAE were held to have unreasonably refused an offer to mediate, is it ever reasonable to refuse? That is a good question. Here’s a (very rare) example.

*Mason and others v Mills & Reeve (A Firm)*<sup>10</sup>

Here, one of the issues that the Court of Appeal had to consider was an appeal by the successful party against the decision to impose a costs penalty for having refused to participate in a mediation. This refusal was despite the fact that proposals for ADR had not just been made by the claimants but also the trial judge. The position of the defendant was that the claim had no merit, a view that had been vindicated at the trial. The view, however, of the trial judge was that claimants' prospects of success "was at variance with the result in the judgment in a number of respects." He in particular noted that a successful mediation would have avoided the risk of "collateral reputational damage" to the defendant and also that mediation would have allowed both parties to gain a better understanding of the weaknesses of their cases something which might have encouraged a settlement. This led the trial judge to hold that:

*"It seems to me that the Defendant's attitude in simply refusing even to contemplate the possibility of mediation on the grounds that the claim was utterly hopeless was an unreasonable position to take. Accordingly, I consider that the Defendant's attitude to mediation is a factor that should be brought into account in making an overall assessment of what costs order should be made."*

The Court of Appeal did not agree with this approach. Davis LJ stressed that the trial Judge had found that the defendant had been "vindicated" in its assessment of the strength of the claimants' case which meant that its position, maintained throughout, had been shown to be justified. Further the Judge did not explain what "weaknesses" in the respective cases would have been revealed in a mediation. It was also not said that if identified, their revelation could have led to a mediated settlement. In addition Davis LJ did not understand why avoidance of "collateral reputational damage" to the defendant should have been considered a relevant factor, counting against the defendant. A settled professional negligence claim was capable, in some instances, of leaving behind reputational damage. Some professional defendants might, entirely reasonably, wish publicly to vindicate themselves at trial in respect of claims which will have been publicly aired by the commencement of proceedings. The Judge noted:

*"It would be unfortunate if claimants in cases of this kind could be encouraged to think that such a consideration as identified by the judge could enhance their bargaining position."*

Davis LJ also had concerns in respect of the trial Judge's assessment that the possibility of a mediated settlement was "not unrealistic". At all stages the parties "in reality were a hundred miles apart." The claimants had sought £750k and costs. The defendant's best offer had never been more than a "drop hands" approach. It was therefore difficult to see how a mediation could have had reasonable prospects of success. Further, unlike many cases, nothing changed to necessitate a re-evaluation on the question of liability. Davis LJ concluded that:

*"A reasonable refusal to mediate does not become unreasonable simply by being steadfastly, and for cause, maintained."*

Davis LJ here noted that the Court of Appeal here was concerned to make clear that parties were not to be compelled to mediate, saying that ADR was not appropriate for every case. The Court of Appeal in Halsey also identified the situation where a party reasonably believes that he has a strong case as being the type of situation where ADR might not be appropriate, otherwise there was scope for a claimant to use the threat of costs sanctions

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10. [2012] EWCA Civ 498

to extract a settlement even where the claim is without merit. This was the situation here. The unsuccessful party (the claimants) was not therefore able to show that the successful party (the defendant) had acted unreasonably in refusing to agree to mediate. This led the Court of Appeal to reassess the original costs order, that the claimants pay 50% of the defendant's costs. This reassessment could only be done with what was described as a broad brush which led the Court of Appeal to increase the percentage of costs awarded to the defendant to 60%.

### Practical tips when faced with an invitation to mediate

Whilst it should go without saying that you should never ignore an invitation to mediate, there are a number of points to consider:

- (i) Always respond promptly to an offer to mediate;
- (ii) If you are prepared to mediate, then be proactive. Confirm dates on which you are available and make proposals as to the choice of mediator;
- (iii) If there are any further documents or further information you require prior to participating in any mediation, request these from the other party without delay.
- (iv) If there are any other obstacles to mediation that might exist, say, if one of the parties is based abroad, try and arrive at a practical solution through correspondence. Keep a record of events.
- (v) If you believe you have reasonable grounds for refusing to participate in a suggested mediation, do not sit on the invitation to mediate as silence is no longer acceptable. Respond promptly and provide full reasons as to why you are declining to participate, having regard to the Halsey criteria mentioned above.
- (vi) Do not wait until you are facing a costs sanction to justify your decision not to mediate: it will be too late.
- (vii) A refusal to mediate might be reasonable if (a) the Pre-Action Protocol has not been complied with; (b) a form of ADR other than mediation would be more suitable for the dispute (such as early neutral evaluation); or (c) if mediation would be too expensive for one of the parties, in which case the party proposing mediation could offer to bear the mediator's fees in full.
- (viii) If you decline to mediate, you should review the reasons for your refusal on an on-going basis to ensure they remain reasonable.
- (ix) Never close off the possibility of mediation for all time as your circumstances, and / or the circumstances of the other party, may change in the future, in which case mediation may be worthwhile at a later date.

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