

Recent Developments in Alternative Dispute Resolution

Update No. 12

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*This **ADR Update** is intended to inform the advice sector of developments and initiatives in alternative dispute resolution. ASA wants to encourage dialogue between advisers and ADR providers so that the growing field of ADR develops in a way that ensures access to justice and informed choice. If you know of others who might like to receive a copy of **ADR Update**, either by post or by email, or if you would like more information about any of these topics, please contact Val Reid, ASA's policy and development officer for ADR. The **ADR Update** can also be downloaded from the ASA website:*

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News and information

Can the court compel unwilling parties to mediate?

This summary of the Halsey judgement has already been circulated to readers of the ADR Update on our email circulation list.

On the 11th May 2004 the Court of Appeal published its decision in the cases of Halsey and Steel. In the course of the judgement reference is made to the three key cases which have set precedents in this area, and which have been featured in previous editions of this ADR Update:

- R(Cowl) v Plymouth City Council [2001] EWCA Civ 1935, [2002] 1 WLR 803
- Dunnett v Railtrack plc [2002] EWCA Civ 303, [2002]
- Hurst v Leeming [2001] EWHC 1051 (ch), [2003] 1 Lloyds Rep 379

The full text of the judgement can be found on the Court Service website on:

<http://www.courtservice.gov.uk/View.do?id=2515>

The decision

The judgement in the these cases establishes two important principles:

- **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
- that the court can decide to deprive successful parties of some or all of their **costs** on the grounds that they have refused to agree to ADR, but that it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. The burden to justify a departure from the general rule is on the unsuccessful party to show that the successful party acted unreasonably in refusing to agree to ADR

Guidance

The first part of the judgement establishes “guidance” on the way in which courts should approach ADR, which is clearly intended to be independent of the facts of the two cases involved. The guidance covers the two important principles stated above, compulsion and costs.

Compulsion

The guidance begins by offering general encouragement of the use of ADR, which is generally understood to mean “some form of mediation by a third party”. The guidance states that:

- courts do have a duty to encourage the parties to use ADR where it is considered appropriate
- courts should proceed on the basis that there are many disputes which are suitable for mediation, an approach which is underpinned by the Woolf reforms. Mediation has a number of advantages over the court process, including the fact that it is generally cheaper, and has a wider range of solutions than litigation
- “all members of the legal profession who conduct litigation should now routinely consider with their clients whether disputes are suitable for ADR”

- mediation and ADR processes have disadvantages as well as advantages, and are not suitable for every case, so there should not therefore be a presumption in favour of mediation

The guidance makes a distinction between the duty of the court to encourage parties to use mediation, and the power to force parties to use mediation against their will. Lord Justice Dyson said:

“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.”

He quoted article 6 of the European Convention on Human Rights in support of this, and distinguished between a voluntary agreement to waive access to a court (such as an arbitration clause) and compulsion by the court itself.

Volume 1 of the White Book (2003) is quoted:

“The Hallmark of ADR procedures, and perhaps the key to their effectiveness in individual cases, is that they are processes voluntarily entered into by the parties in dispute with outcomes, if the parties so wish, which are non-binding. Consequently the court cannot direct that such methods be used but may merely encourage and facilitate.”

The guidance suggests that to compel parties to attempt mediation risked simply adding to the total costs, delaying the date of the hearing, and bringing ADR into disrepute. Judges may well wish to explore with the parties the reason for an initial refusal to mediate, but “it would be wrong for the court to compel them to embrace it”.

Costs

The Civil Procedure Rules (CPR 44.3(2)) endorse the general rule that the unsuccessful party should pay the costs of the successful party. Rule 44.3(5) allows costs to be varied by the court, taking into account the behaviour of the parties both before and during the proceedings, including their attempts to resolve the dispute, and whether or not they have followed any pre-action protocol. However, the judges make it clear in this guidance that deciding to deprive a successful party of costs on the grounds that they have refused ADR should be an exception to the general rule that costs follow the event, and the burden should be on the unsuccessful party to show that the successful party acted unreasonably in refusing to agree to ADR.

The factors taken into account when deciding whether a refusal to mediate is unreasonable should include:

- a. The nature of the dispute
- b. The merits of the case
- c. The extent to which other settlement methods have been attempted
- d. Whether the costs of the ADR would be disproportionately high
- e. Whether any delay in setting up and attending the ADR would have been prejudicial
- f. Whether the ADR had a reasonable prospect of success

a. The nature of the dispute

There may be cases where it is important for a court to resolve a point of law, where a binding precedent would be useful, or where an injunction is needed.

b. The merits of the case

The fact that a party unreasonably believes his case to be watertight is no justification for refusing mediation, but a reasonable belief that a case is watertight may well be

sufficient justification. Courts should be alert to claimants with a weak case inviting mediation as a tactical ploy, using the threat of cost penalties to try to force a settlement.

c. Other settlement methods have been attempted

Attempts to settle and offers to mediate are just one factor for courts to consider when deciding whether a refusal to mediate is reasonable.

d. The cost of mediation would be disproportionately high

This is a particular factor when the sum in dispute is comparatively small. A mediation may be at least as expensive as a day in court, and the parties will also have to bear the cost of legal advice in preparing the case, and representation before the mediator. Generally speaking, the cost of the mediation will be borne equally by the parties regardless of the outcome, though it is possible that the cost of mediation may be the subject of a costs order after the hearing. As it is not possible to predict the outcome of mediation, it may be that the cost of an abortive mediation would simply be added to the costs of the court process, and this is a relevant factor in deciding whether a refusal to mediate was reasonable.

e. Delay

Accepting a late offer of mediation may have the effect of delaying the hearing. This is another relevant factor when deciding whether refusal to mediate is reasonable or not.

f. Whether the mediation had a reasonable prospect of success

The judges in these cases decided that the requirement is not that the unsuccessful party has to prove that the mediation would *in fact* have succeeded, just that there was a reasonable prospect of success. If the successful party refuses to mediate despite the court's encouragement, that is a further factor to take into account. The stronger the encouragement of the court, the easier it would be for the unsuccessful party to demonstrate that the other party's refusal was unreasonable.

The facts of Halsey v Milton Keynes General NHS Trust

In this case a claim was brought against the NHS Trust by Lilian Halsey, after her husband Bert, aged 83, died at Milton Keynes General Hospital. Bert Halsey was being fed through a nasal drip, and died as a result of liquid food entering his lungs. There was a dispute about whether or not the negligence of the hospital staff had caused his death, and an inquest was held. The results of the inquest were inconclusive, as two medical experts disagreed about responsibility. The claimant's solicitors asked for bereavement damages, and offered to refer the matter to mediation to resolve the matter; however, the Trust claimed that they did not accept any liability, and therefore mediation was inappropriate. When the trial took place in June 2003, the claim was dismissed, and the Trust therefore won the case. However, the claimant's solicitor asked for costs to be awarded on the grounds that the defendants had refused to mediate, quoting the decision in *Dunnet v Railtrack* to back the claim. The original trial judge refused to award costs against the successful defendant, and the case was taken to appeal.

The appeal judges concluded that the original judgement was correct, on the grounds that the claimant "*had come nowhere near showing that the Trust acted unreasonably*

in refusing to agree to a mediation". The factors taken into account in dismissing the appeal were as follows:

- Although the subject matter was not intrinsically unsuitable for mediation, the Trust believed it had a strong defence to the claim, and had reasonable grounds for that belief
- The court had not suggested or ordered mediation at any stage
- There were grounds for belief that the offers of mediation from the claimant's solicitors were "*somewhat tactical*"
- The Trust's view that the costs of mediation would be disproportionately high compared with the value of the claim and the cost of a trial was a relevant factor
- The judges believed that the claimant had not discharged the burden of proving that mediation had a reasonable prospect of success

Comment

The general guidelines established in this judgement, independent of the facts of the two cases involved, seem to strike a blow for common sense in making decisions about whether mediation is appropriate or not.

The case of Halsey had been talked about and discussed for some months before the judgement was issued on May 11th. One of the reasons for this unusual degree of anticipation about a forthcoming judicial decision was the fact that the Appeal Court judges had requested opinions from the Civil Mediation Council, the ADR Group and the Centre for Effective Dispute Resolution about the value of mediation. The Law Society had also submitted an opinion. The judgement makes it clear that the Appeal Court judges did not accept the Civil Mediation Council's argument that there should be a general presumption in favour of mediation (the Civil Mediation Council is a recently formed umbrella organisation for providers of civil and commercial mediation). Instead, they accepted the submission of the Law Society that the question of whether mediation was unreasonably refused should depend on a number of factors, which should be evaluated by the court in each case.

This judgement, and the general guidance about ADR which it contains, provides quite a radical departure from the direction in which recent court judgements about ADR had been moving.

Compulsion

With regard to compulsion, the most recent cases seem to authorize courts to compel a party to mediate, even when they are unwilling to do so. In *Shirayama Shokusan Company Ltd and others v. Danovo Ltd* the court ordered mediation to take place, despite the unwillingness of the claimant. However, the court did decide that continuing to delay a hearing in order to require the attendance at mediation of a person who was not a named party to the proceedings would infringe article 6 of the European Convention on Human Rights, and have the effect of denying the parties the right to a fair trial. The Halsey judgement reverses this trend towards compulsion, and makes it clear that courts cannot force unwilling parties to mediate.

Costs

In the case of *Dunnett v Railtrack* the successful party, Railtrack, was required to pay the costs of the case, despite being successful at appeal, as a result of refusing an offer to mediate from Ms Dunnett. Following this decision, an offer to mediate has subsequently been used by potentially weaker parties as a tactic to try to persuade the stronger party to settle, on the grounds that they risked an adverse costs penalty for

refusing ADR. In the case of Halsey, the judges commented that the mediation offers from the claimant's solicitor were "somewhat tactical". This judgement puts the burden on the unsuccessful party to demonstrate that the successful party's refusal to mediate was unreasonable.

What is reasonable?

In the case of Hurst v Leeming, a number of reasons were given by the defendant, who won the case, for refusing to mediate. Many of them were dismissed by the judge: the fact that heavy costs had already been incurred was not a justification for refusing mediation, nor was the fact that a party believes they have a watertight case. The critical factor was whether, objectively viewed, mediation had any realistic prospect of success. In the guidance given as part of this judgement, however, the factors for the court to take into account when judging whether or not a refusal is reasonable are much wider, and give the court far more discretion in deciding on the reasonableness issue. The judgement also makes it clear that the burden should be on the unsuccessful party to prove that the refusal to mediate is unreasonable, rather than, as in Hurst v Leeming, on the successful party to prove that it was reasonable.

The government's ADR pledge

The court also considered whether public bodies should be particularly penalised when refusing to mediate. This is in the light of the previous Lord Chancellor's pledge, in March 2001, that government departments would use ADR to resolve disputes wherever appropriate. In a recent case the MOD was penalised for refusing mediation in a dispute about a lease, which they believed needed judicial resolution because it involved clarifying a point of law. The court stated at the time that that was not a justifiable reason for refusing to mediate. However, the judges in this case have made it clear that the need to resolve a point of law is one of the factors to take into account when deciding whether or not a party is reasonable in refusing mediation. They also decided that the pledge is just one more factor to consider when deciding whether a refusal to mediate is reasonable, and that it should not place any greater burden on public bodies than on individuals.

Commission for Equality and Human Rights

The government has now issued a white paper "Fairness for all: a new commission for equality and human rights". It proposes the establishment of a single commission in 2006, which will take on the roles of the current commissions which champion anti-discrimination in the areas of race, disabilities and gender:

- Commission for Racial Equality
- Disability Rights Commission
- Equal Opportunities Commission

It will also take on responsibility for promoting good practice and eliminating unlawful discrimination in areas covered by new legislation, such as sexual orientation (2003), religion and belief (2003), and age (2006). It will also have wide-ranging responsibilities to monitor human rights issues under the Human Rights Act.

From an ADR perspective, it is interesting that the white paper proposes the possibility of extending the existing Disability Conciliation Service to conciliate a wider range of discrimination disputes. Proposals for this are set out in sections 4.20 to 4.22.

The whole consultation paper can be found on:

http://www.womenandequalityunit.gov.uk/equality/project/cehr_white_paper.pdf

Breaking out or breaking down?

Legal Action Group are running a seminar on Monday 5th July about the future of justice in the new era of dispute resolution. "Is ADR a rational, user-friendly response to the problems of an increasingly cumbersome civil justice system? Or does it signal a retreat into fragmented, privatised justice for civil disputes, at odds with the notion of rights and the rule of law?"

It will include speakers Professor George Pavlich from the University of Alberta, Walter Merricks, the Financial Ombudsman, Professor Martin Partington, and Jane Hickman. It will take place at 4pm at London Metropolitan University, and is free to attend. If you are interested, contact LAG for more details:

events@lag.org.uk

020 7833 7435

Number of mediation cases double

The Association of Northern Mediators has just produced its annual survey of civil and commercial mediation in the north of England. Findings include:

- Numbers of mediation have increased over the last three years, from 94 (2001) to 118 (2002) to 251 in 2003
- 196 of these mediations took place after court proceedings had begun
- 77% of the mediations were successful in resolving the dispute
- The most common types of problem mediated were construction disputes (19%) disputes about sales and supply (17%) and clinical negligence (11%)
- Nearly half of the disputes mediated had a money value of between £10,000 and £100,000
- 16% of these mediations were referred from one of the court-based mediation schemes run by the Association of Northern Mediators in Leeds, Manchester and Birmingham

More information about the ANM and a report on the court mediation schemes can be found on their website:

<http://www.northernmediators.co.uk>

ADR schemes

New court mediation scheme pilots

The DCA is piloting two new court mediation schemes in London and Manchester.

London County Court

There has been an "opt-in" mediation scheme at London County Court since 1996. In this established scheme, parties in cases over £5000 are sent information about mediation with the allocation questionnaire, and where both parties accept mediation a session is arranged. In the new "opt-out" scheme, which is being piloted from April 2004 to March 2005, the court selects twenty cases a week at random to be referred to mediation. If the parties do not want to mediate, they must justify their refusal to the

court. If the court is not satisfied with the reasons given, under the terms of the pilot it can:

- Order the mediation to proceed in spite of the party's objections
- Refuse to hear the case
- Hear the case, but impose cost penalties on the party which has refused to mediate

There are some exemptions to this automatic referral, including:

- small claims
- where an urgent injunction is needed
- where one party is a child or has a mental incapacity
- where one party is exempt from paying court fees

Under the current civil procedure rules, courts have the power to recommend mediation to the parties in a case, and to impose cost penalties where a party refuses to mediate. However, in the recent Halsey judgement (see the first item in this Update) the courts decided that it was not appropriate to compel parties to mediate, as it was contrary to Article 6 of the European Convention on Human Rights. It will be interesting to follow this pilot scheme to assess how this "opt-out" referral to mediation works in practice, monitor the views of the parties affected, and explore the human rights implications of its operation.

Manchester County Court

The pilot scheme in Manchester County Court provides free advice about the suitability of mediation in all types of civil disputes, ranging from personal injury and debt cases to contractual and property disputes. This is very similar to the scheme which has been run by Edinburgh CAB in Edinburgh Sheriff Court since 1994. In the Manchester pilot a dedicated mediation advisor is available in the court to provide people involved in disputes and their legal representatives with the information they need to decide whether mediation can help to settle their case. If they agree to mediation, the advisor can arrange an appointment through the Manchester Law Society mediation scheme. The cost of mediation varies according to the value of the case, but is generally around £250 for up to four hours' mediation, and £75 for each additional hour. Legally aided parties can claim the cost of mediation as a disbursement

For further information about both schemes see press releases 117/04 and 234/98 on the DCA website: <http://www.dca.gov.uk>

Compact Mediation scheme

The Home Office has provided this information for the ADR Update:

From 7 April 2004, the Home Office is extending the scope of the Compact Mediation Scheme to cover disputes around Local Compacts. The scheme was introduced in early 2003 to provide an independent mediation service to settle disputes that arise between government and the voluntary and community sector related to the Compact at central and regional level. The '*Compact on Relations between Government and the Voluntary and Community Sector in England*' and Codes of Good Practice (covering Black and Minority Ethnic groups, Consultation, Funding, Volunteering and Community groups,) is a set of principles and undertakings that provide a framework for how Government and the sector should work together.

Currently over four in five local authority areas have a Local Compact (involving local public bodies such as Learning and Skills Councils, Primary Care Trusts and NHS Trusts and voluntary and community groups) with an expectation for remaining areas to begin work on one by April 2004. It is at local level that government and the sector have the most interaction and therefore potential for conflict. To address this gap in the scheme, it is now being offered as an option for dealing with disputes around disputes between local public bodies and the local voluntary and community sector.

If you want to find out more information about the scheme and Local Compacts, you should visit the following websites:

<http://www.cedr-solve.com/compact/>

<http://www.lga.gov.uk/OurWork.asp?lsection=59&ccat=258>

Ombudsman news

Can the Financial Ombudsman help?

Every month the Financial Ombudsman publishes a short news digest covering typical cases, and answering frequently asked questions. The April edition has a useful briefing on which cases are within the Ombudsman's jurisdiction. For example:

- All banks and building societies are covered for complaints about events that took place from 1 December 2001
- All building societies are covered for complaints about events that took place before 1 December 2001, and most high street banks are also covered
- Accounts based in the UK and credit cards issued in the UK are covered, but not the Channel Islands and the Isle of Man
- Personal customers of the bank or building society can bring complaints to the Ombudsman, as well as some non-customers who have been affected by bank or building society decisions. Complaints can also be brought by small businesses with an annual turnover of less than £1 million
- Complaints must be made within six years of the event complaint about, or three years of the complainant becoming aware of the problem

More details and case studies on:

<http://www.financial-ombudsman.org.uk/publications/ombudsman-news/36/issues-jurisdiction.htm>

If you would like to receive Financial Ombudsman News regularly, by post or email, contact the Financial Ombudsman service on:

Email: publications@financial-ombudsman.org.uk

Phone: 020 7964 0092

Student complaints

The Office of the Independent Adjudicator for Higher Education ("OIA") opened for business on 29 March 2004. The first Independent Adjudicator for Higher Education is Dame Ruth Deech, who is a governor of the BBC, former Principal of St Anne's College, Oxford, and was Chairman of the UK Human Fertilisation and Embryology Authority between 1994 and 2000.

The OIA provides an independent scheme for the review of student complaints, and also publishes recommendations about how complaints are handled and what constitutes good practice.

Currently the scheme is voluntary. However, in due course the scheme will become a statutory scheme which all higher education institutions in England and Wales must join.

For more information see the OIA website:

<http://www.oiahe.org.uk>

ADR feature



www.ADRnow.org.uk

ASA's new ADR website is about to go live on the internet. This is the first website to cover the whole range of ADR choices in the UK, so we hope that it will be a valuable resource both to legal advisers and to the general public. The site aims to give an objective overview of ADR provision in the UK, including England, Scotland, Wales and Northern Ireland.

The ADRnow website has four menus:

- information about the main types of ADR provision, including commercial, court-based, community and family mediation, public and private ombudsman schemes, and arbitration
- an outline of the ADR options available for different types of problem, including employment, housing, family, and benefits
- information on legal and civil procedures affecting decisions about the best method of dispute resolution in an individual case
- a directory of ADR providers and links to key national websites

The website is based on the book "Advising on ADR" by Margaret Doyle which ASA published 4 years ago; Margaret has been responsible for writing, editing and updating information for the new website.

ASA now has three websites:

<http://www.asauk.org.uk> gives an overview of ASA's policy work and CLS Support project

<http://www.advicenow.org.uk> links to the best legal information sites on the web

<http://www.adrnow.org.uk> covers everything you want to know about ADR