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Mediation – The framework in England and Wales

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Introduction

On 26 April 1999, the conduct of civil litigation was significantly changed with the introduction of the Civil Procedure Rules 1998 (CPR).

The CPR followed an enquiry into the civil justice system chaired by Lord Woolf. His report 'Access to Justice' made a number of proposals and recommendations, and many of these were implemented by the CPR.

The CPR are aimed at fairness, speed and economy. They are designed to encourage parties to be more open and co-operative, and to settle their disputes.

Key Provisions of the CPR

The 'Overriding Objective' of the CPR is to enable courts to deal with cases justly.

The Courts must further the Overriding Objective by actively managing cases and this includes encouraging parties to use alternative dispute resolution ('ADR') procedures if the court considers that appropriate, and facilitating the use of such

procedures. A number of tools are available to this end, two of which are pre-action protocols and costs sanctions.

Pre-action protocols

Pre-action protocols exist in a number of specific areas e.g. professional negligence, construction & engineering, defamation. One of their purposes is *'to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings'* or, as the professional negligence protocol puts it, *to 'establish a framework in which there is an early exchange of information so that the claim can be fully investigated and, if possible, resolved without the need for litigation.'* The professional negligence protocol goes on to deal with what is to happen if mediation is suggested by a party. It clearly states however that no *'party can or should be forced to mediate or enter into any other form of ADR.'* Indeed this has been made clear in an important Court of Appeal decision referred to further below, *Halsey v Milton Keynes NHS Trust*, given on 11 May 2004.

Even where a pre-action protocol does not apply, the Practice Direction to the protocols provides that *'the court will expect the parties, in accordance with the overriding objective ……to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings'.*

The Practice Direction goes on to say that *'Parties to a potential dispute should follow a reasonable procedure, suitable to their particular circumstances, which is intended to avoid litigation. The procedure should not be regarded as a prelude to inevitable litigation. It should normally include …… the parties conducting genuine and reasonable negotiations with a view to settling the claim economically and without court proceedings.'*

Costs Sanctions

The CPR give the court wide discretion when it comes to apportionment of costs at the end of an action. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. However, the court is able to make a different order having regard to all the circumstances, including the conduct of the parties. 'Conduct' includes conduct before, as well as during the proceedings and in particular the extent to which the parties have followed any relevant pre-action protocol.

The exercise of the court's discretion on costs has been the subject of much debate over the past few years. The debate was fuelled in large part by the decision in *Dunnett v Railtrack [2002] 1 WLR 2434*. In *Dunnett*, the court exercised its discretion so as to deprive a successful party of its costs because of its unreasonable refusal to mediate following a suggestion of mediation by the court. There are a number of other notable decisions in this field but the most important is *Halsey v Milton Keynes NHS Trust [2004] EWCA* referred to earlier. In *Halsey*, the Court of Appeal, whilst refusing to exercise its discretion to penalise a party who had refused to mediate, laid down some guidance as to how the issue of costs or, more importantly, costs sanctions should be approached.

The Court of Appeal stated that most cases are suitable for mediation and that lawyers conducting litigation should routinely consider with their clients whether disputes are suitable for ADR. Courts should <u>encourage but not compel</u> parties to mediate their disputes. Approval was given to various forms of ADR Order made by judges which encourage parties to think very carefully about mediation. During mediation, parties can take whatever position they decide is appropriate and the court will not enquire as to why mediation failed. The veil of confidentiality remains sacrosanct. Subsequent judgments have served to emphasise the importance of maintaining, except in very exceptional circumstances, the privileged (without prejudice) nature of communications made during settlement negotiations, whether

during a mediation or otherwise (*Reed Executive v Reed Business Information [2004] EWCA Civ 887* and *Venture Investment v Hall [2005] EWHC 1227*).

The Court of Appeal (in *Halsey*) went on to make clear that a decision by a court to deprive a successful party of its costs is an exception to the general rule that 'costs follow the event'. Importantly, the Court of Appeal stated that the burden is on the unsuccessful party to show why a court should make a different order. This burden will only be satisfied if the successful party acted unreasonably in refusing to agree to ADR. A party who refuses to consider whether ADR is appropriate or who ignores an ADR Order made by the court is very much at risk on costs. If there is no ADR order the court should look at a number of factors. The Court of Appeal provided a non-exhaustive list which included, for instance, the extent to which other settlement methods have been attempted, whether costs of an ADR procedure would be disproportionately high and whether ADR had a reasonable prospect of success. This last factor should not in any way be regarded as a 'let-out'. A court's starting point should be that most cases are suitable for mediation, as indeed they are.

Since *Halsey*, other judges have emphasised the importance of mediation in the dispute resolution landscape. In *Burchell v Bullard [2005] EWCA Civ 358*, Burchell, a builder, sued the owners of a house on which he had worked for unpaid fees and the owners counterclaimed for loss arsing out of alleged defects. The builder's lawyers suggested ADR. The response was that it was all too complex for mediation to be appropriate. At trial, the builder recovered most of what he had claimed but the owners of the house recovered only a fraction of their counterclaim. Inevitably there was an argument on costs which ended up in the Court of Appeal. Ward LJ was of the view that the reason for refusing ADR given by the owners of the house (that the matter was too complex) was '*plain nonsense*'. He went to say that '*The court has given its stamp of approval to mediation, and it is*

now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate.'

Mention should also be made of Court annexed mediation schemes.

Court annexed schemes

Court annexed schemes are available in a number of county courts and in the Court of Appeal. Judges, if they consider it appropriate, will encourage parties to a dispute to try mediation under an appropriate court scheme.

A pilot scheme was established in the Central London County Court enabling the court (pursuant to a Practice Direction), to issue a 'notice of referral to mediation' requiring parties to certain types of dispute to attend a mediation or give reasons for not doing so. Despite an objection to mediation from a party, the court could still order that a mediation proceeds. The scheme ran from 1 April 2004 to 31 March 2005. Cases are no longer referred under the scheme although there are still cases 'in the system'. No doubt there will be much analysis of the results.

Recently there have been a number of Small Claims pilot mediation schemes launched. Indeed, the government has made available a 'Toolkit for Court Mediation Schemes' to assist courts with the introduction of mediation schemes or simply to become more aware of mediation and its benefits.

Also, the government recently launched a 'National Mediation Helpline' as part of its commitment to make available mediation to as wide an audience as possible.

Finally, the government recently published a paper on the effectiveness of its commitment to itself using ADR contained in the government's 'pledge' (to use ADR where appropriate)

announced back in March 2001. The results show a similar level of ADR activity to that illustrated by the government's previous report and thus it appears that the government is at least maintaining its own level of commitment to ADR.

Summary

There is no specific statute dealing with mediation. However, English civil procedure encourages and more and more judges are encouraging parties in dispute to try and negotiate a settlement rather than proceed to trial. Indeed judges may well penalise in costs a party who unreasonably ignores a proposal of mediation made by an opponent, or who ignores an ADR Order of the court.

Nor is there any specific regulatory framework for mediators. Most mediators undergo some form of training but it is not compulsory and anyone can hang up a shingle and call themselves a mediator (although very few if any mediators are without some form of training).

The mediation sector in the UK is still evolving. A number of factors may influence its development. The Civil Mediation Council, a body established in 2003 to represent the common interests of mediation providers and mediators in promoting mediation will no doubt play a part, as will individual mediation service providers, judges and the government. The E.U. Directive on mediation may also have some influence but the single biggest factor is likely to be simple market forces, because there is no doubt that mediation, being the effective dispute resolution tool that it is, is now what businesses want to hear about.

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