

# Compelling case

Mediation is increasingly in favour with the judiciary, but with the potential for the current scheme of costs sanctions to lead to further litigation, **Philip Hesketh** asks, should mediation be made compulsory?

The Master of the Rolls, Lord Clarke of Stone-cum-Ebony, said in a recent speech: “Mediation and other forms of [alternative dispute resolution] should become second nature to litigators, litigants and the courts ... education, education, education. I suggest that we should start with the law schools and the professional parties and their lawyers.” (For the full speech, visit [www.judiciary.gov.uk/docs/speeches/mr-littleton-chambers-080609.pdf](http://www.judiciary.gov.uk/docs/speeches/mr-littleton-chambers-080609.pdf).) But is education alone going to be enough to make mediation second nature, or is it time to make mediation compulsory in appropriate cases?

The debate about mediation has moved on in a relatively short time, from its efficacy, to its role in the civil justice system. As recently as October 2007, in *Egan v Motor Services (Bath) Ltd* [2007] EWCA Civ 1002, Lord Justice Ward was compelled to say: “It is not a sign of weakness to suggest it. It is the hallmark of commonsense.” It is unlikely now that any litigator would interpret an offer to mediate as weakness, given the emphasis placed on alternative dispute resolution (ADR) in the Solicitors’ Conduct Rules (see guidance note 15 to rule 2), the Pre-Action Protocols (see, for example, paragraph 2.16 of the Personal Injury Pre-Action Protocol), the Civil Procedure Rules (CPR part 1.4(2)(e)), judicial speeches (see [www.judiciary.gov.uk/docs/speeches/lcj\\_adr\\_india\\_290308.pdf](http://www.judiciary.gov.uk/docs/speeches/lcj_adr_india_290308.pdf)), and the courts’ power to make adverse costs orders (*Dunnett v Railtrack Plc* [2002] EWCA Civ 302).

Encouragement to mediate, as opposed to compulsion, was the approach preferred by Lord Justice Dyson in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA (Civ) 576. He said: “The value and importance of ADR have been established within a remarkably short time. All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR. But we reiterate that the court’s role is to encourage, not to compel. The form of encouragement may be robust.”

## ENCOURAGING MEDIATION – COSTS SANCTIONS

These have been used by the courts to punish parties who have failed even to consider mediation. The power comes from CPR 44.5(3)(a)(ii). When making costs orders, the court is to have regard to efforts made by the parties before and during proceedings to resolve the dispute. The threat of a costs penalty acts as a major incentive to persuade parties to mediate or use some other form of ADR. However, Lord Clarke has said repeatedly that he does not wish to ignite a new round of costs litigation: “The bane of civil litigation is what I call satellite litigation; that is, disputes which are not about the underlying merits. I would certainly not like to see a new type of satellite litigation in which



complaints about the parties’ approach to mediation are investigated in detail and at great expense.” (For the full text of his speech, visit [www.judiciary.gov.uk/docs/speeches/mr\\_mediation\\_conference\\_may08.pdf](http://www.judiciary.gov.uk/docs/speeches/mr_mediation_conference_may08.pdf).)

The risk of such litigation (and the use of mediation) has probably been reduced by the impact of the *Halsey* decision. Having set out a non-exhaustive list of grounds for reasonable refusal to mediate, Lord Justice Dyson put the burden of showing that a refusal was unreasonable upon the party making the allegation. This aspect of the judgment was strongly criticised by Justice Lightman (see [www.judiciary.gov.uk/docs/speeches/berwins\\_mediation.pdf](http://www.judiciary.gov.uk/docs/speeches/berwins_mediation.pdf)). He thought placing the burden this way was “wrong and unreasonable”. Lord Clarke, however, accepted it, saying that, in his view, cases where costs sanctions are being sought are likely to be few and far between. That may be his wish, but is the threat of costs sanctions not the motivating force for mediation? Removing that threat would surely impede the drive to make mediation integral to the litigation process.

There have been few reported cases dealing with costs penalties since *Halsey*. No doubt, ‘tactical’ offers to mediate are made by parties who have no particular intention or expectation of mediating, but wish to protect their costs position. In response, a

refusal by the other party on one of the *Halsey* grounds is the death knell for a mediated settlement. In April 2008, the allocation questionnaire was amended to focus attention on mediation and other forms of ADR, but the drafting of the form undermined the objective. The ADR team at the Ministry of Justice acknowledges that the current wording of the form could be revised to avoid parties sidestepping any genuine consideration of ADR.

If a party unreasonably refuses to mediate, is justice served by denying their opponent the opportunity of enjoying the acknowledged benefits of a mediated settlement? How could such injustice be remedied without costs sanctions?

### ENCOURAGING MEDIATION – AN ALTERNATIVE

One answer is to make mediation compulsory, either by making it an obligatory step in the proceedings, or by ordering it in appropriate cases.

The first option would require a change in the rules. It is unlikely that such a move would be widely supported or desirable. Many cases are unsuitable for mediation. Other forms of ADR such as negotiation can often work more efficiently. Few believe mediation is the dispute resolution panacea. Lord Judge, the Lord Chief Justice, recently expressed concern that making mediation a compulsory stage of proceedings could lead to it becoming increasingly formalised and procedural, and just another part of the expensive process it was intended to alleviate (see [www.judiciary.gov.uk/docs/speeches/lcj-mediation-council-conf-140509.pdf](http://www.judiciary.gov.uk/docs/speeches/lcj-mediation-council-conf-140509.pdf)).

The second option may already exist – parties can be directed to mediate in appropriate cases, according to Lord Clarke: “First of all, the CPR, through the overriding objective and the general case management power set out in CPR 1.3(e), must manage cases by encouraging parties to use ADR and facilitating its use if such is appropriate. Equally, CPR 3(2)(m) provides the court with the general case management power to take any other step or make any other order to further the overriding objective and properly manage individual cases. Without breaching my self-denying ordinance not to refer to *Halsey* again this evening, I cannot but think that this provides the power, in an appropriate case, and consistently with the duty imposed on the court under CPR 1.3(e), to direct parties to enter into mediation or ADR procedures in appropriate cases. In considering whether to exercise these powers, it seems to me that the court will have to consider a number of questions. So will the parties and their advisors, because of the duty imposed by CPR 1.3 to assist the court to further the overriding objective. Thus, both the court and the parties are under a duty to consider whether it is proportionate to pursue their claim through the formal litigation process or whether a mediated settlement might be a just way of dealing with their case. Equally, the question will have to be asked whether it is proportionate to other litigants for their particular claim to be pursued through formal litigation, or whether it would improve access to justice for other litigants if they mediated their case: see CPR 1.1(2)(e).”

Clearly, Lord Clarke believes powers exist enabling case management judges to direct parties to mediate in appropriate cases. Lord Phillips, the former Lord Chief Justice, said in 2008 that compulsory mediation was a step too far (see [www.judiciary.gov.uk/docs/speeches/lcj\\_adr\\_india\\_290308.pdf](http://www.judiciary.gov.uk/docs/speeches/lcj_adr_india_290308.pdf)). His view was that, if a party failed to comply with a compulsory

mediation order and was consequently refused the right to continue with the litigation, “the European Court of Human Rights at Strasbourg might well say that he had been denied his right to a trial in contravention of article 6”.

Lord Justice Dyson in *Halsey* expressed the view that forcing parties to mediate would be an unacceptable restriction on their right to access to the court. His comments were summarised in *Hickman v Laphorn* [2006] ADR.L.R. 01/17 as establishing that compulsory mediation would be a breach of article 6. Lord Phillips and Lord Clarke have both pointed out that Lord Justice Dyson’s views on article 6 were *obiter*, so the question is far from decided. In any event, ordering mediation need not involve removing the

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ultimate right to trial. Indeed, mediation is not guaranteed to succeed, and parties are free to return to the litigation if settlement cannot be reached.

### APPROACHES IN THE USA

These range from entirely voluntary participation through to mandatory schemes. In Massachusetts, mediation is not compulsory, but lawyers are required to advise their clients about it. In Maine, the Rules of Procedure require family and mortgage foreclosure matters to be mediated, with discretion to compel in other cases. Disputes valued below \$50,000 have to be mediated in California, and the court may suggest (and apparently does routinely suggest) mediation in cases above that figure. In Texas, courts were given discretion to order mediation in the ADR Act 1987; parties who object to such an order can file a motion for exemption. The New Hampshire Superior Court has a mandatory system: contract, commercial and medical malpractice cases, *inter alia*, must undergo some form of ADR before they are listed for final hearing, subject to motions for exemption.

### CONCLUSION

We have already created, whether by accident or design, a system with inherent safeguards, where parties can be directed to mediate. It is not an obligatory step of the litigation process. The power is discretionary, and rights to appeal protect parties. The ultimate entitlement to a judicial determination remains unfettered. Practice and education will help define ‘appropriate cases’ and the sanctions for non-compliance. With a clear lead from senior judiciary, case management judges can become proactive in directing parties to mediate. Meanwhile, litigators wishing to provide mediation solutions to their clients have to apply for orders and make the case. This, combined with a real threat of costs sanctions, is the way mediation will become second nature. ■

**Philip Hesketh** ([www.heskethmediation.com](http://www.heskethmediation.com)) is a professional mediator and a panel member of Trust Mediation.