Binding rules

Andrew Hogan on how costs penalties are being used to push parties towards ADR

Alternative dispute resolution (ADR) in the forms of negotiation, mediation, adjudication, and arbitration has been around as long as there has been a system of litigation, to which it offers an 'alternative' path to dispute resolution.

But now moves are afoot with the publication of the Civil Justice Council Report Compulsory ADR in June 2021, to make it compulsory: not in the sense of it being compulsory to resolve the dispute in an alternative forum, but to integrate the process into the civil justice system, with sanctions and costs penalties for not taking part in the process. In a sense, it will no longer be alternative, because it will be compulsory, built into the road to litigation and not an alternative route at all.

The reasons for this enthusiasm for ADR are multi-factorial. Since the spending curbs of the coalition government, and exacerbated by the Covid pandemic, the resource pressures placed on the civil justice system of England and Wales have been immense. I have no doubt that the prospect of easing that pressure, by taking cases out of the court system, is a factor in the drive for ADR.

Another factor is practicality: traditional civil litigation is extremely expensive, and probably unfit for purpose, for the sort of claim involving a consumer dispute, a data breach, a claim under the Equality Act 2010, or a boundary dispute: if the costs of such litigation are likely to render the losing party bankrupt, then an alternative means of enabling parties to resolve their differences should be sought.

And finally, there is a philosophical point, that civil litigation can be outmoded by faster, leaner processes, facilitated by technology that should be promoted: you are far more likely to use eBay's dispute resolution process than you are to start proceedings in the small claims court, when needing to get compensation for unsatisfactory goods.

THE STORY SO FAR

In the existing system, consideration of ADR is meant to be part of the furniture of every case. Rule 1.4 CPR, as part of the overriding objective, notes the court will consider the following when exercising its case management powers:

'(e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure'

The Civil Procedure Rules have also taken on board the need to supplement mediation and other more traditional forms of ADR with the process of early neutral evaluation in rule 3.1(m):

'(m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an early neutral evaluation with the aim of helping the parties settle the case.'

In practical terms, the court will consider inflicting costs penalties on parties who unreasonably refuse to engage in mediation (or some other form of ADR). The leading case on when a refusal to engage in mediation is reasonable or not remains *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, where the Court of Appeal explained that the reasons that might justify the refusal of an offer of mediation included:

(a) The nature of the dispute. Some types of case might be simply unsuitable for mediation.
(b) The merits of the case. A mediation might be a waste of time where the merits of a party's case were very strong.
(c) Other settlement methods have been attempted. And failed.
(d) The costs of mediation would be disproportionately high. Particularly if the costs of a trial then had to be added on, as well.
(e) Delay. Whether the mediation would cause delays in the court process.
(f) Whether the mediation had a reasonable prospect of success. Although this might involve a difficult evaluation of what might have happened.

These guidelines were modestly extended in *PGF II SA v OMFS Company 1 Limited* [2013] EWCA Civ 1288, where the Court of Appeal decided that silence in the face of a reasonable request for mediation could also be unreasonable. But the key point to note is that there was plenty of wriggle room in these guidelines, to enable a party to refuse to engage in mediation if they could present a convincing case as to why their stance was appropriate. There was also some judicial encouragement of this reluctance by other divisions of the Court of Appeal.

In practical terms, the court will consider inflicting costs penalties on parties who unreasonably refuse to engage in mediation (or some other form of ADR)

In the case of *Gore v Naheed* [2017] EWCA Civ 369, where the judge at first instance refused to apply a costs penalty for failing to engage with mediation, Patten LJ opined: 'Speaking for myself I have some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated.'

CJC REPORT

A major stepping stone on the route to Compulsory ADR was the publication in November 2018 of the *Civil Justice Council Final Report on ADR*. Significantly, the authors of that report noted: 'It is with greatest deference that we offer any criticism of the carefully considered guidance given by the Court of Appeal on a case management issue. But that is where we find ourselves and it is significant that some of the feedback we received seeking clarification of the inconsistencies in recent Court of Appeal decisions came from the judiciary.'

The Working Group put forward several recommendations, including a revised and considerably narrower list of what might be good reasons for refusing mediation:

COMPULSORY ADR

(1) The parties have already attempted mediation (or possibly early neutral evaluation ((ENE)), or some other form of ADR) without success.
(2) The parties are already committed to an ADR process in the near term.
(3) The parties (or a party) satisfy the court of a need to wait (often until after disclosure) for any meaningful negotiations to take place, but they will commit to using ADR at that stage if the case has not otherwise settled.
(4) There has been unreasonable or obsessive conduct by one or other party (of the *Hurst v Leeming* [2002] EWHC 1051 (Ch) variety).
(5) There is a genuine test case in which the court's judgment on an issue of principle is required.

The Working Group also went on to say what they considered did not amount to 'good reasons' for refusing mediation:

'In our combined experience of the way ADR and in particular mediation has worked in complex and entrenched disputes, we do not think that any of the following are acceptable opt outs:

'(1) That the case appears complex (this seemed to be accepted as in part justifying a refusal to mediate in *Gore v Naheed*).

'(2) That the case involves serious issues such as fraud.

'(3) That the ADR process appears to be unlikely to succeed.

'(4) (Given the increasing flexibility of the ADR offering) that the cost of ADR is too great.

'(5) That one or other party believes he or she has a strong case.'

THE LATEST PROPOSALS

Thus, the scene was set for further developments. In June 2021, the Civil Justice Council published a report on the use of Compulsory ADR (Alternative Dispute Resolution), addressing two questions: first, can the parties to a civil dispute be compelled to participate in an ADR process? Second, if the answer is yes, in what kind of case and at what stage should such a requirement be imposed?

The paper notes that the debate over compulsion in respect of requiring the parties to engage in ADR has been dominated by the Court of Appeal decision in *Halsey v Milton Keynes General NHS Trust*, where, as part of that decision, Dyson LJ expressed the view that to oblige unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court.

But much water has flowed under the bridge since 2004: a new

Continued on page 9

Continued from page 7
generation of judges and lawyers have grown into place, domestic law has moved on, and so has key jurisprudence in both the EU and the European Convention on Human Rights. This has led the authors of the most recent Civil Justice paper to conclude:

'10. Provided certain factors are borne in mind in designing the scheme, a procedural rule which requires parties to attempt ADR at a certain point or points, and / or empowers the court to make an order to that effect, is in our opinion, compatible with Article 6 of the European Convention on Human Rights.

The factors requiring consideration whenever compulsion is being considered will include:

- 'The cost and time burden on the parties;
- 'Whether the process is particularly suitable in certain specialist areas of civil justice;
- 'The importance of confidence in the ADR provider (and the role of regulation where the provider is private);
- 'Whether the parties engaged in the ADR need access to legal advice and whether they have it;
- 'The stage of proceedings at which ADR may be required; and
- 'Whether the terms of the obligation to participate are sufficiently clear to the parties to encourage compliance and permit enforcement.'

COSTS PENALTIES AND MEDIATION

Travel has already begun down the road of compulsory ADR through the increasing willingness of courts within the existing system to start imposing costs penalties on parties who refuse to mediate.

Recently, there have been a string of first instance decisions whereby stringent costs penalties have been applied to parties who refuse to engage in mediation: including *DSN v Blackpool Football Club Limited* [2020] EWHC 595 (QB) and *BXB v Watch Tower and Bible Tract Society of Pennsylvannia*, *Trustees of the Barry Congregation of Jehovah's Witnesses* [2020] EWHC 656 (QB).

Although the *DSN* case was ultimately overturned on appeal on liability, the court's observations on failure to engage in mediation at first instance reflect the current orthodoxy. Both cases concerned allegations of sexual abuse: hitherto, it may have been thought that this was a type of case where mediation had little prospect of success: whether the abuse occurred or not would appear to be one of those issues forming a chasm between the parties. But in each case a failure to engage in mediation resulted in costs penalties.

It follows that genuine requests for mediation have real force in relation to potential costs outcomes at the end of the case. That in turn means that those requests must be considered genuinely, and any letters written by either side should be written, as ever, on the premise that they may be read out in court, two years after they were written.

Entrepreneurial lawyers should give thought not only to new cases, or new areas of work, but new processes, working out how existing disputes might be capable of resolution through a private mediation or arbitration

THE FUTURE

But ADR is much more than mediation, in the sense of a mediator spending a day, moving parties towards settlement, conducting shuttle diplomacy between different rooms. Moreover, different kinds of mediation can take place. Mediation, like court hearings, can be conducted remotely. It can be conducted by a judge. It may be capable of being conducted by a computer.

Similarly, arbitration is no longer confined to commercial disputes, particularly those with an international element. The scope of the Arbitration Act 1996 is such that it can create binding dispute resolution procedures for all sorts of cases: thus one could have software-driven blind bidding processes, arbitrations conducted by a lawyer via an online portal, either live or by a form driven process, or the parties making an agreement to the effect that their dispute shall be resolved according to a religious code.

It follows that entrepreneurial lawyers should give thought not only to new cases, or new areas of work, but new processes, working out how existing disputes might be capable of resolution through a private mediation or arbitration platform, more quickly and more cheaply than the civil justice system can offer through litigation.

Looking forward, the move to compulsory ADR will be part of a culture shift which is accelerating, not least because of the current demands on the court system; and, I suspect, because of a generational changing of the guard among the judges.

Andrew Hogan practises from Kings Chambers in Manchester, Leeds, and Birmingham. His blog on costs and litigation funding can be found at www.costsbarrister.co.uk