

“Alternative Dispute Resolution will resolve the problems that litigation cannot. Our civil litigation system must change and adopt new procedures for settling disputes.”

INTRODUCTION

Under its various guises, alternative dispute resolution (ADR) has been championed by the Government, academics and the senior judiciary as a complementary mechanism to litigation which is capable of resolving disputes. The publication of Jackson’s Civil Litigation Costs Review, illustrates a continual commitment to educating litigants, lawyers and judges as to the benefit of ADR as a viable alternative to adversarial litigation. It is thought that ADR will afford a palliative to participants frustrated with the ‘excessive and unpredictable cost, delay and complexity’¹ involved with the overburdened court system.

Despite this stamp of approval, provided most notably Lord Woolf, there remains a muted growth of court induced ADR and a continual failure for mediation to become an intrinsic and instinctive part of end users’ lexicon. This suggests that many end users, solicitors, and prominent sections of the judiciary, remain unconvinced of the benefits of ADR and whether it ‘can provide a panacea for the ills of the civil justice system (CJS)’².

In response to this lacklustre take up of ADR, a recent spate of speeches made out of court by prominent members of the judiciary, led by Mr Justice Lightman, have asked that compulsory mediation be introduced. They argue that without a fundamental reform of civil procedures, ADR will remain a peripheral and underutilised resource, leaving many ‘disadvantaged citizens without realistic access to justice’³

¹ Goreity, Moorhead & Abrams, *More Civil Justice? The impact of the Woolf Reforms on pre action behaviour* (2002) Joint report of The Law Society & Civil Justice Council pg7

²Genn, Dame Hazel, *Paths to Justice Scotland. What People in Scotland Do and Think About Going to Law* (Hart publishing:2001) pg 17

³ Lord Phillips of Worth Matravers, *Alternative Dispute Resolution: An English Viewpoint*, (28th March 2008) (Speech given to International Centre for Dispute Resolution) pg 11

ADR can provide an ailment to the problems facing the CJS as was originally envisaged by Lord Woolf. However, for mediation to become ‘an integral part of our litigation culture’⁴, the introduction of new procedures to the pre action protocols, which alter the legal basis of ADR and make it compulsory, is required. Only then can ADR provide an essential supplement to the role of the court, thereby helping to alleviate the problems of the CJS.

Compulsory mediation does not require parties to waive their rights to a fair trial nor amount to an unacceptable constraint on the right to access the court as was stated by Lord Justice Dyson in *Hasley v Milton Keynes General NHS Trust*⁵. Instead, the increased take up of mediation will ‘at worst delays trial if it is unsuccessful’⁶.

WHAT IS THE LEGAL BASIS OF ADR?

Overview of the legal basis of ADR

There is no specific statute dealing with mediation in the UK, but rather the legal basis of ADR has evolved since its importance was recognised in the Helibron Report. This proceeded and informed the publication of the Woolf Report in 1996 and marked a ‘watershed in the development of mediation in civil and commercial cases’⁷. Woolf’s recommendations were given effect in the Civil Procedure Rules (CPR) which introduced a number of mechanisms in the form of Pre action Protocols and Practice Directions. It has been these mechanisms, coupled with the exercise of the court’s discretion on the use of these procedures, (particularly cost sanctions), which has encouraged the effective use of the mediation process, and underpinned ADR as an ‘integral part of the civil procedure process, not simply ancillary to it’⁸.

The impact of the Woolf Report and CPR

⁴ Sir Anthony Clarke, Master of the Rolls, *The Future of Civil Mediation*, (8th May 2008) (Speech given to the Civil Mediation Council) pg 3

⁵ *Milton Keynes General NHS Trust* [2004] WLR 3002 at [9] – [11]

⁶ Sir Anthony Clarke, *The Future of Civil Mediation* at pg6

⁷Genn, Dame Hazel *Paths to Justice Scotland. What People in Scotland Do and Think About Going to Law* pg7

⁸ Lord Clarke of Stone-Cum-Ebony, Master of the Rolls, *Mediation – An Integral part of our litigation Culture*, pg 2

According to Dame Hazel Genn, ‘supporters of ADR had enjoyed little success, even in the commercial field, until the then Master of the Rolls published his much heralded review of civil justice in 1996’⁹. Lord Woolf had identified cost, delay and unpredictability as some of the worst features of the CJS. He recommended that ADR could provide options for litigants, therefore rendering the formal litigation process more accessible and efficient. He believed that ADR could help make the current system more fair, pragmatic, understandable and responsive.

The CPR implemented this view and institutionalised mediation as an integral, yet supplementary aspect of our litigation culture. The Overriding Objective of the CPR is to enable courts to deal with cases justly. The Courts have been instructed in CPR 1.4 (2)(e) to further the Overriding Objective by actively ‘*encouraging the parties to use ADR if the court considers that appropriate and facilitating the use of such procedure*’. Active pursuit of ADR is further encouraged by CPR 26.4(1) which provides that during the allocation stage, the court may, on the application of the parties or on its own initiative, stay the proceedings to enable the parties to explore the use of ADR.

In addition to the CPR rules, the Practice Direction (Part 29PD 4.10(9)) provides that the court, if it thinks appropriate, may provide directions requiring the parties to consider ADR.

‘If any party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the trial, should the judge consider that such means of resolution were appropriate, when he is considering the appropriate costs order to make’.

As the above rules illustrate, pre action protocols and practice directions have been introduced to facilitate the settlement of disputes before the parties resorted to the courts. In addition, ‘once litigation has been commenced, parties and the court are under a duty to actively manage cases in order to further the overriding objective’¹⁰. However, the CPR also gives the courts wide discretion when it comes to the appointment of costs. The court might impose a costs sanction on

⁹ Dame Genn, as cited in Rozenberg, *Dame Hazel Genn warns of downgrading of civil justice*, The Law Gazette (16th December 2008)

¹⁰ Sir Anthony Clarke, *The Future of Civil Mediation* pg2

the successful party if it believes that the party, who refused to mediate, acted unreasonably. It has been this discretion on the apportionment costs which has been the subject of much debate.

The development of case law

The judicial guidance from the English courts and their response to the Woolf Report has developed the legal basis of ADR in the CJS. By considering whether it was right to deprive a successful party of an award of costs on the ground that they had refused to mediate, the judiciary's interpretation of the CPR has been that although costs can be withheld, the end users must have freedom of choice. They must retain the right to decide on the most appropriate method to resolve the dispute. Mediation is one, litigation is another. Both methods are distinct in their characteristics and outcome and yet can be complementary.

The most important case in relation to costs is *Halsey v Milton Keynes NHS Trust 2004*¹¹. Lord Justice Dyson's judgement makes two key things clear:

1. Courts can deprive a winning party of the costs of the case, if they have unreasonably refused to consider mediation or ADR. It is up to the losing party to show that the winning party was unreasonable.
2. Courts cannot compel parties to use mediation or another form of ADR, as this would be contrary to article 6 of the European Convention on Human Rights.

This judgment has shaped the legal basis of ADR and framed the contemporary debate. Since *Hasley*, other judges have emphasized the importance of mediation and upheld Dyson's judgment to deprive a winning party the costs of a case. In *Burchell v Bullard*,¹² Ward LJ was of the view that the reason for refusing ADR given as too complex was 'plain nonsense'¹³.

'ADR WILL RESOLVE THE PROBLEMS THAT LITIGATION CANNOT'

Overview of problems with the CJS and benefits of mediation

¹¹ *Milton Keynes General NHS Trust [2004] WLR 3002*

¹² *Burchell v Bullard [2005] EWCA Civ 358*

¹³ *Burchell v Bullard [2005] EWCA Civ 358*

*'After 45 years in litigation, I have seen so much money spent, stress caused and delay encountered. Reaching settlement at the door of the court is entirely unsatisfactory.'*¹⁴

Sir Henry Brooke

It is these continued problems associated with the litigation system, despite the reforms that followed Lord Woolf's report, which continue to haunt the CJS. It can be suggested that the seemingly intractable problems of delay, cost and excessive complexity have been the driving force behind the enthusiasm for ADR on the part of the Government, academics and the senior judiciary. Both Lord Woolf (1996), and more recently Lord Justice Jackson (2010) have recommended the increased usage of ADR techniques as a complementary settlement process to litigation. It is because of these benefits associated with mediation that has led to ADR being viewed as a process which can resolve the problems of the civil justice system.

Cost

The most pressing challenge faced by the civil justice system is the ever escalating rise in costs. The view among many, most certainly Lord Clarke, is that 'the costs of civil litigation are out of hand'¹⁵. In *Bradford & Anor v Keith James & Ors*¹⁶, an acrimonious boundary dispute over a 3.7 metre strip of land led a county court trial, with a payment on account of costs of £20,000. Mummery LJ commented that 'an attempt at mediation should be made right at the beginning of the dispute and certainly well before things turn nasty and become expensive'.

¹⁴Sir Henry Brooke as cited in, *Mediation; Lawyers still need convincing*, Law Gazette, (18th Sept 2008) <http://www.lawgazette.co.uk/features/mediation-lawyers-still-need-convincing>

¹⁵ Lord Clarke of Stone-Cum-Ebony, Master of the Rolls, *Mediation – An Integral part of our litigation Culture*, pg 2

¹⁶ *Bradford & Anor v Keith James & Ors*¹⁶ [2008] EWCA Civ 837

The principle of 'cost follows the event' means that the losing party not only has to pay his own fees, but the costs of the successful party. So the detriment of losing an action is immeasurably greater than the benefit of winning. In personal injury claims for example, this risk of disproportionate liability 'has been significantly increased, for defendants at least, by the legalisation of conditional fee agreements under the access to Justice Act 1999'¹⁷. Unsuccessful parties are now not only liable to reimburse the costs, but also a success fee and the premium which the claimant was required to pay in order to insure against his potential liability under the no win no fee claim. According to Lord Phillips, it is this 'cost of litigation which has left many disadvantaged citizens without realistic access to justice in the court'.¹⁸

Mediation has been heralded as an informal and confidential alternative to litigation. It holds the possibility of enabling the parties to reach a consensual resolution to their dispute more quickly and at a lower cost than 'might well be possible in the zero-sum game which is litigation'¹⁹. Unlike litigation, mediation does not involve a solicitor, a barrister, a professional expert on each side as well as a Judge, whose cost is covered by the court fees that the claimant has to pay.

Delay and Complexity

Other problems such as delay and complexity remain unresolved by the Woolf Reforms. According to a report commissioned by the Law Society, it was found that the period which it takes a solicitor to arrive at trial from when he first received instructions, was roughly the same pre and post Woolf²⁰. With respect to complexity, Peter Thompson QC suggests that

'.....in 1998, before the new rules came into force, the rules of procedure took up 391 pages of the County Court Practice...we now have three sets of rules which, together

¹⁷ Lord Phillips of Worth Matravers, *Alternative Dispute Resolution: An English Viewpoint* pg2

¹⁸ Lord Phillips of Worth Matravers, *Alternative Dispute Resolution: An English Viewpoint* pg11

¹⁹ Sir Anthony Clarke, *The Future of Civil Mediation* pg 3

²⁰ Goreity, Moorhead & Abrams, *More Civil Justice? The impact of the Woolf Reforms on pre action behaviour* pg9

with practice directions and protocols, cover 2,301 pages of volume 1 of the Civil Court Practice, a 550% increase!’²¹

Mediation can potentially offer a quicker, more direct route to dispute resolution. Many businesses have recognised the procedural time difference between litigation and mediation and therefore utilise ADR as an alternative method to resolve disputes which have the potential to drag. For individuals, the whole complex procedure often appears too daunting. Mediation provides people a forum to talk about ‘impact’, hear ‘a response’, maybe even obtain an apology.

Uncertainty

Aside from delay and complexity, it has been a persistent criticism of the current system that parties involved in disputes are very often far removed from the process.

*‘Once you are in the hands of professional litigants they take charge of you, willy nilly, and you find that you have embarked on a course that has no turning back and the incidents of which you cannot even understand’.*²²

In personal injury and clinical negligence disputes, it is the typical experience of parties and legal representatives to find out the identity of their Tribunal the night before the trial, only to discover that the High Court case is to be tried by a deputy. Clients are left feeling that considerations of court proceedings and timetables ‘are more important than they are, including preliminary hearings, where the ability to call evidence in support of their case is constantly questioned’.²³

Inconsistent decisions

²¹ Thompson, Peter Woolf’s litigants, *New Law Journal*, 27 February 2009, Vol 159 p293.

²² Lord Phillips of Worth Matravers, *Alternative Dispute Resolution: An English Viewpoint* pg3

²³ Gardner, Christopher, ADR – A viable alternation in Personal Injury and Clinical Negligence disputes, <http://www.cgqc.com/art1.pdf> pg1

According to Michael Zander QC, this uncertainty surrounding proceedings felt by litigants is compounded by ‘inconsistent decision-making by judges’²⁴. Those in practice know that where a case commences on time, with an experienced judge capable of grappling with the facts, who is willing to listen rather than being preoccupied with the time, is increasingly the exception rather than the norm. Judge Michael Cook argues that the Woolf Reforms, rather than improve the current system, has in fact led to a situation where

‘there is a growing concern among judges and lawyers that the new rules have become a lottery. Parties have little idea of how much they will recover if they win or how much they will have to pay if they lose.’²⁵

Often stand-in deputies are sometimes quite unreasonable expected to determine complex medical issues of fact, liability, causation and quantum which he is not familiar. The unconscionable long adjournments make it almost impossible for a judge to remember what the case was about in the resumed hearing.

Unlike litigation, mediation involves the party in the process of dispute resolution and serves to make the client feel as if they have a degree of control over the process. ADR enables the parties to communicate, via a third party or otherwise, exactly what they hope to achieve from the process and allows for creative solutions which would not be possible within an adjudication framework. This approach enables parties to preserve or restore good relationships and clearly goes to the heart of Lord Woolf’s emphasis on co-operation rather than adversarialism. Even if settlement is not reached through the mediation, it may assist by narrowing the issues in dispute between the parties.

‘OUR CIVIL LITIGATION SYSTEM MUST CHANGE AND ADOPT NEW PROCEDURES FOR SETTLING DISPUTES’

Developments towards the introduction of compulsory ADR.

With the opportunity for creative solutions, for a fast and inexpensive resolution that the parties develop and buy into, and for a process that enhances rather than destroys on-going

²⁴ Zander, Michael QC, ‘Zander on Woolf’, *New Law Journal*, 13th March 2009, Vol 159

²⁵ Cook, Michael, *Cook on Costs*, (London: Buttersworth) pg62

business relationships, why have ‘so few solicitors been asked to or taken part in mediation?’²⁶ Although cases are settling via Part 36 or as part as normal negotiation between solicitors, it seems that ADR has not been incorporated into the court process. ‘The judges are reluctant to order mediation because the lack of facilities and resources, and there is some confusion about the appropriate timing for ADR in any case’²⁷. It can be suggested that for ADR to be fully embraced as a remedy to the problems which the CJS faces, compulsory mediation should be adopted through the introduction of new procedures. This can only be achieved once the obstacles placed in its path by *Hasley* are removed.

Halsey v Milton Keynes NHS Trust, a “much maligned” decision.

Following the judgment in *Hasley*, which stated that the courts cannot compel parties to use ADR as this would be contrary to Article 6 ECHR, the matter has been addressed in some detail by speeches made out of court by Lightman J, Lord Phillips of Worth Matravers, and Lord Clarke, former Master of the Rolls. All three Judges appear to be unanimous in the view that the approach to mediation in other jurisdictions demonstrates that compulsory mediation does not itself violate Article 6 or similar human rights legislation. A number of European states such as Belgium and Greece, both signatories to the Human Rights Convention, have introduced successful compulsory mediation schemes without Article 6 challenges. In fact, our own Family Division compels parties to mediate in matrimonial property disputes. Lord Clarke stated that ‘there may well be grounds for suggesting that *Halsey* was wrong on the Article 6 point’. Lightman argued that compulsory mediation ordered by the court would not require parties to waive their right to a fair trial as was laid down in *Hasley*, but would merely slow the road to trial, and not even that, if properly planned. He went on to argue that the burden placed on the party to show that the other had unreasonably refused to resort to mediation had ‘significantly reduced pressure on English Litigants to attempt mediation’²⁸. It should be up to the party refusing mediation to justify his conduct.

²⁶ Lightman J, mediation; Approximation to Justice (28 June 2007) (Speech given to SJ Berwin) pg2

²⁷ Peysner J, The management of civil cases: the courts and the post-Woolf landscape. (2005) Report for Department for Constitutional Affairs, pg6

²⁸ Lightman J, mediation; Approximation to Justice pg 12

Compulsory mediation can provide ‘an approximation to justice’.

Underpinning this opposition to the Court of Appeal’s decision in *Hasley* is the belief that the threat of costs sanctions as a means of driving parties into ADR has not succeeded in educating end users and solicitors as to the benefits of mediation. District Judges are bound to continue to follow *Hasley* and fall short of ordering parties to engage in compulsory mediation. Mr Justice Lightman has argued that new procedures should be introduced in order for mediation to reach its full potential and provide an approximation to justice. Only then will the most disadvantaged citizens, previously excluded due to the cost of litigation and withdrawal of legal aid, once again have real access to justice.

Compulsory mediation can be introduced as part of the normal pre trial case management process. Other jurisdictions such as Hong Kong have recently embraced ADR and given the courts new case management powers to encourage and facilitate mediation. In the UK, legislation should be introduced to alter the effect of the decision in *Hasley*. This legislation should provide us with a Mediation Code as well as an appropriate practice directive. There should be compulsory mediation training for judges and the mandatory inclusion of mediation as part of legal professional training. I would suggest that personal injury, despite the ingrained resistance of solicitors and claims management companies, is a particular area that could potential benefit from compulsory mediation. The rise of satellite litigation as well as the cost burdens imposed on the losing party as a result of conditional fee agreements has created a cottage industry that is ripe for change. Australian jurisdictions have moved towards compulsory mediation for personal injury with mediators acting as a gateway to the Courts.

A CRITIQUE OF COMPULSORY ADR

Significance of Jackson’s ‘Civil Litigation Costs Review’

Jackson’s recently published proposals have poured cold water on the growing movement that wish to alter the legal basis of ADR by introducing new procedures which would make mediation compulsory. Although Jackson recognises the importance of ADR as a tool to reduce costs and concedes that it is currently under used, he stresses that ADR should not be

made compulsory and has not recommended any changes to procedure. Instead Jackson proposes a serious campaign to educate lawyers, judges, the public and small businesses as to the benefits of ADR and would like to see the production of a standard handbook on ADR procedures and mediation providers.

Jackson's recommendations should therefore be seen as providing continuity to the Woolf Report. Rather than introducing radical new procedures as Mr Justice Lightman would have wished, Jackson argues that support for mediation should come incrementally from the grassroots. In other words, 'from the bottom up must be where the future successful growth of mediation lies, as opposed to from the top down'²⁹. It could be argued that Jackson is correct in his emphasis on education rather than compulsion. The poor take up of mediation is not due to the decision in *Hasley*, nor because of resistance on the part of barristers and solicitors, fearful of an adverse financial effect of their practices, but rather continued ignorance. According to the Twisting Arms Report, the public, as end users, still remain unaware of mediation. Despite all the apparent effort being exhausted at raising awareness, 'the opportunity of educating the public about mediation and thus contributing to the likelihood of its use has been neglected'³⁰.

It could be credibly argued that if the court were to compel parties to enter into a mediation to which they objected, it is likely that it would 'achieve nothing except to add to the cost 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'.³¹ Perhaps more damaging is the view that compulsion is the very antithesis of mediation. 'The whole point of mediation is that it is voluntary. How can you compel parties to indulge in a voluntary activity'?'³²

Support of compulsory ADR does not require the adoption of new procedures.

²⁹ Davis, Joy, 'Directing to educating' *New Law Journal*, 31st July 2009, Vol 159 pg 2

³⁰ Davis, Joy, 'Directing to educating' *New Law Journal*, 31st July 2009, Vol 159 pg 1

³¹ Lord Phillips of Worth Matravers, *Alternative Dispute Resolution: An English Viewpoint* pg 11

³² Lord Phillips of Worth Matravers, *Alternative Dispute Resolution: An English Viewpoint* pg 14

Despite being an enthusiast of compulsory mediation, Lord Clarke did not believe that the legal basis of ADR had to change by adopting new procedures. He thought that the court possessed sufficient powers to ‘direct the parties to take part in a mediation process or attend a mediation hearing during the course of the pre trial stage of any proceedings’³³. Such orders could either be made on allocation as anticipated by CPR 26.4 (1) or by the judge at the first case management conference. But what of the obstacles placed in the path of judges by the decision in *Hasley*? Lord Clarke suggested that the judgment in *Hasley* remained *obiter*. The courts still retained the jurisdiction to require parties to enter into mediation. According to Lord Clarke, what is required is a culture change of active case management, in accordance with the overriding objective, rather than amendments to be made to the CPR.

CONCLUSION

A deep malaise afflicts the civil justice system. It is a fundamental flaw when a legal system is outside the financial reach of most of the population; it undermines the rule of law.

Whether or not we are moving closer to a situation of mandatory ADR, the Woolf reforms, and more recently Jackson’s report, demand that we change our attitude to disputes. ADR has been consistently praised as a viable method to resolve disputes efficiently, therefore alleviating the crowded CJS as Lord Woolf intended.

Despite this broad consensus, ADR has yet to realise its full potential. The fault lines as to whether the current procedures should be modified to encourage further usage have been drawn. On the one hand, senior judges, led by Mr. Justice Lightman contend that judicial encouragement has not resulted in mediation being embraced as a method of dispute resolution. Consequently, procedural changes are required so that mediation is intrinsically embedded in the lawyer’s psyche. On the other hand, Jackson has stated that the freedom to choose between litigation and mediation remains the most appropriate system and any deviation from that path is likely to be a breach of Article 6. Lord Clarke has attempted to

³³ Sir Anthony Clarke, *The Future of Civil Mediation* pg7

straddle a middle course by indicating his enthusiasm for compulsory mediation, but making it clear that the CPR has more than sufficient levers, without any significant need to introduce new procedures and alter the legal basis of ADR.

My own view is that whether ADR is effective at settling disputes depends upon what the parties hope to gain from the procedure. When successful, it can certainly save time and money and leave disputants feeling satisfied. However, there is a great deal of different techniques even within mediation, and the variance in the standard of mediator can lead to inconsistency.

Despite these benefits, the most important experience of contemporary ADR experiments is a constant lack of demand. There remains ‘a dearth of knowledge and familiarity with mediation and other ADR processes’³⁴. I contend that eventually we will require new procedures, most likely a process at the initial stages where the court can require parties to attempt mediation. This should be at the judges’ discretion and perhaps requires the assistance of a mediator supplied by the court.

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