

# trustmediation

~ not-for-profit dispute resolution ~

Tel: 0207 353 3237 Fax: 0207 583 9521

www.trustmediation.org.uk info@trustmediation.org.uk



Trust Mediation Limited  
218 Strand  
London  
WC2R 1AT

## Horses to water

**Where the fear of cost sanctions has failed, the judiciary's consistent encouragement will bring more litigants to mediation, says Tim Wallis**

**[This is the text of an article published by the Solicitors Journal, 28 August 2008]**

A review of recent developments in the field of ADR and Civil and Commercial Mediation may not give us a crystal ball to see the future, but the pattern of change indicates quite clearly the direction the courts are likely to take.

Two recent cases tell us something of what is happening in the courts. In *Bradford & Anor v Keith James & Ors* [2008] EWCA Civ 837 an acrimonious boundary dispute over a 3.7 metre strip of land led a county court trial, with a payment on account of costs of £20,000, and then, almost inevitably, a trip to the Court of Appeal. A familiar tale. Mummery LJ commented that too many of these disputes reach the courts and added "Greater use should be made of the services of local mediators, who have specialist legal and surveying skills and are experienced in alternative dispute resolution. An attempt at mediation should be made right at the beginning of the dispute and certainly well before things turn nasty and become expensive." Some people might agree with him. Other might respond with the remark that, although you can lead a horse to water, you cannot make it drink.

In *Earl of Malmesbury v Strutt & Parker* [2008] EWHC 424 (QB) the parties did mediate. This was also a property dispute, it being alleged that surveyors had been negligent in connection with a leasehold airport car park. The mediation did not succeed and at the trial damages were awarded in the sum of £915,139. This was somewhat less than the £87.8 million claimed, there having been a pivotal issue over how damages should be assessed: loss of capital value or loss of income. The court also penalised the claimant in costs because it had taken an unreasonable position in the mediation. (The parties, perhaps surprisingly, had waived their entitlement to confidentiality in relation to the mediation enabling the court to review the conduct of the mediation.) The reasoning of the court was that a party who acted unreasonably during mediation was in the same position as a party who unreasonably refused to mediate, and this could be taken account of when dealing with costs (following *Halsey v Milton Keynes General NHS Trust* (2004) EWCA Civ 576, (2004) 1 WLR 3002).

A reasonable deduction from these cases might be that in future we are likely to see more of the same: judicial laments at the conclusion of trials over the failure of parties to use ADR, and costs sanctions being meted out for parties unreasonably refusing to agree to mediation or, where confidentiality is waived, being unreasonable during a mediation. There are, however, further matters to consider, before we can get the full picture and look into the future.

Senior members of the judiciary, for example Ward LJ in *Egan v Motor Services (Bath) Ltd* [2007] EWCA Civ 1002, have been exhorting the greater use of mediation:

*"Mediation is a perfectly proper adjunct to litigation. The skills are now well developed. The results are astonishingly good. Try it more often."*

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England and Wales  
Chairman Sir Henry Brooke

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Nevertheless, it seems that, in practice, many practitioners have taken the view, following Halsey, that although they were under a duty to consider ADR it was entirely optional in terms of whether it was necessary to actually use an ADR process. Anyone not wishing to be deflected from the path to trial could rely on the following statements by Dyson LJ:

*"It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court. "*

*"...it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6 (of the European Convention on Human Rights)".*

However, the judgment of the Court of Appeal in Halsey, and the Article 6 point in particular, has been controversial. Rather unusually, the matter has been addressed in some detail in speeches made out of court by Lightman J, Lord Phillips of Worth Matravers, Lord Chief Justice and Sir Anthony Clarke, Master of the Rolls . All three judges appear to be unanimous in the view that the approach to mediation in other jurisdictions demonstrates that compulsory mediation does not of itself violate Article 6 or similar human rights legislation. Further, Sir Anthony Clarke felt (subject to the issue being fully argued) "there may well be grounds for suggesting that Halsey was wrong on the Article 6 point." He went on to say that "far too many people know far too little about mediation." and spoke of the need for ADR become an integral part of our litigation culture. Such a culture change did not, he said, need amendments to be made to the CPR:

*"It seems to me that the court has sufficient powers at present routinely to direct the parties to take part in a mediation process or attend a mediation hearing during the course of the pre-trial stage of any proceedings."*

Pausing here, one could, again, deduce that we are faced with compulsory mediation and cost sanctions. The language used by the Master of the Rolls, however, is a little different to this. First, he expressly disapproved of satellite litigation about refusal to mediate and costs sanctions, save in exceptional circumstances. (He intimated a similar view, with reference to the Malmesbury case, about cost sanctions for unreasonable conduct at mediation.) Secondly, he argued that the route to culture change is active case management, in accordance with the overriding objective. We can, as he put it "render mediation part of the normal pre-trial case management process" and he emphasised that parties have a duty to assist the court in furthering the overriding objective by taking proper part in the mediation process.

So, although the Master of the Rolls speaks of the court's power to direct the parties to mediate and impose cost sanctions, he appears to be saying that active case management should, ordinarily, make this unnecessary. By and large, court orders are complied with without sanctions having to be applied. Summing up he said

*"a horse (even a very obstinate horse) is more likely to drink if taken to water. We should be doing more to encourage (and perhaps direct) the horse to go to the trough. The more horses approach the trough the more will drink from it."*

Turning from policy statements to the detail of procedure and court forms, it does appear that judges are now likely to have more prompts to consider ADR when carrying out their case management functions. For example, the Allocation

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Questionnaire (Form N150) was amended earlier this year and now asks parties if they would like the court to arrange a mediation appointment through the National Mediation Helpline ([www.nationalmediationhelpline.co.uk](http://www.nationalmediationhelpline.co.uk)). It also asks about the steps that have been taken regarding settlement and requires the parties to state (if such is the case) why they consider it inappropriate to try and settle the claim at this stage. Answering these questions involves “nailing the colours to the mast” and it is clear that the court is intended to look at this information when dealing with costs. HM Courts Service (HMCS) is currently considering similar amendments to the Claim Form and the Defence Form. They are also, with the Civil Justice Council and the Civil Mediation Council, developing a form of mediation protocol to promote mediation.

Many judges who regularly deal with case management will also be aware of the HMCS small claims mediation service which has this year been extended throughout the jurisdiction. This mediation service will not impact on the work of most solicitors, but the judiciary will be aware that the in-court mediators have now settled about 5,000 claims, including 2,527 between March 2007 and March 2008, and have a high user satisfaction rate.

There is another factor to be borne in mind, when considering the extent to which ADR and mediation will be used in the future in civil and commercial cases, and that is how ADR is being used in other fields. We can look at our own jurisdiction and the increasing use of mediation for small claims, in family mediation, and in employment disputes, or abroad, where we can see mediation being used, for example, in international reinsurance disputes and in attempting to deal with the political situation in Zimbabwe. It is becoming increasingly clear to the public, the judiciary and practitioners that ADR is being used more widely because it is a settlement process that is often successful. This view was held by the European Commission which recently said, before passing the EU Mediation Directive :

*“The Commission believes that mediation holds an untapped potential as a dispute resolution mechanism and as a means of providing access to justice for individuals and businesses.”*

The new Directive promotes the use of mediation and in particular for resolving cross border disputes. It has to be implemented by 2011.

Another reminder of the international development of ADR is the recent Consultation Paper on ADR published by the Irish Law Reform Commission. This paper is a most extensive piece of work which follows a comprehensive review of ADR in many countries across the fields of civil justice, planning, employment, family and community disputes. The Commission makes some imaginative and “joined-up” recommendations, all based on the foundation stone of ADR being put on a statutory footing. (Incidentally, these comprehensive recommendations contrast with the rather more piecemeal approach adopted by different government departments here.)

The Commission, like the Master of the Rolls, concluded that ADR and mediation “must be seen as integral part of any modern civil justice system.”

Taking all of these developments together it can be seen that the pressure for a change of litigation culture initiated by the CPR in 1999 continues to exist. Most cases do settle by negotiation, whether by letter, phone, direct talks or at joint settlement meeting. Many others are settled by Part 36 procedures. Nevertheless, a considerable number still reach trial or settle at a late stage and it is a fact that the take up of ADR has been

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relatively low, particularly in some sectors. The lead from the Master of the Rolls is that the CPR has more than sufficient levers, without any significant use of compulsory mediation or cost sanctions, to cause this to change.

Whether the horses are English, Welsh or Irish, one suspects that many more of them will be getting closer to that water trough in the near future.

Tim Wallis, mediator and solicitor, is chair of the ADR Committee of the Civil Justice Council, a director of Trust Mediation Limited (a specialist personal injury mediation provider), a director of Expedite Resolution Limited (which specialises in mediation in the insurance and commercial sectors) and a member of the Civil Mediation Council.

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[http://www.judiciary.gov.uk/docs/speeches/berwins\\_mediation.pdf](http://www.judiciary.gov.uk/docs/speeches/berwins_mediation.pdf) Lightman J

[http://www.judiciary.gov.uk/docs/speeches/lcj\\_adr\\_india\\_290308.pdf](http://www.judiciary.gov.uk/docs/speeches/lcj_adr_india_290308.pdf) Lord Phillips CJ

[http://www.judiciary.gov.uk/docs/speeches/mr\\_apil\\_ann\\_conf\\_2008.pdf](http://www.judiciary.gov.uk/docs/speeches/mr_apil_ann_conf_2008.pdf) Sir Anthony Clarke

[http://www.judiciary.gov.uk/docs/speeches/mr\\_mediation\\_conference\\_may08.pdf](http://www.judiciary.gov.uk/docs/speeches/mr_mediation_conference_may08.pdf) Sir Anthony Clarke MR)

Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF>

See <http://www.lawreform.ie/>