DEKA CHAMBERS

BRIEFING
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ALTERNATIVE DISPUTE RESOLUTION

I had the pleasure this week of training mediators as part of my role on the faculty of the London School of Mediation. I enjoy this work so much, not least as I meet such a range of people, including even, deep breaths, some non-lawyers (!), who are so enthusiastic to learn.

Teaching the core skills to other professionals, many at the top of their game, is a real privilege. It also never fails to remind me, in case I ever forget on a weary November day, what a powerful tool mediation can be. Not only does this refresh me as a mediator, but those softer skills, including active listening, reflecting, clarifying, feed into my practice as a barrister afterwards – at least for a few days!

Certainly the government and the Courts continue to recognise the power of mediation. In this briefing, Kerry Nicholson considers developments in the mediation market over the last 12 months, including the planned introduction of compulsory mediation in the small claims track and beyond. While we all await, with eagerness, the Court of Appeal's decision in *James Churchill v Merthyr Tydfil County Borough Council*, Dr Russell Wilcox reviews the caselaw and judicial shifts which have led us to where we are now.

This will be the last ADR bulletin of 2023 so wishing you all a happy and restful holiday period. I look forward to bringing more from the world of ADR to all of you in 2024.

Laura Elfield
Head of the ADR Team

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OVERVIEW OF MEDIATION MARKET

By Kerry Nicholson

As we come to the end of 2023, it seems like a good time to take stock and review the state of the mediation landscape.

In February, the Centre for Effective Dispute Resolution (CEDR) released its biennial audit of the commercial mediation marketplace. It raises some interesting key points which give a good overview of landscape:

- Covid brought about a 35% dip in market activity. However, in the year to 30 September 2022 case numbers climbed back up to 17,000, which was a 3% increase above the pre-pandemic level. 64% of those were conducted online, with report author Graham Massie noting "*it would seem the nature of the field has permanently changed.*"
- Settlement success rates following mediation remain high: 73% settle on-the-day, and a further 20% settle in the immediate period thereafter, meaning a total of 92% of cases that go to mediation are settling.

This continued success and growth of mediation during and following the Covid pandemic should be considered in the context of two other significant industry developments: the government's planned compulsory mediation scheme; and the increasing case delays in the courts.

Starting with the government's planned compulsory mediation scheme, the Ministry of Justice plans to introduce mandatory mediation for all contested claims under £10,000 in the County Courts. It consulted on the proposals, and published its response in September 2023. Details so far include:

- The scheme will apply in all defended County Court proceedings allocated to the Small Claims track within the standard CPR Part 7 procedure.
- There will be no categories of parties or claims that will be exempt from the process, and it will not be possible for a party to apply for an exception in individual cases (although judges considering sanctions for non-compliance will be able to take into account any mitigating circumstances).
- If a party does not attend a scheduled telephone mediation, the court will have full discretion as to the appropriate sanction – including costs sanctions or strike out of the party's claim or defence.

The government also indicated its intention to integrate both fast-track and multi-track claims into mediation. It has stated that its current intention is to do this by referring the cases to external mediators rather than those employed by HMCTS.

This continued push towards mediation for higher value claims is not surprising when viewed in the context of increasing issues with delays in claims coming to trial. According to the Civil Justice Statistics for the period of April – June 2023, fast-track and multi-track claims are taking an average of over 78 weeks to reach trial. Not only is this more than nine weeks longer than for the same period in 2022, it is also the longest on record.

Taking all of the above into account, it seems like the market for mediation is going to continue to grow and thrive.

COMPULSION IN MEDIATION: AN UPDATE

By Dr Russell Wilcox

The various advantages of mediation over contested litigation have long been recognised. The proponents of mediation are well versed in drawing those advantages to the attention of the wider legal community and have waged an effective campaign over the past few decades to raise the profile of mediation, not just amongst disputant parties, but also, amongst the higher judiciary as the pressures on the formal court system continue to grow. Paradoxically, the underlying trends fuelling those pressures may well reside in wider and apparently irreversible trends towards the formalisation of societal dispute resolution, as evidenced in the explosive proliferation of legislation and semi-legislation over the same period. This might well render the early theoretical reservations expressed in respect of mediation by the likes of the US scholar Richard Abel ripe for careful reconsideration and recontextualization. Whatever the underlying drivers, however, the CPR and the higher judiciary have long sought to embed ADR via one or more forms of mediation process as part of the standard case management armoury for all civil disputes.

Indeed the requirement to consider ADR generally, and mediation, in particular, and to demonstrate the reasonableness of that consideration now appears as something of a mantra. In the CPR it is emphasised with particular force in the Practice Direction on Pre-action Conduct and Protocols, and throughout the various specific Pre-action Protocols themselves, but it is also found in CPR 1.3 and 1.4 of the Overriding Objective, at CPR 26.5 and 26.6 in relation to directions questionnaires, and CPR 44.4 in relation to questions of costs. It also invariably receives redoubled emphasis in each of the Court Guides, and in the fact that there now exist so many court endorsed mediation schemes available to parties already engaged in the litigation process. Finally, there is, of course, the constant refrain of judges in the higher courts themselves, encouraging mediation or, alternatively, bemoaning parties' failure to engage in it: *Egan v Motor Services (Bath)* [2007] EWCA Civ 1002; *Bradford v James* [2008] EWCA Civ 837; *Binns v Firstplus Financial Group Plc* [2013] EWHC 2436 (QB) (24 July 2013); *TMO Renewables Ltd (In Liquidation) v Yeo* [2022] EWCA Civ 1409 (28 October 2022), to name only a few well known examples.

Of course, the hall-mark of mediation has traditionally been the fact that it is a consensual process and that it is engaged in only with the consent of the parties involved. It is the consensual nature of mediation that is said to distinguish it from arbitration and the court process itself. At first blush, then, it is perhaps unsurprising that, until recently, the high-water mark of the courts' enthusiasm for mediated settlement seems to have been reached in the case of *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 in which the Court of Appeal concluded that, whilst attempts to mediate were strongly to be encouraged in very many cases, it was not open to the courts actually to force parties to engage in the mediation process, and that to do so would, in its view, be contrary to the Article 6 of the European Convention on Human Rights. Thus, the now well-known observations of Dyson MR:

> *"It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. 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....it seems to us likely that 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."

He went on:

> *"...Even if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it. ...If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process. ...if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it. ...the court's role is to encourage, not to compel."*

Since *Halsey* the courts have either agreed with it or felt themselves bound by it, though in *Wright v Michael Wright Supplies Ltd and another* [2013] EWCA Civ 234 and, more recently, *McParland & Partners Ltd and another v Whitehead* [2020] EWHC 298 (Ch) the question of whether the decision in *Halsey* might need to be revisited has been canvassed.

What has been clear, however, is that a growing number of mediation practitioner bodies seem to have come to the view that the time is now ripe for some form of "compulsory" mediation. By "compulsory", of course, the emphasis is not upon the ***outcome*** of any mediation, which must remain voluntary, otherwise, the process simply ceases to become mediation at all, but upon the requirement that parties actually engage in the ***process*** of mediation. Indeed, it was the conclusion of a report of the Civil Justice Council in June 2021 *Compulsory ADR* that, contrary to *Halsey*, compulsory ADR is not, in fact, incompatible with Article 6 of the ECHR and that introducing further compulsory elements of ADR will be *"potentially an extremely positive development."* That report was directed to ADR more generally, but it clearly covered the question of the introduction of compulsory elements into the court backed mediation process[1].

It also must be set against a background of growing judicial willingness to be robust in their encouragement of various forms of ADR. This appears most obviously to have been the case in *Hadley v Przybylo* [2023] EWHC 1392 (KB) (22 June 2023), in which Master McCloud was prepared to order the parties to engage in ADR in respect of their costs budgeting, but also in the case of *Lomax v Lomax* [2019] EWCA Civ 1467 (6 August 2019), where it was held that the consent of the parties was not required for the court to exercise its discretion under CPR 3.1(2)(m) to order early neutral evaluation. Similarly, in the complex and sensitive case of *Abdel-Kader & Ors v Royal Borough of Kensington and Chelsea & Ors* [2022] EWHC 2006 (QB) (28 July 2022) Senior Master Fontaine was prepared to impose a further stay of proceedings for the purposes of mediation even against the stated wishes of the Claimants, BLJ.

The whole question of "compulsory mediation", as well as the decision in *Halsey* itself, appears now set finally to be revisited by the Court of Appeal in the case of *James Churchill v Merthyr Tydfil County Borough Council*. That case concerns a dispute over Japanese Knotweed damage which Mr Churchill said the council had allowed to enter his garden from its land. The council argued that the Claimant should have been compelled to use its dispute resolution service before bringing his claim. It is subject to an appeal from the DDJ's order direct to the Court of Appeal. Permission was given to Centre for Effective Dispute Resolution (CEDR), the Civil Mediation Council (CMC) and the Chartered Institute of Arbitrators (CIArb) to make submissions as to the whether the *Halsey* decision was made in error. What, if anything, the Court of Appeal will have to say on the question of compulsory mediation remains to be seen, but it will be noted by all those attentive to the legal news that it concluded its three day hearing of the matter on 10 November 2023, so it should not be long before we find out.

1. It is also noteworthy that two of the report's authors were members of the higher judiciary, Lady Justice Asplin and Mr Justice Trower.

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