Fenwick Elliott

THE COURTS AND ADR

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Introduction

The term ADR has attracted some considerable attention in the legal and related fields since around the mid-1980s. The term is most frequently taken to mean "Alternative Dispute Resolution", although some suggested it should mean "Appropriate Dispute Resolution" (in selecting the most sensible course of action) or Amicable Dispute Resolution (insofar as it relates to the parties reaching settlement by way of "round table talks"). The concept that a range of dispute resolution techniques is available as an alternative to the court system, or indeed arbitration, is not new. The more recent advent of the term ADR is usually taken to mean a voluntary, consensual dispute resolution process. The most frequently encountered process is that of mediation. [(1)]

Mediation involves the use of a third-party mediator who assists the parties towards a voluntary negotiated settlement. The origins of mediation can be traced back to ancient China; however, the more formalised technique of commercial mediation was principally developed in the United States. In the UK, mediation was initially taken seriously in the resolution of family disputes, but has since expanded into all commercial areas.

Much literature has been published on the subject of ADR and in particular, mediation. The purpose of this paper is to consider the approach of the courts to mediation in the light of recent case law. Further, the paper will outline the relatively new process of "Contracted Mediation", sometimes referred to as "Project Mediation". Finally, the developments of the Construction Conciliator's Group in respect of "homeowner" disputes will also be considered. Before turning to these main issues, this paper briefly sets out a reminder of the general principles of mediation.

Mediation – a reminder of the general principles

Mediation is essentially an informal process in which the parties are assisted by one or more neutral third parties in their efforts towards settlement. Mediators do not judge nor arbitrate the dispute. Essentially, they do not make a decision about how the parties should settle their dispute. The power to settle the dispute remains with the parties.

[(1)] See Gould , N., Capper, P., Dixon, G. and Cohen, M. (1999), *Dispute Resolution in the UK Construction Industry*, Thomas Telford, London

Mediators advise and consult impartially with the parties in order to assist in bringing about a mutually agreeable solution to the problem. Goldberg defines mediation in the following terms:

> Mediation is negotiation carried out with the assistance of a third-party. The mediator, in contrast to the arbitrator or a judge, has no power to impose an outcome on disputing parties. [(2)]

There are two common threads to mediation. First, the form of the third party intervention. The primary role of this neutral third party is to facilitate other people's decision-making. The process builds on negotiation, and the mediator reviews the situation with the parties. Second, the third-party mediator must be independent of the parties in dispute. The essence of mediation is that the mediator is impartial. The trust that develops during the process allows the mediator to perform a bridging role between the parties.

There is some debate about how interventionalist or evaluative a mediator should be. There is no internationally agreed law. It is perhaps more useful to make a distinction between a facilitative and an evaluative technique. A facilitative mediator merely tries to aid communication between the parties. Such a mediator will call on many techniques such as reality testing in order to persuade the parties to critically review the strengths and weaknesses of their position in order to reach a settlement. The Centre for Effective Dispute Resolution (CEDR) advocates the facilitative approach to mediation. At the other end of the scale is the evaluative approach. An evaluative mediator comments on the subject matter and makes recommendations as to the outcome. Some argue that the danger with the evaluative approach is that one party may feel that the mediator is "finding" against them, and in those circumstances the mediator will compromise his or her neutrality.

In summary, the main elements of mediation are therefore:

1. It is a voluntary process in the sense that the parties participate of their own free will. They are free to leave the process of mediation at any time;

2. A neutral third party assists the parties towards settlement. The parties do not try to settle the dispute on their own;

3. The process is non-binding unless an agreement is reached. If an agreement is reached and signed, then that agreement becomes binding and enforceable in court;

4. The process is private, confidential and conducted on a without prejudice basis. Therefore, if the parties do not manage to settle their dispute then they have not prejudiced their legal position should the matter proceed to arbitration or litigation.

[(2)] Goldberg, S.B., *et al*. (1992), *Dispute Resolution: Negotiation, Mediation and Other Processes,* Second Edition, Little Brown & Co, Boston, p. 103

The court's approach to mediation

The initial development of mediation for the resolution of commercial disputes, and in particular construction industry disputes, developed from within the industry, its consultants and new organisations such as CEDR. The growth of ADR and mediation in practice was slow during the 1990s. A much greater awareness had developed by the end of the 1990s. The increased use of ADR and mediation in practice was assisted by the new Civil Procedure Rules that embraced ADR principles.

The Civil Procedure Rules

ADR and its principles are now embodied at the heart of the Civil Procedure Rules (CPR). These Rules govern litigation in the courts. The overriding objectives of the CPR are set out at CPR part 1:

> **Rule 1.1 The overriding objective**
>
> **1.1**
>
> The overriding objective
>
> (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
>
> (2) Dealing with a case justly includes, so far as is practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate—
>
> (i) to the amount of money involved;
>
> (ii) to the importance of the case;
>
> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly; and
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

> **Rule 1.2 Application by the court of the overriding objective**
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> **1.2**
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> Application by the court of the overriding objective
>
> The court must seek to give effect to the overriding objective when it—

(a) exercises any power given to it by the Rules; or

(b) interprets any rule.

Rule 1.3 Duty of the parties

1.3

Duty of the parties

The parties are required to help the court to further the overriding objective.

Essentially, the courts are to deal with cases justly, ensuring that cases are dealt with expeditiously and fairly. However, this is not to be done at any cost, and the courts are expected to "save expense" if reasonably possible. In order to achieve this goal, the courts are to proactively manage cases and encourage parties to use ADR.

All parties to litigation have an obligation to assist the court to further the overriding objective (CPR 1.3). Assistance includes clearly setting out the issues in dispute, identifying key documents and in particular attempting to avoid litigation by settling the dispute (see Practice Direction – Protocols 1.4(2)). This assistance is expected from the parties even before proceedings are commenced in the court by the requirement for the parties to follow pre-action protocols. For building and engineering disputes, the applicable protocol is the Pre-action Protocol for Construction and Engineering Disputes. [3]

The Pre-action Protocol for Construction and Engineering Disputes

The Pre-action Protocol for Construction and Engineering Disputes applies to all disputes in that category, including professional negligence claims against architects, engineers and quantity surveyors. A claimant must comply with the Protocol before commencing proceedings in the court, subject to some exceptions. Paragraph 1.4 relates to compliance and states that:

> The court will look at the effect of non-compliance on the other party when deciding whether to impose sanctions.

Non-compliance with the Construction and Engineering Pre-action Protocol was considered in the case of *Paul Thomas Construction Limited* v *Hyland & Anor* (8 March 2000). In that case the defendants had employed the claimant as a building contractor. A dispute arose over the quantification of the final account. The defendants offered to submit to a form of adjudication, but the claimant refused unless the defendants paid the entire costs of that process. The claimant then issued proceedings in the High Court, and made unsuccessful applications under CPR Part 24 (summary judgment) and Part 25 (interim payments).

His Honour Judge Wilcox considered whether the claimant was justified in issuing proceedings. He came to the conclusion that they were not, and that they had conducted themselves in an unreasonable manner in breach of the Pre-action Protocol. The appropriate sanction was for the claimants to pay the defendant's costs of the action on an

[3] August 2000

indemnity basis. The Judge stated that the conduct of the claimant had been exceedingly heavy-handed. He stated:

> Culpability here means wholly unreasonable behaviour. That must be measured against the reasonable conduct of reasonable solicitors at the time and must be informed by the current rules and, in particular, paragraph 1.4 of the pre-action protocol. I take the view that it was wholly unnecessary to commence this litigation. It was wholly unreasonable. It is clear that there could have been and should have been explored alternative dispute resolution. That may include sensible discussions between the parties not necessarily involving a third party. In my judgment, there is in those terms some culpability in this case. In my judgment, indemnity costs are warranted.

Therefore, failure to comply with the Pre-action Protocol can lead to cost sanctions. Unreasonable heavy-handedness of a claimant and failure to comply with the Pre-action Protocol will mean paying the defendant's costs on an indemnity basis.

Daejan Investments Limited v *The Park West Club Limited* v *(Part 20) Buxton Associates* also considers compliance with the Pre-action Protocol and its impact on costs. [(4)] This case concerned the introduction of a Part 20 claim against Buxton Associates. The claim between Daejan and Park West Club had been running for almost two years as the original complaint had been made in February 2002 in respect of the quality of waterproofing works carried out by Daejan. After obtaining an experts' report Daejan alleged professional negligence against Buxton Associates, and sought leave of the court to join Buxton as a Part 20 defendant. The claim was amended, and then a further amendment was sought. The court allowed the further amendment to the pleading, but said that a Part 20 claimant was not relieved of the obligation to follow the material terms of the Protocol. If this were not the case then a party would be at risk of being joined into an action late in the day and without the opportunity to consider the nature of claims brought against it. The purpose of the Protocol was to ensure that a defendant knew the basis of the case against it.

Buxton had, therefore, not had the opportunity of considering its true position until it had been brought directly into the litigation. The failure to comply with the Protocol could and in this case did result in cost sanctions. As a result Daejan paid Buxton's costs. It is worth noting that the amendment being sought by Daejan resulted from Daejan realising that parts of its claims were speculative and could not be supported by subsequent investigation.

For parties that follow the Pre-action Protocol Procedure, section 5 requires the parties to attend a Pre-action Protocol meeting. At that meeting the parties are expected to consider whether some form of ADR procedure would be more suitable than litigation. If so, the parties should endeavour to agree which form of ADR to adopt. In this respect the Pre-action Protocol is simply emphasising and extending the requirement for the parties to consider alternative dispute resolution in line with the requirements of the Civil Procedure Rules considered above.

[(4)] [2004] CILL 2084, April

How has the court approached contractual ADR provisions and mediated settlement agreements?

In *Cable & Wireless Plc* v *IBM United Kingdom Limited*[5] the Court of Appeal held that a contractual agreement to refer disputes to a dispute escalation ADR procedure was binding and enforceable. Clause 40 of the contract between the parties stated:

> Any question or difference which may arise concerning the construction, meaning effect or operation of the Agreement, any Local Services Agreement or any matter arising out of or in connection with this Agreement or any Local Services Agreement shall in the first instance be referred to the C&W Project Executive and the IBM Project Executive (both as defined in Schedule 13 (Governance)) for discussion and resolution at or by the next Review Meeting. If the matter is not resolved at such meeting, the matter shall be referred to the next level of C&W's and IBM's management who must meet within five working days or such other period as the Parties may agree to attempt to resolve the matter. If the matter is not resolved at that meeting, the escalation shall continue with the same maximum time interval through one more level of management. If the unresolved matter is having a serious effect on the Services, the Parties shall use every reasonable endeavour to reduce the elapsed time in completing the process. Neither party nor any Local Party may initiate any legal action until the process has been completed, unless such Party or Local Party has reasonable cause to do so to avoid damage to its business or to protect or preserve any right of action it may have.
>
> The levels of escalation referred to in Clause 40.1 above are
>
> | IBM | C&W |
> |---|---|
> | First Level – Regional Executive | First Level – Global Executive |
> | Second Level – Executive Sponsor | Second Level – Executive Sponsor |
>
> If any of the above are unable to attend a meeting, a substitute may attend provided that such substitute has at least the same seniority or reasonably comparable managerial or directional responsibility and is authorised to settle the unresolved matter.
>
> If the dispute is not resolved by escalation in accordance with Clause 40.1 the Parties shall seek to resolve disputes between them pursuant to Clause 41.2.

Clause 40 is in effect a dispute escalation clause. Any differences between the parties are referred to management in an attempt to discuss and settle the matter. Unresolved matters are then referred up to senior management. The parties are not to commence any legal action until this process has been completed. Clause 41 then provides:

> The Parties shall attempt in good faith to resolve any dispute or claim arising out of or relating to this Agreement or any Local Services Agreement promptly through negotiations between the respective senior executives of the Parties who have authority to settle the same pursuant to Clause 40.

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[5] [2002] EWHC 2059

> If the matter is not resolved through negotiations, the Parties shall attempt in good faith to resolve the dispute or claim through an Alternative Dispute Resolution (ADR) procedure as recommended to the Parties by the Centre for Dispute Resolution. However, an ADR procedure which is being followed shall not prevent any Party or Local Party from issuing proceedings.

The dispute resolution procedure set out at clause 41 provides that the parties must attend good faith negotiations in accordance with clause 41, before then attempting to resolve the dispute through some form of ADR as recommended by CEDR. The application to stay the legal proceedings was based upon clause 41. The Honourable Mr Justice Coleman in the commercial court held that the contractual agreement to mediate was enforceable. He also held that the dispute escalation clause was clear and operable such that that would also be enforced.

At the other end of the scale is the conclusion of a mediation. If successful, the parties will then set out their settlement agreement in writing and sign it. It is at this stage that the "non-binding" mediation process comes to an end with a binding settlement agreement. If the parties have commenced litigation then they will usually bring the court proceedings to an end with a consent order. These orders used to be known as Tomlin orders, after the judge that initially recognised the concept. A consent order is quite simply a court order that confirms that the parties have settled the litigation. The terms of the settlement are then set out in a schedule attached to the order.

In the case of *Thakrar* v *Thakrar* Sir Andrew Morritt QC held that a Tomlin Order (agreed at a mediation) was not adequate and so would not be enforced. The Court of Appeal reversed the decision.

There were a complicated series of applications in respect of the CIRO Citterio Menswear Plc administration. This appears to be the main reason why the Consent Order was not approved at first instance. On appeal, the Vice Chancellor held that a genuine compromised has been reached, even if some of the facts were doubtful. He therefore found that the mediation settlement agreement was unconditional and was enforceable.

The impact of ADR on litigation; costs

There have been several highly significant decisions regarding costs orders against successful litigants on the basis that those litigants failed to seriously consider mediation. The first of these was *Susan Dunnett* v *Railtrack Plc* in the Court of Appeal. [(6)] Judgment was delivered on 22 February 2002. Susan Dunnett's three horses had been killed when the gate to her paddock, which had been replaced by Railtrack, had been left open, allowing the horses onto the line. The gate was not padlocked, nor was there any mechanism for automatically closing the gate, despite the fact that Susan Dunnett had warned Railtrack that people left the gate open. There was an appeal and cross-appeal from the first instance decision, and in granting permission to appeal the Lord Justice stated that mediation or a similar process would be highly desirable in this particular case because of its inherent flexibility.

[(6)] [2002] EWCA Civ 302

Regardless of the court's suggestion Railtrack refused to engage in mediation. Railtrack effectively won the appeal, but the Court of Appeal found that as Railtrack had refused to mediate a costs order should not be made against the unsuccessful claimant. Lord Justice Brooke said at paragraph 14 of the costs judgment:

> My Lord, when asked by the Court why his clients were not willing to contemplate alternative dispute resolution, said that this would necessarily involve the payment of money, which his clients were not willing to contemplate, over and above what they had already offered. This appears to be a misunderstanding of the purpose of alternative dispute resolution. Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and the courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claim. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which go beyond the powers of the court to provide. …

He went on to make the point that a party who dismissed the opportunity for mediation without proper thought would suffer uncomfortable consequences.

The Court of Appeal was in effect following the view of Lord Woolf in *Frank Cowl* v *Plymouth City Council*.[7] In that case Lord Woolf emphasised the need for parties in dispute with public bodies to consider ADR. Lord Woolf said that "today sufficient should be known about ADR to make the failure to adopt it, in particular where public money is involved, indefensible". In that case the defendant offered to submit the dispute to a complaints procedure chaired by an independent chairman. The claimant refused, and that refusal led to an adverse costs order against the claimant.

Given that the CPR requires the parties to consider ADR, and that obligation is extended into the pre-action protocols there is now a clear obligation on the parties to seriously consider some form of mediation or other ADR process. It seems that that obligation will, if ignored, lead to cost consequences, even if the party concerned is successful. However, there may be some circumstances when a failure to mediate is justified.

Refusing to mediate and cost sanctions

Since the decision of the Court of Appeal in *Dunnett* v *Railtrack*, the courts have given significant weight to the willingness or otherwise of parties to attempt alternative dispute resolution when assessing the conduct of the parties for the purposes of making a costs order under CPR 44.3. Part 44.3 states:

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(7) *The Times,* 8 January 2002

Rule 44.3 Court's discretion and circumstances to be taken into account when exercising its discretion as to costs

44.3

Court's discretion and circumstances to be taken into account when exercising its discretion as to costs

(1) The court has discretion as to—

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(2) If the court decides to make an order about costs—

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.

(3) The general rule does not apply to the following proceedings—

(a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or

(b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including—

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36).

(Part 36 contains further provisions about how the court's discretion is to be exercised where a payment into court or an offer to settle is made under that Part.)

(5) The conduct of the parties includes—

(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended his case or a particular allegation or issue;

(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

(6) The orders which the court may make under this rule include an order that a party must pay—

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment.

(7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c).

(8) Where the court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed.

(9) Where a party entitled to costs is also liable to pay costs the court may assess the costs which that party is liable to pay and either;

(a) set off the amount assessed against the amount the party is entitled to be paid and direct him to pay any balance; or

(b) delay the issue of a certificate for the costs to which the party is entitled until he has paid the amount which he is liable to pay.

The case of *Hurst* v *Leeming* [8] gives some guidance as to when a refusal to mediate might be justified. The case concerned the dismissal of an action against a barrister, Leeming. The claimant argued that despite the dismissal of the action he should still receive his costs as Leeming had refused to mediate. Leeming raised five reasons as to why he had refused to mediate:

1. The legal costs already incurred were high;
2. The seriousness of the allegation, as it related to professional negligence;
3. The total lack of substance of the claimant's claims;
4. The lack of any prospects of successful mediation; and

[8] 9 May 2002

5. The obsessive character and attitude of Hurst, and his history of litigation.

Lightman J in the Chancery Division considered each of these grounds and decided that the first three were insufficient. Therefore, the matter of legal costs already incurred, the seriousness of the allegation and the fact that there is no substance to the claim do not amount to valid reasons for refusing to mediate. However, lack of any prospects of a successful mediation, given the obsessive character and attitude of the claimant and his repeated history of litigation, which demonstrated that it was highly unlikely that the claimant would make any serious attempts to settle during a mediation, was sufficient. Therefore, Leeming was not deprived of his full entitlement to costs.

The Court of Appeal has also recently held that there are circumstances within which it is reasonable to refuse to mediate. In the case of *Alan Valentine* v *(1) Kevin Allen (2) Simon John Nash (3) Alison Nash*[9] the respondents had put before the Court considerable correspondence which made it clear that real efforts to settle the dispute had been made, and that the offers were reasonable and generous. The respondents had also tried to arrange a "round the table" meeting. Those offers were refused by Valentine who sought the payment of a large sum of money in settlement. The Court of Appeal therefore distinguished this case from the case of *Dunnett* v *Railtrack Plc* even though the respondents had refused Valentine's offer of mediation. The Court of Appeal held that their refusal to mediate was reasonable, and so Valentine would pay the respondents' costs in resisting the appeal.

Must a party always submit to mediation if offered by the other side?

The case of *Hurst* v *Leeming* makes it clear that the court might not penalise a refusal to mediate, but only in very limited circumstances. The courts have now considered further instances, and also whether mediation is the only option.

Park J held in *Societe Internationale De Telecommunications Aeronautiques SC* v *Wyatt Co (UK) Limited and others (*v *Maxwell Batley (A Firm) part 20 defendant)* [10] that a party that was successful in the litigation should not be deprived of its costs because it reasonably refused to mediate. In *Societe* the claim against Maxwell Batley failed completely. The judge considered that Watson Wyatt Sarl's (3rd defendant) motive for claiming against and seeking to mediate with Maxwell Batley was to pressure them to make a large contribution that could then be used to settle the main action. The case was distinguished from *Dunnett*.

In the Court of Appeal case of *Leicester Circuits Limited* v *Coates Brothers Plc*[11] the parties agreed (after delivery of the first instance decision) on 4 January 2002 to mediate. A mediator was appointed and position statements exchanged. Coates withdrew from the mediation. Coates then won the appeal and asked for its costs. Leicester were ordered to pay Coates costs to 1 January 2002, with no order as to costs thereafter. Leicester were also to pay costs of the appeal.

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[9] 29 July 2003
[10] [2002] EWHC 2401 (Ch)
[11] [2003] EWCA Civ 333

When might the court make no order as to costs?

On 9 June 2003 the Court of Appeal delivered its judgment in *Dearling* v *Foregate Developments (Chester) Limited*. [12]

The claimant, Mr Dearling, had alleged that the house which the defendant had contracted to build for him had not been constructed in accordance with their contract. An initial application to court was settled on the basis that an expert be appointed to determine the dispute ("the ADR proceedings"). The expert allowed some, but not all, of the claimant's claims, and decided that the cost of the ADR proceedings should be split 50/50 between the parties. The claimant subsequently issued further proceedings claiming damages for breach of contract, but when the matter came to trial, the Judge again encouraged the parties to attempt to settle the matter. The parties duly settled, but left the matter of costs to the Judge, who ordered that the defendant should pay all the claimant's costs apart from its half share of the costs of the ADR proceedings.

The defendant appealed on the basis that the Judge should not have allowed the claimant its costs after the last date on which the defendant's final Part 36 offer could have been accepted. The claimant cross-appealed on the basis that the Judge should have awarded him his costs of the ADR proceedings.

The Court of Appeal allowed the appeal and dismissed the cross-appeal. The Court affirmed previous authorities to the effect that in the absence of a good reason to make any other order, the fall-back was to make no order as to costs. The parties had reached a commercial settlement, which did not reflect the merits of the case, and the Judge had not looked into these. The costs of the ADR proceedings awarded by the expert reflected the defendant's success in reducing an initially exaggerated claim and were upheld.

Under the CPR the court has the power to make an award of costs where parties have settled without a trial. In two previous cases considered and approved by the Court of Appeal, *Brawley* v *Marczynski*[13] and *Boxall* v *Waltham Forest LDC*, [14] costs orders were made because the Judge concluded that it was obvious which side would have won had the substantive issues been brought to trial. These cases therefore offer no encouragement to litigants to defend a hopeless case up to the door of the court in the expectation of no order being made as to costs by the court if a commercial settlement is reached at that final stage. The amounts in issue in *Dearling* were small, and the conduct of the parties reasonable in attempting ADR and making Part 36 offers, so the Judge had been justified in not looking into the substantive issues.

In different circumstances, it would have been proper for him to do so and then an award of costs could have been made. As there had been an award of costs in the ADR proceedings and not an agreement between the parties to split them or bear their own costs, the court had the discretion to review the award. In upholding the expert's award of costs, the court bore in mind the principle of proportionality and penalised the claimant as the expert had done for bringing an exaggerated claim.

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[12] 9 June 2003, Court of Appeal, Civil Division
[13] (2002) 4 All ER 1067
[14] (2001) QBD, 21 December 2000

The burden is now on the unsuccessful party to show why there should be a departure from the rule that the winner gets its costs.

In *Halsey* v *Milton Keynes General NHS Trust; Steel* v *(1) Joy (2) Halliday*[15] the Court of Appeal considered the important question of when a judge should impose cost sanctions on an unsuccessful litigant on the grounds that he refused to take part in mediation. The judgment concerned two appeals, and also reviewed submissions from four interveners, namely: the Law Society, the Civil Mediation Council, the ADR Group and CEDR.

In the first case Mr Halsey died while in hospital. Negligence was alleged by his widow but she was unsuccessful at trial and so the NHS claimed its costs. Following *Dunnett* the claimant argued that the NHS should not receive its costs as the claimant had written to the NHS suggesting mediation. The Trust refused on the basis that it believed that it had a good defence and should not be forced to make financial offers to settle in mediation and so wanted to avoid the costs of mediation. The claimant argued that this was an unreasonable refusal to mediate. The trial judge did not agree with the claimant, and so made the usual costs order thus awarding the Trust its costs.

In the second case of *Steel* v *(1) Joy and (2) Halliday* the claimant was injured in two road accidents. The first in 1996 and the second in 1999. The defendants admitted liability and the only issue was whether the second defendant had caused further damage to the claimant. The second defendant refused an offer to mediate on the basis that the dispute concerned a question of law. The second defendant was successful and asked for its costs. The trial judge awarded costs to the second defendant, thus following the usual costs rule.

Lord Justice Dyson made it clear that it was no longer necessary to make extensive references to the Civil Procedure Rules or Court Guides in order to demonstrate the importance of ADR. He did, however, draw a distinction between the court's encouragement of parties to agree to mediate, and the court ordering the parties to mediate. Whilst he supported the court's encouragement, even in the strongest terms, he considered it quite wrong for the court to order the parties to mediate. Forcing a "truly unwilling" party to mediate was not only unacceptable, but was also an obstruction to a party's rights to access to the court and a breach of Article 6 of the European Convention on Human Rights (ECHR).

This aspect of the case is particularly interesting (although orbiter) given that the 35th Amendment to the CPR introduced, from 1 April 2004, a mandatory mediation scheme for the Central London County Court. Will this Scheme and the Amendment be challenged for directly conflicting with the ECHR?

The second aspect is the court's "encouragement" to mediate. In *Dunnett* v *Railtrack* the Lord Justice recommended mediation twice. The Court of Appeal held that the successful party's refusal to mediate was unreasonable, leading to cost sanctions. The Model Directions for clinical negligence cases require the parties to consider mediation and if refusing to mediate to then file reasons in court, which will be considered after judgment in respect of the award of costs.

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[15] [2004] EWCA Civ 576

Nonetheless the court's encouragement to the parties to undertake some form of ADR may be robust, and cost sanctions may follow. CPR Part 44.3(2) provides that the general rule is that an unsuccessful party will pay the costs of a successful party, but "the court may make a different order".[16] If a court is to deprive a successful party of some or all of his costs because of a refusal to agree to ADR then "such an order is an exception to the general rule that the costs should follow the event". The key question was whether a party had acted unreasonably in refusing ADR. At paragraph 16 of the judgment the question of whether a party had acted unreasonably in refusing ADR should included a consideration of:

(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; and

(f) Whether the ADR had a reasonable prospect of success.

He then considered each of these in turn. In respect of the first, the nature of the dispute, he acknowledged that there were some cases where ADR was not appropriate. This included the determination of issues of law or construction, allegations of fraud, or disreputable conduct, resolving a point of law that arises from time to time and injunctive or other relief.

In respect of the merits of the case, a party's belief as to the strength of its case was also to be taken into account. Otherwise invitations to mediate could simply be used as tactical ploys, and those with strong cases will be forced to mediate and thus incur additional costs despite the strength of their case. He therefore qualified Lightman J's test in *Hurst* v *Leeming* by the inclusion of the word "unreasonably", thus: "the fact that a party *unreasonably* believes that he has a watertight case again is no justification for refusing to mediate". Conversely, a *reasonable* belief that one has a watertight case may well justify refusing to mediate.

Attempts at other settlement methods should also be considered. This will be relevant because it may demonstrate that one party is making an effort to settle or that the other has an unrealistic view in respect of the merits of its case.

The cost of mediation in respect of the amount of the claim by comparison to the cost of litigation is another factor. The costs of the mediation may only be minimal, perhaps the costs of one day in court, but it may be possible to resolve a dispute quite simply by a single day in court.

Delay is also a factor to take into account. Suggesting mediation late in the day may not be acceptable if it will delay the trial. This fifth consideration is analogous to an issue raised in the adjudication case of *Gibson* v *Imperial Homes*, where HHJ Toulmin QC considered

[16] CPR Part 44.3(2)(b)

that adjudication may not be appropriate where "final dispute resolution" methods were "immediately available". [17]

Whether the mediation had a reasonable prospect of success was a "critical factor". It was crucial in *Hurst* v *Leeming* and rightly so in the Court of Appeal's view. Lightman J, in *Hurst* v *Leeming*, considered that the question should be asked objectively. So, a position of intransigence might lead to an adverse costs order. However, the Court of Appeal went further. They recognised that a successful party cannot rely on its own unreasonableness. The Court of Appeal therefore adopted a wider test, focusing not just objectively on the dispute but also on the parties' "willingness to compromise and the reasonableness of their attitudes". [18] In this regard Lord Justice Dyson said that the burden should not be on the refusing party to satisfy the court that the mediation had no reasonable prospect of success, but instead the burden should be placed on the "unsuccessful party to show that there was a reasonable prospect that mediation would have been successful". It is, therefore, for the loser in litigation to prove that there was a reasonable prospect for successfully concluding a mediation in order to upset the general costs rule that he should pay all or some of the other side's costs.

The Court of Appeal has therefore established six useful guidelines that help to establish whether a party has acted unreasonably in refusing to mediate, such that an exception to the general costs rule should apply.

The Court of Appeal also recognised that there is a "scale" of encouragement that the courts might adopt in respect of a particular case. This may range from statements in the Civil Procedure Rules, or the appropriate Court Guide or Pre-action Protocol to a suggestion by the judge in the variety of different forms. A party that refuses to consider whether its case is suitable for ADR is "always at risk of an adverse finding at the cost stage of the litigation". This is particularly the case where the court has made an order requiring parties to consider ADR. On the other hand, a pledge by public bodies, such as the government departments and agencies pledge, and the National Health Services Litigation Authorities pledge, should not be given great weight. It was merely an undertaking that ADR would be considered; it was not an undertaking that ADR would be adopted in every case.

In respect of the two cases before the Court of Appeal, the Court considered that the letters written in one (*Halsey*) were "somewhat tactical" and were devised in order to build pressure for the other side to settle the matter because of an adverse cost order simply because of the risk of refusing to mediate. The second case (*Steel*) raised a question of law concerning causation. The Court of Appeal held that the defendant had not acted unreasonably in saying that he wanted to have the question resolved once and for all by the court. Further, the issue was disposed of by the recorder in about 2 hours, and so the costs were not significantly high when compared to the costs of a mediation.

There is one final point arising from this case. Mr Justice Dyson LJ stated:

> All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR.

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[17] Unreported, 18 June 2002.
[18] Paragraph 26.

This is arguably a clear message to the legal profession, undoubtedly including claims consultants when advising clients in respect of disputes, that a failure to properly advise their clients as to whether a particular dispute is suitable for ADR by the application of the considerations in *Halsey* may amount to negligence.

The Government's ADR pledge

On 23 March 2001 the Lord Chancellor's Department issued a formal written pledge that it and all of its departments would attempt ADR before resorting to litigation. The pledge stated:

> Government departments and agencies make these commitments on the resolution of disputes involving them. Alternative dispute resolution will be considered and used in all suitable cases wherever the other party accepts it.

The pledge states that all government departments and their agencies will seek to use ADR wherever possible in order to avoid litigation. This pledge was recently considered in the *Royal Bank of Canada* v *Secretary of State for Defence*. [(19)]

The claimant was a landlord seeking to determine whether or not notices served by the tenant to terminate a lease were valid. At trial, the tenant's first notice was held to validly terminate the lease, except in respect of an area known as the store room. The tenant therefore argued that it had effectively won and was entitled to its costs.

The landlord had expressed on a variety of occasions a willingness to mediate the claim, but the tenant had refused. A large part of the dispute related to the factual question as to whether vacant possession was required under the lease, and the tenant had effectively lost the factual argument. Further, the Lord Chancellor's Department on 23 March 2001 issued a formal pledge that all government departments should settle cases using alternative dispute resolution wherever possible. The issue, therefore, was whether the tenant Secretary of State for Defence was entitled to its costs for winning the issue in respect of the notice when it had lost the factual position, and refused to mediate in the light of the Lord Chancellor's press notice.

The Judge held that the key factor in the issue of costs was the landlord's willingness to mediate which was refused by the tenant. The formal pledge given by the Lord Chancellor's Department was to be taken seriously and the tenant should have abided by that pledge. As the tenant had not abided by the pledge it was not entitled to recover its costs from the landlord. In conclusion, no order was made as to costs.

This is another case that follows the reasoning in *Dunnett* v *Railtrack* that the winning party should not be awarded their costs because of their unreasonable refusal to mediate (see above). However, this case also highlights the importance of the Lord Chancellor's formal ADR pledge that was issued on 23 March 2001.

More recently the Government's draft circular on Best Value and Performance Improvement states, at paragraph 49: [(20)]

[(19)] 14 May 2003, High Court, Chancery Division, Lewison J
[(20)] July 2002, Office of the Deputy Prime Minister

> It is in everyone's interest to work at avoiding contractual disputes in the first place and this is mirrored in the emphasis above on improving relationships between the client and contractor through teamwork and partnering. However, when disputes do occur it is important to have a fast, efficient and cost-effective dispute resolution procedure. Local authorities should seek, wherever appropriate, to provide clauses in their contracts on the use of alternatives to litigation (commonly termed Alternative Dispute Resolution) which can achieve this.

As a result of this case and the recent pledge it is clear that all of the government departments and their agencies must now seriously consider ADR in order to avoid adverse cost consequences. However, the recent Court of Appeal decision of *Halsey* has substantially decreased the impact of the *Royal Bank of Canada* to the point where the case cannot be considered good law. The pledge is a realistic undertaking to consider ADR if appropriate (by considering the *Halsey* guidelines), but not a guarantee that government departments and agencies will resort to ADR for every case.

Late offers to settle

Lawyer to lawyer settlement negotiations and CPR Part 36 offers to settle were considered in the case of *Corenso (UK) Limited* v *Burnden Group Limited* by His Honour Judge Reid QC. [(21)]

The claimant, Corenso (UK) Limited ("Corenso") supplied the defendant ("Burnden") with coreboard from its French factory. Burnden received a number of complaints from its customers about the quality of the coreboard, which led to them making a complaint to Corenso in September 2000. Corenso's solicitors responded to the complaint and proceedings were issued by Corenso in February 2001. Burnden made a Part 36 offer by way of payment into court in March 2001 of £64,000 and increased this to £90,000 shortly before trial. As there were less than 21 days to go until trial, the claimant had to obtain the permission of the court to accept the Part 36 offer and in so doing had to seek an order from the court as to costs. Burnden had made offers to attempt to resolve the dispute by mediation during correspondence which preceded its Part 36 offer which was eventually accepted.

Burnden submitted that Corenso should be liable for its own and some of Burnden's costs because of its refusal to attempt mediation. Corenso maintained that it had substantially succeeded in the action, which had included a £300,000 counterclaim by Burnden, and that it should therefore have its costs up to the date of its acceptance of the Part 36 offer in the usual way.

The court held that the parties had shown a genuine and constructive willingness to resolve the issue between them and neither of them deserved to be penalised for not having gone along with the particular form of ADR proposed by the other side. Corenso was therefore awarded its costs on the basis that it had succeeded in the action.

This case is the latest in a series of cases in which an unsuccessful party has sought to resist a costs order against it on the strength of a refusal to attempt mediation by the successful party.

[(21)] 1 July 2003, Queens Bench Division, High Court

The overall circumstances of the case clearly favoured Corenso the claimant. The defendant had significantly increased its Part 36 offer very close to trial, despite a disclosure exercise which, if anything, strengthened its position. The court therefore took the view that the defendant could just as well have increased its offer sooner when the claimant would have been entitled to its costs up to the date of acceptance as of right under Part 36 and so the court should not make a different costs order.

The court nevertheless acknowledged the force of recent authorities for costs penalties following a refusal to attempt ADR, characterising the negotiation engaged in by the parties, at without prejudice meetings with lawyers present, as a form of ADR. Such an approach is consonant with cases such as *Cowl & Others* v *Plymouth City Council* (2001) in which Lord Woolf characterised the defendant council's ad hoc complaints procedure as a form of ADR, but is perhaps unnecessary given the power in CPR 44.3(5) to consider various factors in assessing the overall conduct of the parties. The conduct of the defendant in failing to make a realistic offer to settle until very late on was more significant than the conduct of the claimant in preferring without prejudice negotiations to a process of dispute resolution involving a third party.

So a party need not always submit to mediation, but must show a genuine willingness to settle the dispute. However, a failure to make a realistic offer to settle at an appropriate stage would be given more weight than offers to negotiate when considering costs orders.

Project mediation

The construction industry benefits from a wide range of dispute resolution techniques. The traditional processes of arbitration and litigation have in part made way for mediation and more recently adjudication under the Housing Grants, Construction and Regeneration Act 1996. Mediation has developed slowly since around the start of the '90s. Hybrid and multi-stage processes such as dispute review boards or dispute escalation clauses have become more widely used on some projects. At the other end of the scale management techniques such as partnering are attempts to avoid disputes arising.

"Contracted Mediation" or "Project Mediation" attempts to fuse team building, dispute avoidance and dispute resolution in one procedure. A contracted mediation or project mediation panel is appointed at the outset of the project. The impartial contracted mediation panel consists of one lawyer and one commercial expert who are both trained mediators. The panel assists in organising and attends an initial meeting at the start of the project and may conduct one or more workshops at the outset of the project or during the course of the project as necessary.

The panel may also visit the project periodically during the life of the project. In this respect the panel therefore has a working knowledge of the project and more importantly the individuals working on that project. That knowledge allows the panel to resolve contractual differences before they escalate, because the panel provides an immediate forum for the confidential discussion and potential mediation of differences or disputes. Experiences with contracted mediation in practice are limited. However, contracted mediation was used on Jersey Airport.

The only publicly reported project where contracted mediation has been used was Jersey Airport taxiway. The contract sum was approximately £15 million, and the contracted

mediation panel cost approximately £15,000. According to the article in *Construction Manager* a variety of disputes were resolved and the project finished one day ahead of schedule and approximately £800,000 below budget. Much of the project's success has been attributed to the use of the contracted mediation process.

The parties to the construction contract have recognised that there is a risk that they might have disputes during the course of the building work but they have also recognised that a standing mediation panel can help to avoid those disputes during the course of the work. This is because the parties to the construction contract will get to know the individual mediators, and those mediators will not only have an understanding of the project, but will get to know the individuals working on the project. There is therefore the potential for the contracted mediation panel to become involved not just in disputes, but also in the avoidance of disputes before the parties become entrenched and turn to adjudication, arbitration or litigation.

The experience at Jersey raises an important observation and that is the amount of the contract sum by comparison to the cost of the contracted mediation process. Most of the structured ADR procedures such as dispute review boards are only economically viable because they are used on substantial projects. This is because of the costs associated with establishing and running a three man dispute review board. A dispute review board is established at the start of the project, and then follows the project by making site visits. Disputes are then referred to that board, which will make recommendations only or binding decisions depending upon the drafting of the contract between the contractor and the employer.

However, a contracted mediation panel is viable for projects with a much lower contract sum. Statistics indicate that around 80% of construction work carried out in this country has a contract sum in tens of millions rather than hundreds of millions. Therefore, the contracted mediation has the potential for use on around 80% of the construction projects carried out in this country.

The author is currently on a contract mediation panel of two members. The project concerns a large hospital development in the South-East of the UK. Work commenced in the Summer of 2002, and will be ongoing for at least another year. It is of course too early to say whether the process has been a complete success in respect of this project. However, the feedback has been positive and a variety of issues have been explored and resolved through the panel.

Construction Conciliator's Group

The Construction Conciliator's Group (CCG) was launched on 1 May 2003. The CCG's aim is quite simply to provide a cost-effective dispute resolution procedure principally aimed at disputes concerning residential occupiers and their builders (or disputes between residential occupiers and their architects or other professionals).

The adjudication legislation does not cover disputes involving residential occupiers. [(22)] In the absence of a contract, such as the JCT Minor Works Agreement 1998 which contractually provides for adjudication, disputes between residential householders and the

[(22)] Section 106(1) of the Housing Grants, Construction and Regeneration Act 1996 excludes disputes with a residential occupier

builders end up in the county court. These disputes are often (although not always) of low value, such that the legal fees are disproportionate to the amount in dispute. However, legal fees are not the only issue in respect of these types of disputes. The Chairman of the CCG, David Miles, states: "such disputes are often highly emotionally charged. They have the capacity to absorb considerable time and costs which frequently end up exceeding the sums in dispute." The essentials of the CCG procedure provide:

- A pre-agreed, fixed period with a fixed price process;
- A fixed period of 28 days within which a fixed duration mediation is to be held. If an agreement cannot be considered at the mediation, then a binding enforceable recommendation is made by the conciliator (subject to later litigation/arbitration); and
- The amount of documentation is severely limited.

The parties can simply log on to the website (www.ccgroup.org.uk) in order to choose a conciliator. The rules can be downloaded for free. If the parties cannot agree upon a conciliator then the Group will appoint one for a fee of £59.00. The fixed timescale and fixed fee are aimed at introducing an economical manner for the resolution of these disputes. Further, in the absence of a mediated settlement, the parties know that a recommendation will be made based upon the documents, submissions and representations made. If one of the parties does not wish to accept the recommendation then that party must issue a notice of dispute within 28 days of the recommendation and also take steps to commence either legal proceedings or arbitration within three months otherwise the recommendation will become finally binding.

The CCG hope that the procedure will provide an economic manner within which to resolve construction disputes with homeowners. The procedure can of course be used for any construction dispute should the parties wish to adopt the CCG's conciliation rules.

An interesting aspect of the CCG's Conciliation Procedure is the ability of the conciliator to make a recommendation if a settlement cannot be reached during the conciliation. The first stage of the procedure requires the conciliator to chair the conciliation in order to try to get the parties to reach a settlement. If a settlement can be reached then the conciliator may even assist in preparing the terms of the settlement. If settlement cannot be reached then the conciliator shall, within 7 days after the conciliation, produce a written recommendation. This recommendation is not necessarily based upon any principles of law, and shall not contain reasons. Clearly, a conciliator will not have heard full argument on the issues in dispute. However, this procedure has been adopted because the majority of householder disputes are low in value, and the costs of taking the claim to the county court will most usually far exceed the amount in dispute. The procedure is therefore offered as an economical way of providing an opportunity for the parties to reach a settlement, but then for the conciliator to make a recommendation as to how to settle the dispute if the parties fail to agree.

The recommendation is binding, in that it is to be implemented immediately and the parties will be entitled to summary enforcement of the recommendation. If a party intends to commence legal proceedings in connection with the dispute then that party must within 28 days of the recommendation serve notice on the other party, and also commence

proceedings within 3 months of the recommendation. Therefore, if a party is serious about continuing the dispute then steps must be taken immediately in order to avoid the recommendation becoming final and conclusive.

Conclusion

In conclusion, the CPR and pre-action protocols require parties to endeavour to settle their disputes by negotiation, mediation or some other form of ADR. The courts are now enforcing those requirements by upholding contractual ADR procedures and penalising parties that unreasonably refuse to mediate in the form of adverse cost orders.

Parties may agree to mediate at any time, or may include their agreement to mediate in their contract. The parties could include a dispute escalation clause in their contract. The court will enforce agreements to negotiate and mediate (or follow any form of ADR procedure) (*IBM*) providing those processes are conducted within a reasonable time frame. This does not mean that the court will insist that the parties settle the dispute, but the court will insist that reasonable attempts are made to follow the ADR procedure.

A party that unreasonably refuses to mediate will receive an adverse costs order (*Dunnett* v *Railtrack*). An unreasonable refusal to engage in any ADR process such as an independent complaints procedure (*Frank Cowl*) or settlement negotiations will be penalised by an adverse costs order. Basically, ADR does not just mean mediation, but any form of ADR. A winning party will not get its costs. A losing party will be ordered to pay costs on an indemnity basis.

The Court of Appeal has recently revised the test to be applied when considering whether a party has unreasonably refused to mediate, and so should suffer adverse cost consequences. These are: (1) the nature of the dispute, (2) the merits of the case, (3) the extent to which other attempts were made to settle the matter, (4) whether the costs of the mediation would be very high, (5) whether an attempt at mediation would be prejudicial, and (6) whether the mediation had a reasonable prospect of success.

Reasons for *unreasonably* refusing to mediate include: costs already incurred, type of issues in dispute, the claim being misconceived (*Hurst* v *Leeming*). Reasons for *unreasonably* refusing to mediate include: the nature of the other party is such that settlement is extremely unlikely (*Hurst* v *Leeming*), generous offers have been made, offers to negotiate are being made instead of mediation (*Corenso* v *Burnden*), the refusing party rightly believes that it will win (*Halsey*), there is a genuine need to resolve a point of law, the costs of a mediation would be disproportionate (*Steel*).

In addition, the development of the CCG in the area of homeowner disputes and contracted mediation or project mediation for larger projects demonstrates that mediation-based processes are readily available in the construction industry.

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Mediation Case Law

Nr	Date of Judgment	Case Name	Court/Judge(s)	Remarks
1	8 March 2000	*Paul Thomas Construction Limited* v *Hyland & Anor*	TCC HHJ Wilcox	Unreasonable conduct and failure to follow pre-action protocol leads to indemnity costs
2	8 January 2002	*Frank Cowl* v *Plymouth City Council*	Court of Appeal Lord Woolf	A refusal to consider ADR (independent complaints procedure) is unfortunate
3	22 February 2002	*Susan Dunnett* v *Railtrack Plc*	Court of Appeal Lord Brooke LJ	An unreasonable refusal to mediate will lead to uncomfortable cost consequences
4	9 May 2002	*Hurst* v *Leeming*	Chancery Division Lightman J	If there is no realistic prospect of settling the case in mediation because of the obsessive character and attitude of the other party, then a refusal to mediate will be justified. Burden of proof reversed in *Halsey*.
5	1 November 2002	*Societe Internationale De Telecommunications Aeronautiques SC* v *Wyatt Co (UK) Limited and others (v Maxwell Batley (A Firm) part 20 defendant)*	Chancery Division, Park J	A party that was successful in the litigation should not be deprived of its costs because it reasonably refused to mediate
6	14 May 2003	*Royal Bank of Canada* v *Secretary of State for Defence*	High Court, Chancery Division, Lewison J	
7	9 June 2003	*Dearling* v *Foregate Developments (Chester) Limited*	Court of Appeal, Civil Division	
8	1 July 2003	*Corenso (UK) Limited* v *Burnden Group Limited*	High Court, Queen's Bench Division HHJ Reid QC	
9	29 July 2003	*Alan Valentine* v *(1) Kevin*	Court of Appeal	

		Allen (2) Simon John Nash (3) Alison Nash		
10	1 October 2003	*Thakrar* v *Thakrar*	Court of Appeal	Tomlin Order (agreed at a mediation) refused at first instance. Upheld on appeal
11	11 October 2002	*Cable & Wireless Plc* v *IBM United Kingdom Limited*	QBD, Commercial Court (Coleman J)	A dispute escalation clause was valid and enforceable
12	5 December 2003	*Shirayama Shokusan Company Ltd & Ors* v *Danovo Ltd*	Chancery Division (Blackburne J)	The Court has jurisdiction to order an unwilling party to mediate its dispute. No longer good law. (See *Halsey*)
13	11 May 2004	*Halsey* v *Milton Keynes General NHS Trust*; *Steel* v *(1) Joy (2) Halliday*	Court of Appeal (Ward LJ, Laws LJ, Dyson LJ)	The burden is on the unsuccessful party to show why the general rule on costs should be departed from. The fundamental principle was that the normal costs rule applies unless the successful party had acted unreasonably in refusing to agree to mediation.