Practice&Law

TO MEDIATE, OR NOT: THAT IS THE QUESTION

Alternative dispute resolution Mediation has gained momentum following the Woolf reforms. Beverley Vara looks at its evolution and why, today, it's hard to refuse

Litigation lawyers have always seen one of their primary functions as being to settle a case rather than fight it. Proceedings are sometimes necessary and occasionally a case must be pursued as far as trial. However, most cases settle before then and it is the lawyers' role to achieve that settlement on the best possible terms for their client, bearing in mind many factors, including the legal strength of their position and the client's appetite and/or financial resources to take a case to trial. The role of a legal adviser is to be partisan and while a few cases should be taken as far as trial for the benefit of the client, the vast majority of the time, the client's interest is best served by the case settling, even if that does deprive the state, and other litigants, of a judicial decision on a particular point of law.

The way those settlements are arrived at has changed, however, particularly over the last 15 years or so, and the use of alternative dispute resolution (ADR) has increased while inter-solicitor without-prejudice conversations (in isolation) have declined.

When was mediation invented?

There are references in reported cases to mediation of sorts taking place in litigation from at least 1554, and it is obvious that mediation, defined as intervention in a dispute in the hope of resolving it, has always existed. However, its development as a formal process – by which legal

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disputes are resolved with the assistance of a trained independent neutral – is a far more recent development, one which at its earliest dates from the 1970s, but which only really gained momentum after the Woolf reforms to civil litigation procedure (the Woolf reforms) were implemented in April 1999.

Fifteen or 20 years ago it was seen as novel to suggest mediation. Now it is the default opening to a without-prejudice dialogue.

Following the Woolf reforms, the new court rules encouraged the use of ADR and case law started to appear which reinforced that sentiment. For example, in *Dunnett* v *Railtrack plc* [2002] EWCA Civ 302, Brooke LJ found that the defendant's position that they would not contemplate ADR as this would "necessarily involve a payment of money..." was a misunderstanding of the purpose of ADR. He added: "Skilled mediators are now able to achieve results satisfactory to

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both parties in many cases which are quite beyond the power of lawyers and courts to achieve."

There were, however, limits on the courts' enthusiasm for mediation. Later in the same year, in *Societe Internationale de Telecommunications Aeronautiques SC* v *Wyatt Co (UK) Ltd and others* [2002] EWHC 2401 (Ch) the question of whether a part 20 defendant who had refused on three occasions to take part in mediation should be deprived of its costs was considered. It was found that the part 20 defendant's refusal to take part in mediation was justified and reasonable in the circumstances, including that the defendant had issued "self serving" invitations, which the judge described as "akin to demands" that the part 20 defendant participate.

Has the courts' approach to mediation altered?

Over time, the courts have expressed greater enthusiasm for the mediation process and there have been a variety of decisions on when, and if so how, a party can legitimately refuse mediation. Broadly speaking, the opportunities for avoiding mediation have become more restricted as the following series of cases illustrate.

In *Halsey* v *Milton Keynes General NHS Trust* [2004] EWCA Civ 576 it was taken as read that "all members of the legal profession who routinely conduct litigation should consider with their clients whether their case is suitable for mediation", albeit in the context of making it clear that it was the courts' role to encourage but not to compel mediation. It was made clear in that case that the encouragement could be "robust", provided it stopped short of compulsion.

It was also made clear that the reasons for the failure of a mediation were not a matter for the court, and so a party did not have a complaint it could rely on in court because it felt the other party had been unreasonable during the mediation. This, it found, was a different matter from the question of whether a party had been unreasonable in refusing the offer of mediation. While the court accepted that the circumstances of each case were different, it set down some relevant factors for the court to consider in deciding if it should depart from the usual costs order because of a refusal to mediate. One of these, which has been considered in depth in subsequent case law, is whether the mediation had a reasonable prospect of success.

In *Halsey* it was made clear that a party could not rely on its own unreasonableness to engage in mediation as a reason why mediation was doomed to fail. It was recognised also that the success of a hypothetical mediation was hard to gauge as it depended not only on the parties' attitudes but also the nature of the dispute and the skill of the mediator. It concluded that the burden of proof should be on the refusing party to satisfy the court that the mediation had no reasonable prospect of success.

Two years later in *P4 Ltd* v *Unite Integrated Solutions plc* [2006] EWHC 2924 (TCC), the *Halsey* test was applied and the usual costs order varied because of a refusal to mediate. The defendant made a part 36 offer which the claimant failed to beat but rather than award the defendant their costs on an indemnity basis, the court awarded the claimant (who had proposed mediation) costs up to the date of the part 36 and the claimant their costs on a standard basis thereafter. Ramsey J had no difficulty in finding that the tone of the solicitors' letters did not illustrate intransigence which would have prevented a mediation from being successful, saying: "Parties who through solicitors' letters may appear intransigent are often quite the opposite when they meet face to face, particularly before a third party mediator. Having seen the witnesses, I consider that this is likely to have been the position here."

While each case turns on its facts, *P4* demonstrates a development in the court's thinking from the position displayed in *Societe Internationale*.

The behaviour of a party in the mediation process is not normally a matter before the court, however, in *Carleton* v *Strutt and Parker (a partnership)* [2008] EWHC 616 (QB) the parties all agreed to waive privilege and so the court considered the without-prejudice exchanges between the various parties' solicitors. It found that a party who agrees to mediation but then causes the mediation to fail by taking an unreasonable position in it is in the same position as a party who unreasonably refuses to mediate.

In *Rolf* v *De Guerin* [2011] EWCA Civ 78, one of the factors in deciding how to exercise the court's discretion on costs was the claimant's willingness to settle and that the defendant's reasons for refusing mediation did not find favour with the court. The defendant had said, among other things, that he "wanted his day in court". Rix LJ said that this was a reason why the courts had been unwilling to compel parties to mediate but 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".

The sense that judicial attitudes to reluctant participants in mediation are hardening was sharpened again in *PGF II SA* v *OMFS Company 1 Ltd* [2013] EWCA Civ 1288; [2013] EGILR 35 (see *EG*, 16 November, p101). This case considered the situation where a party simply fails to respond to an offer to mediate and concluded that not only could such a refusal mean a party should be deprived of an award of costs that it might otherwise have expected, but also that the cost consequences could be reversed in certain cases. One could be forgiven for feeling that mediation is now, in effect, mandatory.

A number of cases since have considered mediation, including *Universal Satspace (North America) LLC* v *Kenya* (unreported, 20 December 2013) in which a clause in a mediation agreement that provided that no settlement reached in mediation would be binding unless and until it had been written and signed by all parties, did not operate to prevent the court from taking into account an oral agreement made between the parties at the mediation to sign a written settlement within a certain time period. The oral agreement had given rise to a collateral contract with which the mediation agreement was not concerned.

Another relevant case was *Courtwell Properties Ltd* v *Greencore PF (UK) Ltd* [2014] EWHC 184 (TCC), in which a claim for indemnity costs because of, inter alia, an alleged refusal to mediate, was not upheld.

> While mediation is not mandatory, it appears that it will be increasingly hard to find reasons that the courts find acceptable for refusing to engage in it

Where are we now?

While mediation is not mandatory, and there are many good reasons why that should remain the case, it is increasingly hard to justify not at least considering mediation. Indeed, it appears that it will be increasingly hard to find reasons that the courts find acceptable for refusing mediation.

It seems inevitable that the increasing trend for settling disputes by this method looks set to continue. Since a mediated outcome often results in all parties being happy and a court judgment is almost axiomatically going to have at least one party unhappy, this is no bad thing.

For tactical advice on breaking a mediation deadlock, see p90

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