

Mediation – You’re damned if you do and you’re damned if you don’t

Have the courts stripped mediation of its voluntary element?

With growing support as a quick and cost-effective alternative to litigation, mediation has rapidly gathered momentum as a powerful tool in dispute resolution. But has its success placed too much pressure on the foundations on which it once thrived? What was originally an encouraged option has now become almost a compulsory step in litigation.

In this article, we examine two key questions: have the courts gone too far in taking the voluntary element out of alternative dispute resolution (ADR); and is it right for judges to dictate how parties conduct negotiations at mediation?

Compelled to mediate

Mediation may have been heralded as a voluntary process but the reality is now quite different.

The position as set out in the CPR practice direction for protocols is that:

- (1) ADR should be considered.
- (2) The parties to a dispute may be required to show evidence of consideration of ADR.
- (3) The court “must” have regard to such endeavours when determining costs.

In applying these principles, the courts have made it clear that mediation is virtually mandatory. In *Dunnett v Railtrack* [2002] 2 All ER 850, the Defendant decided against mediation on the basis that it was unlikely to achieve anything other than unnecessary costs. As a result, the court refused to award costs to the Defendant, despite Railtrack’s successful defence of an appeal by the Claimant.

Giving judgment in the Court of Appeal, Lord Justice Brooke said that if a party rejected ADR when the court had suggested it, they would suffer costs consequences. He emphasised that the parties themselves have a duty to further the overriding objective of the CPR, namely to allow the court to deal with cases justly and proportionately. This duty includes considering ADR.

So, an unreasonable refusal to mediate will attract adverse costs consequences, irrespective of a party’s ultimate success. As a result, the “option” of mediation has been lost, save where a party can demonstrate it acted “reasonably” in refusing to mediate.

Refusing reasonably

What constitutes a “reasonable” refusal to mediate, though? The court in *Hickman v Blake Laphorn (Costs)* [2006] EWHC 12 (QB) addressed this issue.

In *Hickman*, the first Defendant solicitors and the second Defendant barrister were held liable to the Claimant in respect of advice given in a personal injury claim. The Claimant had made various offers of settlement. The first Defendant wished to settle and urged the second Defendant to mediate. The second Defendant refused to do so, on the grounds that the Claimant was unlikely to establish liability. He was wrong and the Claimant recovered a sum less than his settlement offer. The first Defendant argued that the second Defendant should pay all the Claimant’s costs because of his failure to mediate. In determining costs, the court held there was a strong possibility that a settlement could have been achieved close to the sum actually awarded if there had been ADR. The main issue was whether the second Defendant’s views on his prospects of success were “unreasonable” and whether the Claimant could demonstrate that.

The Claimant valued the claim at three times the sum that the second Defendant was prepared to pay. Given this substantial gap, the court found that the second Defendant’s refusal to mediate was not “unreasonable”. Mr Justice Jack said it could not be right that a defendant should always be prepared to pay more than a claim was worth in order to avoid being rendered vulnerable on costs. This would allow a claimant to put undue pressure on a defendant to settle at a higher figure than the claim merited.

The problem is that deciding what constitutes an “unreasonable” refusal to mediate will depend on the facts of the case. So it may be difficult to decide how the court will ultimately view the issue.

Acting unreasonably

But attending mediation out of compulsion is not enough either. A party’s conduct at mediation may itself result in adverse costs consequences. The recent decision of *Carleton (Earl of Malmesbury) v Strutt & Parker* [2008] EWHC 424 (QB) provides a warning to parties who attend mediation and adopt an unreasonable approach.

During mediation in the *Carleton* case, the Defendants offered to settle for £1 million, with each side bearing its own costs. The Claimants put forward a counter-offer of £9 million (against an ultimate award in the judgment of £915,139) plus 80% of their costs. The Claimants’ offer was rejected and the mediation advanced no further. On the issue of costs, the court held that the Claimants should only recover 68% of their costs on the basis that their position at mediation was unrealistic and unreasonable. Mr Justice Jack also ruled that where a party agreed to mediate but then took up an unreasonable position during the ADR process, they should be put in the same position as a party who unreasonably refused to mediate.

So, even where a party is compelled to mediate, they must behave fairly and sensibly.

Leaving the gloves on

Even if a party does behave fairly and sensibly at mediation, they may still not recover their costs despite winning on the central issues in the case.

The decision in *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd* [2008] EWHC 413 (TCC) dealt primarily with an application for security for costs. However, it also provides a useful commentary on the recovery of pre-action costs, including costs of mediation. While pre-action costs are potentially recoverable via a subsequent costs order, pre-action mediation costs are not considered “of and incidental to” the proceedings, and are consequently irrecoverable. However, it was said in *Lobster Group* that costs were recoverable (at least, in principle) in respect of mediation conducted after proceedings had been started.

However, in practice and in compliance with the pre-action protocols, mediation is usually conducted before the start of proceedings. A party who ultimately succeeds in a legal action but who participated in an unsuccessful pre-action mediation will, therefore, not recover the costs of that mediation.

Playing the game

The development of case law on mediation raises two important questions:

- By forcing parties to mediate “reasonably”, are the courts ignoring the principle that mediation is a form of negotiation?
- Litigation is, by its very nature, adversarial and that means “playing the game”. Whether it involves bluffing with a pair of twos or going all in with a fist full of aces, should it not be for the parties to play their hand as they see fit? Why should a party be compelled to act “reasonably” at mediation simply to avoid a possible adverse costs order after trial, where a negotiating advantage could be obtained by taking a robust (or even an “unreasonable”) approach?

The answers to these questions seem to lie in the courts’ insistence on adopting a prescriptive approach to mediation. While taking such a tough line may generally encourage settlement, decisions such as *Carleton* represent an erosion of parties’ liberty to negotiate as they see fit.

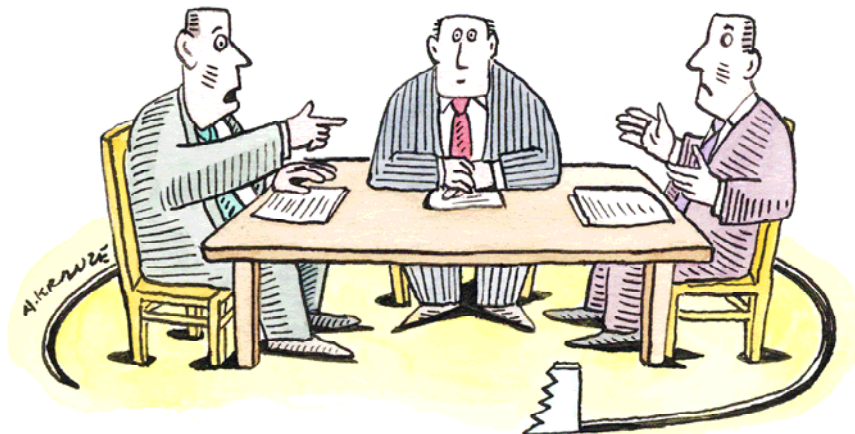
So for insurers who are tempted to take a robust line at mediation, the dilemma is that they risk being condemned in costs if they do but possibly damned in terms of the overall result if they don’t!

Sushma MacGeoch, Kennedys, London

s.macgeoch@kennedys-law.com

Andrew Orr, Kennedys, London

a.orr@kennedys-law.com



This article first appeared in Kennedys' *The Key of Winter* 2009.

London
25 Fenchurch
Avenue
London
EC3M 5AD
Tel: 0207 667
9667

Kennedys worldwide (including associated offices):

Auckland, Belfast, Birmingham, Cambridge, Chelmsford, Dubai, Dublin,
Hong Kong, Karachi, Lisbon, London, Madrid, Maidstone, Manchester,
Mumbai, New Delhi, Paris, Santiago, Singapore, Sydney, Taunton and
Warsaw.

www.kennedys-law.com

[Privacy statement](#)
[Disclaimer](#)
[Copyright](#)