HOW MEDIATION WORKS

*"**Most cases are suitable for mediation**"*

Halsey v Milton Keynes General NHS Trust

What is Mediation?

Mediation means using an independent person, the Mediator, to facilitate the process of resolving a dispute. The Mediator does not act as a judge to determine the dispute nor make rulings, but assists the parties to explore the strengths and weaknesses of their cases and tries to find if there is a point at which the parties' needs and expectations can be brought together to form a settlement. In some cases a Mediator will not be necessary and the parties will be able to reach agreement without independent help, but where that has not happened then experience shows that mediation does work.

Mediation provides a quick, confidential and cost-effective way of resolving disputes without trial, where the parties remain in control of the process and where issues can be addressed that are outside the narrow scope of litigation. Thus matters such as apologies or undertakings as to future behaviours, treatment or care provision can feature in Mediation in a way that litigation cannot handle. These are matters that may be peripheral in the litigation process but can be of fundamental importance to a party, and if addressed can assist the process of settlement.

When to use Mediation?

Mediation can be used to settle any kind of dispute. Litigation does not even have to have been started. The more complex a dispute the more appropriate it is for Mediation, as Mediation can be a way of cutting through the web of issues to find an acceptable outcome that reflects the litigation risks. If a dispute is deadlocked, then a mediator can try and break through the obstacles without either party appearing weak, by asking the awkward questions in private and finding out whether the private hopes and expectations of the parties are more capable of being brought together than they might each perceive. Mediation can be particularly useful where there are multiple parties, as it can ease and speed the process of discussions that may have been going round in circles. It can also help to cut through issues of jurisdiction and applicable law in cross-border claims, such as travel claims. Mediation can also address any emotional issues that are posing a barrier to settlement. It can provide litigants with a feeling of closure, without risk of appeal, but also a feeling that they have "had their day" and "their say" without the cost, and risks, of trial.

Agreeing a format

Before a Mediation starts the parties enter into a Mediation agreement. The agreement confirms that the parties have authority to settle their claims and that they will keep the discussions private and confidential, the whole process being without prejudice to any court proceedings unless and until agreement is reached, just like a without prejudice meeting between the parties.

A normal Mediation will last a day. Some schemes provide "Short Form" Mediations that last 2 - 4 hours. Deka Chambers offers short form mediations which are particularly suitable for lower value claims. A Short Form Mediation does not of course permit the parties to explore issues in depth in the way that can be achieved in a whole day Mediation. Given the cost that parties will incur to prepare for a Mediation, it can often be a better investment to pay for a Mediator to devote more time to the dispute in cases which are higher value or more complex.

How to set up a Mediation

To set up a Mediation the parties can go to one of the organisations offering Mediators, such as CEDR, ADR Group, Trust Mediation or In Place of Strife. Alternatively, the parties can go direct to a Mediator. Deka Chambers has a number of experienced, practising Barristers who are also trained and accredited Mediators. They can be booked by a call to the clerks, just as if they were being booked as Counsel for a court hearing. A suite of rooms is needed for the Mediation (normally it helps to have at least 3 rooms). Either the parties can make an arrangement to host the Mediation, or if that is a problem then arrangements can also be made with the Mediator to find a convenient location.

The Mediator will need to be provided with some background information about the dispute. Normally the equivalent of a Case Management hearing bundle will suffice. The parties need to agree the Mediator's fees before the Mediation. The fee will normally be a fixed fee to include the day set aside for the Mediation and any reasonable pre-reading and liaison with the parties. An hourly rate may be agreed for any additional work. Ordinarily either one party agrees to pay the Mediator's fees or they are divided equally between the parties and then can be the subject of costs recovery as costs in the case as appropriate, just like the costs of any without prejudice meeting. If the mediation agreement provides for the parties to pay their own costs of the mediation in any event, however, then those costs will not be recoverable in court proceedings. It is normally best to spell out what the parties intend in the agreement.

Even if a dispute does not settle within the time set for the Mediation, the Mediator will normally follow up the dispute in the following days to see if any outstanding matters can be agreed and a resolution reached to end the dispute. Experience indicates that even if cases do not settle at the Mediation, many of those will settle soon after the Mediation.

On the day

On the day of a mediation the Mediator will usually meet the parties separately and finalise the agreement and any questions about the process that have not been sorted out in advance. The parties will often have been asked to provide brief written summaries of the

case and of their positions to help the Mediator and also to help focus discussions. The Mediator will normally then start with a joint session in which the mediator explains their role to all involved and each party is invited to make a brief opening statement of their position for 5 or 10 minutes. The Mediator will then hold private discussions with each party separately to explore each party's position before engaging in some shuttle diplomacy to explore the room for settlement. That process may go on until agreement is reached or the attempt is abandoned, but if the Mediator thinks it appropriate the parties may be brought back together to address issues with each other, or the lawyers, or the clients, or the funders may be put together for discussions as the Mediator thinks might assist.

In a personal injury claim up to date CRU information and the current figure of any interim payments should be available. It also helps to have at the mediation a current schedule of costs to date and of prospective costs to trial. This is for the purpose of assessing litigation risks and in case there is an opportunity to negotiate a costs inclusive deal. Sometimes the Mediator will have asked for this information in advance. If not then the Mediator will ask for it on the day. It is worth being ready with the information. If agreement is reached at the Mediation then it will be set out in writing. The parties will be encouraged to draft the agreement themselves (it is "their" agreement after all) but the Mediator will assist in the process.

Refusal to mediate: Adverse Costs Orders

The Court of Appeal's decision in *Dunnett v Railtrack plc* in 2002 prompted a number of Mediations for fear that an adverse costs order would be made against even a successful party if Mediation was refused. The argument appeared even stronger in relation to public bodies on whose behalf the Lord Chancellor gave an "ADR Pledge" in March 2001; that ADR would be considered and used by public bodies in suitable cases. In *Halsey v Milton Keynes General NHS Trust* in May 2004, however, the Court of Appeal confirmed that a successful party would only normally be deprived of its costs for refusing Mediation where the refusal was unreasonable. The burden was on the unsuccessful party to show that the successful party had been acting unreasonably in refusing ADR and the factors that could be relevant to the issue of unreasonableness in this context were:-

- The nature of the dispute;
- The merits of the case;
- The extent to which other settlement methods had been attempted;
- Whether the costs of ADR would be disproportionately high;
- Whether any delay in holding ADR would be prejudicial;
- Whether ADR had a reasonable prospect of success.

Although in assessing these factors the court needs to consider the conduct of settlement efforts by the parties, that does not give the court jurisdiction to consider without prejudice correspondence where one of the parties refuses to waive the without prejudice privilege. Further, no adverse inference should be drawn against a party who chooses to rely on their privilege, as to do so would undermine the privilege by applying indirect pressure to disclose, see *Reed Executive Plc v Reed Business Information Ltd*, a case involving the Court of Appeal's mediation scheme.

Just as some after *Dunnett* had wrongly concluded that mediation was effectively compulsory, some after *Halsey* wrongly concluded that they no longer needed to bother about mediation or ADR. In truth the effect of the judgments is to require parties to behave reasonably against a background in which it is no longer considered reasonable to turn a blind eye to the benefits of mediation. This was emphasised post-*Halsey* by the Court of Appeal in *Burchell v Bullard* in which Lord Justice Ward, at para.43, said:

> "Halsey has made plain not only the high rate of a successful outcome being achieved by mediation but also its established importance as a track to a just result running parallel with that of the court system. Both have a proper part to play in the administration of justice. The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate… These defendants have escaped the imposition of a costs sanction in this case but defendants

> in a like position in the future can expect little sympathy if they blithely battle on regardless of the alternatives."

As Lord Justice Ward emphasised, the main reason for using mediation is because experience has shown that it works.

In the psychiatric stress through over- work case of *Vahidi v Fairstead House School Trust Ltd*, the Court of Appeal expressed its exasperation with parties who engage in long trials and appeals where the Court of Appeal has already laid down settled principles. In the words of Lord Justice Longmore:

> "One shudders to think of the costs of this appeal and of the trial which apparently took as long as 9 days. As the courts have settled many of the principles in stress at work cases, litigants really should mediate cases such as the present."

The Halsey guidance was extended further by the Court of Appeal in *PGF II SA v OMFS Co 1 Ltd* when they held that as a general rule silence in the face of an invitation to participate in ADR amounted to unreasonable conduct which could be reflected in costs. In doing so the court expressly endorsed the Judicial College's Jackson ADR Handbook.

Lord Justice Jackson then provided yet further emphasis in *Thakkar v Patel*:

> "The message which this court sent out in *PGF II* was that to remain silent in the face of an offer to mediate is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed. The message which the court sends out in this case is that in a case where bilateral negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction. In the present case, the costs sanction was severe, but not so severe that this court should intervene."

Thirlwall J took account of a refusal to mediate when ordering a defendant to pay costs on an indemnity basis in *Marsh v Ministry of Justice*. She did so on the basis that the involvement of a third party as mediator could offer a lot in a personal injury claim and that an independent person looking dispassionately at a claim had much to offer.

Compulsory Mediation?

In Halsey the Court of Appeal held 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."

Nine years later, Sir Alan Ward, who had been a member of the Court of Appeal in Halsey, suggested in the course of a further Court of Appeal judgment in *Wright v Michael Wright (Supplies) Ltd* concerning a dispute between two businessmen who had fallen out that cried out for mediation, that the reluctance in Halsey to impose mediation might have been obiter and/or wrong. He asked in an obiter aside:

> "Is a stay [to allow for mediation] really 'an unacceptable obstruction' to the parties right of access to the court if they have to wait a while before being allowed across the court's threshold? Perhaps some bold judge will accede to an invitation to rule on these questions so that the court can have another look at *Halsey* in the light of the past 10 years of development in this field."

That invitation found no immediate takers, but in *Lomax v Lomax* the Court of Appeal, in the course of deciding that CPR 3.1 permitted compulsory ENE, indicated that "the court's engagement with mediation has progressed significantly since *Halsey* was decided" [para.27]. They pointed out that the introduction of compulsory Financial Dispute Resolution appointments in the family courts since 1996 had been "outstandingly successful" and clearly there is now greater judicial appetite for compulsory ADR.

How solicitors can help their Client in Mediations

The role of a lawyer representing a party at a Mediation is:-

- To sort out the terms of the Mediation agreement and set up the process
- To prepare any written case summary
- To present any opening comments,
- To provide support and advice to the client about the process of Mediation and the claim
- To help the client test the claim and any response to the claim
- To help the client assess the litigation risks
- To help the client with information about costs
- To help explain the client's case to the Mediator
- To help devise a negotiation strategy and to implement it
- To help draft any settlement
- To help sustain the client through what can be a long, emotional and tiring day

www.dekachambers.com
clerks@dekachambers.com
020 7832 0500