Compelling Parties to Mediate? Testing the Limits of 'Encouragement'

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Changing Perceptions

INTRODUCTION

Judgment was handed down last week in the case of *Mills & Reeve Trust Corp v Martin and ors* [2023] EWHC654, in which the Chancery Division revisited the vexed question of whether a court can force unwilling parties to take part in a mediation.

This note reviews the decision and looks more widely at the court's role in relation to ADR.

ENCOURAGING THE PARTIES

"(E)ncouraging the parties to use an alternative dispute resolution procedure" is one of the things which the courts are expected to consider as part of their 'active case management'[1].

The trend of authority suggests that 'encourage' is to be read here rather as Voltaire used the French equivalent when he had Candide witness the execution by firing squad of Admiral Byng and receive the explanation *"in this country it is considered a good thing to kill an admiral from time to time to encourage the others*".

Indeed, it was this passage to which Briggs LJ alluded in *PGF II SA v OMS* [2013] EWCA Civ 1288, when he said:

> *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.

PUNISHING THE PARTIES

It has long been established that a party may be penalised in costs for refusing to take part in ADR. There have been numerous cases in which successful claimants have secured awards of indemnity costs against defendants who rejected invitations to mediate. The courts have taken the view that staying silent in response to an invitation to mediate is tantamount to rejection.

Costs penalties are not restricted to the losing party in contested trials. In *PGF II SA*, the Defendant ignored several invitations to mediate. Both parties made Part 36 offers. The Claimant accepted the Defendant's offer on the eve of trial. However, the Judge agreed with the Claimant that the

[1] CPR 1.4 (e)

Defendant's conduct in not engaging with offers of mediation should deprive it of the costs to which it would otherwise have been entitled under Part 36. The Court of Appeal upheld the decision.

The Court of Appeal's decision in *Halsey v Milton Keynes* [2004] 4 All ER 920 made clear that even a party which had won at trial might nevertheless be subject to sanction, although suggested that the bar might be high.

Dyson LJ (as he then was) started from the general rule that costs follow the event. "*The fundamental principle*," he said, was "*departure* [from the general rule] *is not justified unless it is shown (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR*".

The court expressly rejected the submissions of one of the interveners that there should be a presumption in favour of ADR. It accepted that ADR was not suitable for every case. It identified various factors which might go to the reasonableness or otherwise of a refusal to mediate, including the nature and size of the dispute and the merits.

Dyson LJ referred to dicta of Lightman J in an earlier decision[2] that, *"The fact that a party believes that he has a watertight case again is no justification for refusing mediation. That is the frame of mind of so many litigants,"* and concluded that this needed qualification. It would, he said, be no justification if the belief were unreasonable but may well be sufficient if well founded.

It might be thought that if the party went on to win, its belief in the strength of its case was *ipso facto* reasonable. But *Wales v CBRE* [2020] Costs LR 603 affords a warning against complacency. In that case, CBRE rejected a number of invitations to mediate at the pre-action stage and after proceedings were issued. It did, however, make a drop hands offer at a relatively advanced stage. Mr Wales did not respond to it. The claim proceeded to trial. It failed. The Judge was satisfied that its conceptual basis was unsound.

He nevertheless concluded that CBRE's refusal to mediate was unreasonable. This led him to disallow 50% of its costs between the date on which it first rejected mediation and the date of its drop hands offer and 20% thereafter.

COMPELLING THE PARTIES

In *Halsey*, the Court of Appeal concluded that the court did not have the power to force the parties to mediate against their will. It referred to the decision of the European Court of Human Rights in *Deweer v Belgium* (1980) 2 EHRR 439 which it suggested was about arbitration[3] and expressed the view by analogy that compulsory ADR would likely be considered a violation of Article 6 (right to trial) of the European Convention.

It has since been doubted whether *Halsey* is right on this point, and as to whether it is binding on the lower courts. Notably, Sir Alan Ward who was part of the Court of Appeal in that case *y*, was faced in the later case of *Wright v Michael Wright (Supplies)* [2013] CP Rep 32 with entrenched litigants in person who had rebuffed efforts by the Judge to get them to submit to mediation. He said:

> *What, if anything, could be done about 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] *for which I am partly responsible.*

[2] *Hurst v Leeming* [2003] 1 Lloyd's Rep 379

[3] It was actually about a butcher being offered the option of paying a fine to avoid prosecution and the closure of his shop.

He referred to critical commentary on the case and posed as questions whether that part of the decision was *obiter* and whether the court had been wrong to place reliance on *Deweer.*

The European Court of Human Rights has since considered compulsory mediation head on and concluded that it did not offend against Article 6.

In *Lomax v Lomax* [2019] 1 WLR 6527, Moylan LJ (with whom the others agreed) concluded that the court did not need the parties to consent to an order for early neutral evaluation. He distinguished *Halsey* on the basis that it only applied to mediation. This, he observed, meant that he did not need to enter into what precisely *Halsey* had decided and whether it remained good law but added, "*I would only comment that the court's engagement with mediation has progressed significantly since* [*Halsey*] *was decided*".

In *McParland v Whitehead* [2020] Bus LR 699, Sir Geoffrey Vos C (as he then was) commented that *Lomax* raised the question of whether the court might require parties to mediate notwithstanding *Halsey.* But the point did not arise on the facts as a direction for mediation was agreed.

In 2021, the Civil Justice Council issued a report which outlined some of the extra-judicial and academic criticism of *Halsey* and concluded that there was no legal impediment to compulsory ADR. Echoing Sir Alan Ward, the authors concluded that it would be helpful for the appellate courts to consider the issue afresh.

In *Mills & Reeve Trust Corp*, some of the defendants argued that the court had the power to order mandatory mediation and that it ought to do so. The other defendants accepted that the court may have that power but that, if it does, it should not be exercised on the facts. The Claimants maintained that parties could not be compelled to attend a mediation against their will.

HHJ Kelly (sitting as a High Court Judge) accepted that the comments in *Halsey* about mandatory mediation were technically *obiter* but nevertheless concluded that she was bound by them. Although she acknowledged the criticism made of *Halsey* and the calls for the point to be revisted by the appellate courts, she did not accept that it was necessary or appropriate to grant permission to appeal from her decision.

It remains to be seen whether this will be the last word on the point.

CONCLUSIONS

Each case should be considered on its own merits. There are countless reasons why mediation might be thought inappropriate. It needs, however, to be borne in mind that declining to mediate might lead to a costs penalty. It is not necessarily a good enough excuse to be confident of winning at trial, even if a favourable judgment proves that confidence justified. While the courts can punish a party for an unreasonable failure to mediate, it remains the law that they cannot force them to mediate against their will. It is questionable, though, whether this proposition would survive further consideration by the Court of Appeal.

Further Information

Given the generality of the note it should not be treated as specific advice in relation to a matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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