ADR

COMING OF AGE?

Introduction.

1. One of the primary purposes behind the reforms undertaken by the introduction of the CPR, was the desire to speed up litigation and reduce the number of litigated cases. The Rules used many tools to achieve those purposes. The pre-action protocols and the introduction of Part 36 offers were but two of the tools that were used. In order to achieve the objectives set out by the reforms, the reforms also, as we now know, introduced the active involvement of the Courts in the management of cases and the active involvement of ADR in order to achieve settlement without Court hearings.

2. It is instructive to remember that CPR set out a new landscape for the relationship between the parties. We are all aware of CPR 1.4(1) which obliges the Court to further the overriding objective of enabling the Court to deal with cases justly by actively managing cases and CPR Rule 1.4(2)E, which defines active case management as including "encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate, and facilitating the use of such procedure". Whilst it is the case that the pre-action protocols refer to the use of ADR as part of the steps that need to be undertaken prior to the start of proceedings, we are also well aware of CPR Rule 26.4(1) which provides that "a party may, when filing the completed allocation questionnaire, make a written request for the proceedings to be stayed whilst the parties try to settle the case by alternative dispute resolution or other means".

3. The Court of Appeal has also taken the lead in encouraging the use of ADR and its everyday application. Without reiterating all the cases that you are already well aware of, Cowl –v- Plymouth City Council, Dunnett –v- Railtrack Plc and Hurst –v- Leeming are but three of the significant number of cases that have been decided since the introduction of the CPR, which have specified in no uncertain terms that mediation is to be used.

4. However, the increasing application of mediation as a mainstream activity as an important step undertaken by litigants in order to settle a claim, has led to the consideration of what that will mean to parties who differ when a mediation is unsuccessful. In circumstances where the parties are jostling for position on the lead up to a mediation, or on the less frequent occasions when the mediations themselves are unsuccessful, there have been issues arising out of the increasing application of mediation. In particular, the Courts have had to deal with applications for costs in circumstances where the parties have been using the mediation process as a reason why costs should be paid, or why costs should not be paid, depending on the respective outlook of the applying party.

   On a wider perspective, the Courts have also had to balance their encouragement of the widespread use of mediation beside controlling the use of mediation as a tactic in litigation. In essence, the Courts have had to provide guidelines so as to ensure that the fundamental objective of achieving early dispute resolution by the widespread use of mediation, is achieved in the still competitive environment of day to day litigation.

5. The guidelines have now been received in two landmark Court of Appeal cases, and those cases are:-

   (a) Halsey v Milton Keynes General NHS Trust with Steel v Joy and Halliday, and (2004 EWCA (Civ) 576).

   (b) Reed Executive Plc –v- Reed Business Information Ltd. (2004 EWCA (Civ) 887)

Halsey.

6. In Halsey, the basic circumstances are that claimants' solicitors in a clinical medical negligence case, where liability was hotly denied, instigated an early offer of mediation and persistently made several offers throughout the litigation until the matter went to trial. The Defendants declined to undertake mediation, specified that there was no liability and whilst some negotiations did take place sporadically at various points, the fact was that the trial took place and the claimants' action failed. The claimants, on the issue of costs, specified that costs should not follow the event because the Defendants had refused to mediate. The Court of Appeal have now provided guidelines for successful and unsuccessful parties when issues concerning costs fall to be determined. The Court of Appeal have also taken the opportunity to provide far wider guidelines on the implementation of mediation and to look at the circumstances when it may be permissible to refuse to mediate.

7. The principal points that arise out of Halsey are:-

   (a) Mediation is here and integral to the many steps taken by the Court to achieve settlement. The Court of Appeal made it quite clear that there were many Court based initiatives and the Court positively encouraged the parties to embark on ADR wherever that was appropriate as part of their obligations to seek resolution and resolve issues.

   In terms, the Court of Appeal said "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".

   This fundamental obligation for lawyers was reiterated in clear and unambiguous terms.

   (b) In arriving at this statement, the Court however, considered whether it would be appropriate for the Court to go further and to impose compulsion, such that all parties must undertake mediation as a matter of course. Here, the Court reiterated that the approach that was to remain in place for the time being, at the least, was that voluntary participation by the parties should continue. An intervention in argument before the Court by the Law Society on the issue of whether compulsion was possible in view of Article 6 of the Human Rights Act, resulted in the Court specifying that Article 6 may prevent compulsion being implemented in any event. However, there is academic debate about that view and the point may yet be fully tested, but the Court, for the present, made it clear that it was content that the parties should be encouraged and should act responsibly themselves to undertake mediation.

(c) The Court also made it clear that it was common ground with the Court and all the interveners, and those involved in the implementation of mediation, that if as a result of differing positions being taken up by parties in mediation, a case does not settle in mediation, then that is not a matter for the Court and what takes place in mediation remains in mediation. In essence, as a matter of policy, and indeed for the success of the mediation process, if the integrity and confidentiality of the mediation process is to be respected, the Court should not know what takes place in mediation, and therefore it should not investigate why the process did not result in agreement. This was a further reaffirmation of the basic underlying ground rules which ensure mediation's success, and a further reaffirmation that the Court of Appeal supports mediation.

(d) The Court of Appeal also gave guidelines as to costs. Everyone will know the basic rule that when the Court decides to make an order on costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but that discretion remains with the Court to take into account all the circumstances, including the conduct of a party, when deciding what to do in a specific set of circumstances. In essence, the Court may have to decide whether a party has acted unreasonably in refusing ADR and the Court has given guidelines as to the considerations that should be borne in mind when considering that issue. Indeed, the Court looked at six factors in particular as being relevant, or can be relevant when considering conduct in refusing to undertake ADR. Those factors are:-

(i) The nature of the dispute.

If injunctive relief is essential, or a particular point of law requires public explanation, then these are two examples of the type of dispute that may justify a decision to refuse ADR. Even here the Court made it clear that these were relatively rare exceptions, where the Court said "most cases are not, by their very nature, unsuitable for ADR".

(ii) The merits of the case.

The Court specifically had in mind the circumstances where a completely unmeritorious claim was being pursued and mediation may be used as a means to extract payments in circumstances where such claims have no merit and should not be pursued. In these circumstances, the costs consequences of refusing mediation should not be used to force public bodies, or indeed any Defendant into mediation, but here again the Court says that it would need to establish that these circumstances were in fact applying, and that "merit" did not mean that there were just differences of opinion.

Indeed, the Court said "the fact that a party refused to agree to ADR because he thought he would win, should be given little or no weight by the Court when considering whether refusal to agree to ADR was reasonable".

(iii) Other settlement methods have been attempted.

Mediation is probably the prime method by which settlement can be engineered or achieved, but not the only method. If it is the case that persistent negotiations and/or any other routes are used such as evaluation, or

conciliation, or Part 36 offers, the whole number of steps undertaken by the parties in order to try to reach terms or indeed to seek settlement together with the parties' commitments to settlement, will be looked at by the Court. In circumstances where the parties are clearly – in good faith - attempting to reach solution, but that they do not achieve it, and in circumstances where the prospects of obtaining a solution through mediation are remote, then the Court may consider that it was right to refuse mediation, but nevertheless, even in these circumstances, the parties must be prepared to explain that decision.

But here again the Court of Appeal also said "it is also right to point out that mediation often succeeds where previous attempts to settle have failed".

(iv) The costs of mediation would be disproportionately high.

The point here is that the underlying obligation to incur "proportionate costs" is not forgotten when using mediation, or indeed any other settlement tool. The Courts have addressed this issue in small value cases by instigating more widely Court annexed mediation schemes which have, normally, fee scales which are adjusted to the value of the amount in issue. The parties should also take into account the issues arising in relation to all the costs of all parties, especially where substantial sums have yet to be incurred.

(v) Delay.

If it is the case that mediation is suggested late in the day, then the Court may consider that that is a factor in justifying refusal, especially in view of the overall effect of all the settlement steps undertaken by the parties in trying to reach settlement.

(vi) Whether the mediation has a reasonable prospect of success.

Here, the Court considered the approach adopted by Lightman J. in Hurst v Leeming, which specified that refusal to mediate was a high risk course to take, because viewing any refusal objectively, it was rare that no reasonable prospect of success existed. The Court of Appeal looked into this position very carefully, and came to the view that the approach by Lightman in Hurst was too narrow an approach, although in itself still useful law. The principal issue is whether the conduct of the successful party is reasonable or not in refusing mediation. The Court then went on to decide that it was up to the unsuccessful party to have the burden of that issue and the evidential task of showing that there was a reasonable prospect that the mediation would have been successful. In essence, it is not up to the successful party to show that the refusal to mediate was reasonable because there had been no reasonable prospect of success, but up to the unsuccessful party to discharge the burden of proving that the refusal was unreasonable.

The Court did not think that that was an unduly onerous burden to discharge. The unsuccessful party did not need to prove that a mediation would in fact have been successful, all that needed to be proved was that there was a reasonable prospect that a mediation would have succeeded if it were

undertaken. A reasonable prospect only is required, and not the guarantee of a successful outcome.

The Court went on to specify that where the Court specifically became involved by way of Order or encouragement in a particular circumstance, then that would be a matter that would be viewed very seriously by the Court. The prospects of the unsuccessful party in sustaining that the refusal was unreasonable, would be considerably improved by the successful party simply ignoring the encouragement and/or Order of the Court.

(e) The Court also went on to consider the types of Orders that could be implemented, and in particular referred to Master Ungley's mediation Order in clinical medical negligence cases as a good guide to that could be put into common usage by Courts.

(f) Finally, the Court made it quite clear that it was aware of the ADR pledge that the Government had given on behalf of public bodies, which required those bodies to use and actively pursue the use of ADR. In particular, "alternative dispute resolution will be considered and used in all suitable cases, wherever the other party accepts it".

The Court simply specified that the pledge would not add greater weight than that already set out in the Court's approach, although it will be a factor which the Court will take into account when judging the conduct of the parties involved in a particular dispute. In essence, the use of ADR in suitable cases, really did not take the matter much further than the guidelines adopted by the Court.

(g) Halsey Summary.

Halsey has endorsed the use of mediation once again, confirmed the professional obligation of lawyers to discuss mediation with clients and use it, and provided guidelines on the use of mediation and offers to mediate, and costs.

Reed Executive Plc –v- Reed Business Information.

8. Following the decision in Halsey, within months Reed arrived.

This Court of Appeal case supported the approach of Halsey, but did so in circumstances where parties, for the purpose of cost arguments, were seeking to rely upon without prejudice exchanges where the Court was considering whether one party or another had acted unreasonably.

The Court in Reed gave significant and definitive advice on the following:-

(i) The Court confirmed again the overall integrity of the mediation process; specified that it would not look inside the mediation process when considering conduct for the purposes of cost arguments, and that it supported the confidentiality of the process and content as being free from direct investigation.

(ii) In particular, the mediation process is without prejudice and, as has been established for some considerable period of time, namely since Walker –v- Wiltshire 1889, if exchanges are without prejudice, they remain without prejudice and not capable of

being produced to the Court unless both parties agree to without prejudice being lifted, or the Court decides that the actual content being undertaken is not in fact undertaken with a view to settlement and therefore truly without prejudice.

In essence, the rule in Walker –v- Wiltshire remains good law, and the Court cannot order disclosure of without prejudice negotiations against the wishes of one of the parties to those negotiations. This may, indeed does, mean that in some cases the Court, when it comes to the question of costs, cannot decide whether one side or the other was unreasonable in refusing mediation by accessing that information.

(iii) The decision by the Court to support the without prejudice rule is not disastrous, nor in any way a limitation on the process of encouraging the use of ADR. The parties are perfectly at liberty to undertake some protection as to costs, by referring to negotiations and the steps undertaken prior to mediation by simply using the well established Calderbank rules. It is open to either side to make open or Calderbank offers of ADR. The opposite party can respond to any offers given, whether openly or in Calderbank form. If it does so and gives good reasons why it thinks ADR will not serve a useful purpose, then that is one thing, but if it fails to do so then that is a matter the Court may consider relevant in exercising its discretion as to costs. The reasonableness or otherwise of going to ADR may be fairly and squarely debated between the parties, and under the Calderbank procedure made available to the Court, but only when it comes to consider costs.

So, Reed has confirmed that the contents of mediation are protected from disclosure to the Court, that without prejudice negotiations remain unavailable to the Court on the application of one party, and that it is open to any party to protect itself as to costs when debating the question of reasonable conduct by writing under Calderbank rules, or indeed in open letters.

Summary.

The two Court of Appeal cases of Halsey and Reed have set the landscape for the widespread use and future development of ADR and both have shown that discussion of the suitable use of mediation is a professional obligation, that cynically using offers of mediation in order to obtain costs advantage is an approach that the Courts will reject, but that issues on costs can be dealt with where they need to be, and that the Courts expect the parties to use mediation in order to achieve the disposal of disputes.

Phillip Howell-Richardson
Mediator and Consultant,
SJ Berwin LLP
10 Queen Street Place,
London,
EC4R 1BE,
(Tel: 020 7111 2566)
E-mail: phillip.howell-richardson@sjberwin.com

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