The Civil Mediation Council's Response to the Civil Justice Council's report "Compulsory ADR"[1]

13 July 2021

1. It has been 17 years since the decision in *Halsey v Milton Keynes*[2] where Dyson LJ (as he was then) held that parties to a dispute could not be compelled to participate in an ADR process (the legality question) and (if, contrary to his belief, the court could make such an order) whether there would be circumstances where court should exercise that jurisdiction (the desirability question). It has been another 11 years since Lord Dyson concluded that his decision on the legality question had been wrong.[3] So, the publication yesterday of the Civil Justice Council's report on Compulsory ADR ('the Report') is a very welcome update on the issues, particularly in light of developments in both case law and practice since *Halsey*.

2. The Report concludes that in relation to the legality question, parties can be compelled to participate in ADR and that there are circumstances in which such compulsion could be a "desirable and effective development".

3. Clearly for the CMC, a charity which exists to promote greater use of mediation and other forms of ADR, this is a significant development. It is also a step further towards the CMC's aim for Automatic Referral to Mediation to be the default means of dispute resolution in the civil justice system.

The legality question

4. The Report gives a detailed review of the way in which the legality question has been answered in the courts of England & Wales, judicial commentary and academic literature. The Report also looks to the practice in other jurisdictions, particularly those which are also subject to the provisions of Article 6 of the European Convention on Human Rights. The conclusion that the Report reaches - that compelling parties to engage in ADR will

[1] Compulsory ADR published 12 July 2021

[2] [2004] 1 WLR 3002. The Court of Appeal consisted of Ward, Laws and Dyson LJJ. Ward LJ later became Chair of the CMC.

[3] Paragraph 46 of the Report

not necessarily violate Article 6 – is surely undisputable and now would seem to reflect the opinion of the majority. Case law, practice and procedure have all moved on considerably in the past two decades and it is now, in the CMC's view, time to put ADR at the centre of the civil justice process.

5. Indeed, the authors of the Report recognise this when they state that "*ADR can no longer be treated as external, separate, or indeed alternative to the court process*"[4] and that "*there is a tension between treating an order to mediate as a breach of Article 6 but then giving the court power when dealing with costs to penalise a party financially for unreasonably failing to mediate."* The CMC agrees that failure to comply with an order to engage in ADR should attract the same sanctions as for example, a failure to comply with an order for disclosure. The Report goes as far as to state that "*there seems no reason why the sanction for non-compliance with an order or a procedural rule should not be striking out the claim/defence*".[5] Whilst the CMC can see that this might prove controversial, there is an inescapable logic behind it and it may bear more immediate fruit in terms of encouraging ADR than, perhaps, the more frequently used power to impose an adverse costs order. The implications of an adverse costs order are often too distant for a litigant, wedded to a belief in the rightness of his case, to comprehend. As Norris J said in *Bradley v Heslin*[6] (albeit in the context of boundary disputes but a statement that, in the CMC's experience, could be applied more broadly):

   'I think it is no longer enough to leave the parties the opportunity to mediate and to warn of costs consequences if the opportunity is not taken. In boundary and neighbour disputes the opportunities are not being taken and the warnings are not being heeded, and those embroiled in them need saving from themselves.'

6. Integral to the Report's reasoning is the recognition of the growing tension at the heart of civil justice that in several arenas of dispute resolution and despite *Halsey*, compulsory ADR processes are already part of the civil justice system and are proving successful and accepted. Appendix 1 of the Report lists a number of these but two of the most familiar are the requirement to attend a MIAM in family court proceedings or to obtain an early conciliation certificate from ACAS before starting Employment Tribunal proceedings. From the purely pragmatic point of view, the pandemic will almost certainly have resulted in a greater backlog of civil cases than existed before its impact and ADR offers a way of helping to clear that backlog.

[4] Paragraph 63
[5] Paragraph 67
[6] [2014] EWHC 3267 (CH) at [24]

The desirability question

7. The Report then considers the second question – in what circumstances, in what kind of case and at what stage should ADR be imposed?

8. As the Report recognises most of the debate has been focused on compulsory mediation, but that this is only part of the picture. There has been some concern that compulsory ADR will not work either because of the parties' intransigence or because the lack of understanding about the process has meant that parties are reluctant to engage. The CMC recognises these concerns and continues to work hard on educating the public, but this cannot be done without the active support of government, the courts and the wider legal community. It shares the Report's conclusion that the need for a proper online resource detailing the different forms of ADR and how to access them is now well recognised.

9. A second concern has been that "*pushing more disputes into ADR undermines the value of the adjudicative system, which is the foundation on which the effectiveness any form of ADR ultimately relies*."[7]

10. The authors of the Report believe that such concerns are not decisive and the CMC agrees. Lack of familiarity will be overcome if ADR is put at the centre of civil justice processes. Those who currently participate in compulsory ADR processes may not be familiar with them at the outset, but these processes are still proving successful. As to the fear that compulsory ADR processes will undermine the courts' role in dispensing justice or as vital guardians of the rule of law, the CMC believes that such views are, perhaps, based on a more idealistic, rather than realistic, view of the function of justice and the court system today. Growing case-loads, long delays and the time and financial costs of seeking a court-based resolution are barriers to many: if the system can offer another means by which litigants can reach a resolution of their dispute, perhaps more quickly and cost-effectively then court, then surely this should be an option available to all. And, if the ADR process does not work, then there is nothing to prevent a reversion to an adjudicative process.

11. The Report considers a number of factors (not an exhaustive list) which might play into a decision to make ADR compulsory. The first of these is whether the form of ADR proposed or required is too burdensome or disproportionate in terms of cost or time? Of course, as the Report notes, this depends on what type of ADR is being proposed but that ADR should "*reduce the ultimate burden in terms of cost and time imposed by disputes on individuals, businesses and the community*."[8]

[7] Paragraph 81
[8] Paragraph 94

12. The Report suggests that privately-provided mediation services cause more difficulty in this regard, unless they are publicly funded. There is a risk that the fees may represent a disproportionate cost in many low value cases. Of course, this is a risk (as it is a risk in commencing legal proceedings) and one which the CMC seeks to address with its fixed fee mediation scheme. The CMC also supports the Report's view that continued and increased funding and support for the Small Claims Mediation Service is vital. The argument that mediation involves disproportionate or even just extra costs is familiar to the CMC. However, it is our belief that this issue is often looked at from the point of view of an expectation of the mediation failing with the need for the parties to return to court. Upwards of 80% of cases that come to mediation are settled on the day or shortly afterwards.[9] The time and costs benefits to litigants of settling a case at an earlier stage of proceedings is mentioned, but rarely quantified. Particularly in the case, for example, of SMEs that may struggle to maintain the financial and manpower costs that litigation entails, earlier settlement means a return to being able to focus on business and relieve the stress (to both individuals and consequently the business) that disputes create. Further, a failure to settle at mediation is not a waste of time and costs – many of the issues that might emerge months or even years down the line in litigation are narrowed and discussed at an earlier stage resulting in reduced time and cost overall. Therefore, the view that costs of privately funded mediation are "additional" or "wasted" is open to challenge because, if the majority of cases settle, then the costs of continued litigation have been saved. It is perhaps worth noting that CEDR's Ninth Mediation Audit published in 2021 concludes that £4.6 billion will be saved this year by parties engaging in commercial mediation, with £40 billion saved since 1990.[10]

13. The Report also asks whether there is sufficient confidence in the neutral person, the ADR Provider? This is, of course, necessary and, as the Report acknowledges, the CMC has established a scheme of regulation which allows mediators to demonstrate their professional status and operates a complaints system. The Report calls for more systematic regulation and the CMC would welcome that conversation.[11]

14. As to the question as to at what stage should ADR be required, the CMC shares the authors view that it is difficult to be too prescriptive about this, given the wide nature of disputes. However, it is the CMC's view that mediation certainly does not necessarily need to await the issue of proceedings and that, with better education, the public might look to ADR processes before going to court. Once proceedings have been issued, the CMC's view is that there should be an Automatic Referral to Mediation as set out in its response to the CJC's earlier Report.[12]

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[9] CEDR Ninth Mediation Audit 2021, p 16
[10] CEDR Ninth Mediation Audit 2021
[11] Paragraph 103
[12] Civil Mediation Council Response to the Civil Justice Council Consultation

Conclusion

15. The Report concludes by making 3 specific observations which essentially say that if there are no time or money implications on the parties or the ADR is provided by judges then compulsory ADR will not be controversial - as long as the ADR is otherwise useful and potentially productive. The first observation perhaps needs some further qualification by the word 'extra' because it is not clear to the CMC how participation in an effective form of ADR can NOT require expense of time by the participants. To be effective, both preparation and participation time in ADR is required but if that saves time in the future then it is, surely, a justifiable expense?

16. The third observation is as follows:

> "*We think that as mediation becomes better regulated, more familiar and continues to be made available in shorter, cheaper formats we see no reason for compulsion not be considered in this context also. The free or low-cost introductory stage seems the least likely to be controversial*"

17. The underlying message of these observations is, however, of slightly more concern to the CMC. Where mediation is the form of ADR, there are certain skills that are deployed by the mediator to facilitate or encourage parties to resolve their differences. Sometimes the factors that drive parties to settlement are different from those openly deployed in the litigation. A skilled mediator may identify these factors and move the parties towards settlement knowing about them. Sometimes, even in what might seem the smallest dispute, it can take time to bring the parties to a point where they are prepared to settle. It is important to recognise that a mediator must be properly trained and accredited. Not everyone makes a good mediator. Whilst there are many judges who make extremely good mediators, not all judges are necessarily equipped to be a mediator – although, of course, may become equipped if trained properly. The role of a "case officer" could be important in any court-annexed mediation process.

18. At the same time as urging a professionalisation of the industry and the regulation of mediators (which, of course, involves time and costs by the individual) the authors seem to be suggesting that compulsory mediation needs to be cheap or free. The CMC cautions against the implicit suggestion that mediation should be carried out "on the cheap". This could prove to be a false economy. It is the CMC's view, as articulated above, that a broader view needs to be taken, particularly of the savings in time and costs to individuals, businesses, the community and the state by the settlement of disputes at an earlier stage. It is also the case that low value cases are not inherently less legally complicated (in terms of progress through the Courts), or easier to settle (in terms of consensual settlement).

19. Finally, if alternative dispute resolution is to become mainstream, then we need to find another name for it – others have suggested Appropriate Dispute Resolution or simply Dispute Resolution.

20. Despite the reservations expressed in paragraphs 15-18 above, the CMC welcomes the Report and looks forward to further developments consequent upon it.

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