QUADRA
alternative dispute resolution

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What happens if one party refuses a "judge-recommended mediation"? English law at glance

Di Pierluigi Cornacchia 11/07/2005

Can a Judge oblige parties to participate in a mediation? And, what happen if the invited parties do not participate? The art. 1.4 (1) of the CPR states that "the *Court must further the overriding objective by actively managing cases",* and active case management include "encouraging *the parties to use an alternative dispute resolution procedure if the Court considers that appropriate and facilitating the use of such procedure*".

Since the civil procedure rules were introduced, the courts have been strongly encouraging parties to use alternative dispute resolution instead of litigation wherever possible. The fact that Judges can recommend mediation is of vital importance for the survival of this form of process. A clear obstacle that could hinder the development of mediation is indeed represented by the lawyers who could look at whatever form of ADR as a mean of losing "part of the pie" represented by the litigation market in favour of the new figure represented by the mediator. Lawyers could then act strategically to retain the market for themselves.

On the opposite, there are cases in which even if the lawyer would opt for mediation, the client will conceive it as a concession in favour of the other party, as if the proposal for the mediation would put him in a weaker position with respect to the rival. In these cases I believe that the judge-recommended mediation would have more effect on the reluctant party, either because the Judge is regarded as a very respectable person, trusty and experienced, or simply because is an order made from a neutral party.

We have been speaking of recommendation, suggestion and encouragement made by Judges to push parties towards the mediation, but, what happens if one party or both parties are reluctant? While the CPR rules encourage the use of ADR is not so clear whether the courts have any power to order a compulsory mediation, so imposing this kind of process to the parties.

If we have a look at some decisions we can easily find out how the Courts have indirectly pushed parties to consider mediation. While in fact in *Kinstreet Ltd vs Balmargo Corp. Ltd.* the judge ordered ADR despite strong resistance of one party, in *Dyson and Field vs Leeds City Council,* the Court of Appeal, stated that "...in *consistence with the overriding objective of the CPR and the court's duty to manage cases as set out in rule 1.4 (2)(e),* ***we should encourage*** *the parties to use an alternative dispute resolution procedure to bring this unhappy matter to the conclusion...*". Most important, the Judge stated that "*...the court has powers to take a strong view about the rejection of the encouraging noises we*

are making, if necessary by ***imposing*** *eventual orders for indemnity costs or indeed ordering that a higher rate of interest be paid on any damages which might at the end of the day be recoverable*". So, on the contrary, with respect of the former case, even if the Court did not directly order ADR in this one, such a warming might coerce parties to cooperate even if not deeply convinced.
This concept has been recently confirmed in *Shirayama vs Danovo*. Here again, *Danovo's* solicitors applied for an order seeking that the parties would mediate their various dispute. The question was again if the court had jurisdiction to order a party, who is unwilling, to have a dispute mediated in the term applied for. Judge J. Blackburne stated that the Court do have this power and furthermore, he pointed out that this power is not only confined to the case where the parties jointly wish to settle the whole or part of the case or to use alternative dispute resolution procedures.
At the end of his judgement he ruled that if the mediation fails, whether the costs should be borne by one side or the other or whether no order at all should be made, will depend on all of the circumstances. For circumstances being intended the conduct of all the parties either before or during the proceedings, and the efforts made in order to try to resolve the dispute. So, as reminded before, the overall frame is not clear whether indemnity costs and damages should be confined as just an incentive towards a more efficient use of the justice or should be regarded as a threat, and so as a constraint on the parties.
These conflicts have triggered a lot of concerns in the legal sector. More specifically, many jurists regard the compulsion to ADR as an unacceptable constraint on the rights of access to the court and, therefore a violation of art. 6 of the European Convention on Human rights. Again, the compulsory mediation would undermine the voluntariness of the parties, so eroding one of the main and genuine characteristic of the process, so that mediation would no longer be seen as voluntary.
Anyway, both points have been highly debated and disregarded. Art. 6 is in fact not breached cause access to the parties is not denied if they go to mediation. If mediation fails in fact, the parties are entirely free to return to the litigation process without the fear to incur any sanctions. It is then possible that by reasoning in this way, it is likely that parties feel obliged to just participate in the mediation without playing an active role. On the contrary we must acknowledge that sometime, even if pushed to the mediation, parties realise the genuineness of it just once involved in, settling a dispute that they would have never thought to settle. On the other way, neither the voluntariness of the parties is hindered, since this process is deemed to let the parties free of exchanging their point of views, and since the mediation will aim at this, it cannot be seen as a threat to the voluntariness.
Whether conflicts have arisen over the power of courts to impose a mediation, is out of doubts that Courts do have jurisdiction to impose a costs sanctions on successful parties who unreasonably decline to mediate. An example of highly significant decision regarding costs orders against successful litigants on the basis that those litigants failed to seriously consider mediation is represented by the case *Dunnett v. Railtrack* in the Court of Appeal. *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 to stray on to the railway line. Despite the fact that Ms *Dunnett* had warned *Railtrack* about the

fact, the gate was not padlocked, causing later on the death of the horses, that had been killed by an express train. 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 another ADR would be highly desirable in this particular case because of its flexibility.
Railtrack legal representative told the Court that they had refused to mediate because they thought that doing so would necessarily involve the payment of money, which they were not ready to contemplate. So, despite the Court's suggestion, *Railtrack* refused to go to mediation or any other form to ADR. Later on, *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.
Again, in the case *McMillan vs. Range,* **both** parties were criticised for not mediating in the teeth of a recommendation to use ADR by Lord Justice who gave permission to appeal. The recommendation was based on dis-proportionality of costs to the amount at stake. In a claim under an employment contract brought by a law firm against a former employee solicitor, the defendant solicitor won her claim in the County Court on a preliminary point.
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The claimants appealed and won. They were awarded their costs of trial, but Lord Justice Ward made no order as to the costs of the appeal. The successful claimants were thus denied their appeal costs and the unsuccessful defendant failed to persuade the court to reserve the costs until the substantive trial had taken place. Finally in the case *Virani vs. Revert,* the latter was directed by the Court, to use the Court of Appeal mediation scheme which he refused being confident of winning the case.
On the contrary, it turned out that at the appeal hearing before Ward and Tuckey LJJ and Lightman J, short shrift was given to the appellant on the merits. The successful respondent then sought a costs sanction because of *Manuel Revert's* refusal to negotiate or mediate. The Court agreed and ordered the appellant to pay indemnity costs to the respondent. The judgement is in line with the one in *Dunnett* just working the other way round and indeed is the first time that a successful party obtain a costs sanction against an unsuccessful party, for their refusal to mediate.
If we go further in comparing the two cases, we realise that in both cases the parties had strong reasons to believe they had won the case, but *Virani's* lawyers decided to declare their willingness to mediate instead of refusing it. This turned out to be a superior choice, led to an extra penalty for indemnity costs being imposed on Manuel Revert and consequently escape from any costs liability for *Virani.*
On the other way, we must keep in mind that the fact that a party does not comply with the "request" or the "order" of a Court to try to mediate the case, does not necessarily means that they will face problems for sure. The message is that they are committed to ADR as a real and serious alternative to litigation, and that parties, and lawyers, ignore ADR at their peril. But there should not be a presumption in favour of mediation and indeed sometime, ADR could be the wrong answer to the solution of a dispute, and therefore is not appropriate for every case. In such cases the court will not penalise those parties who refuse to mediate if they have good reasons.
There are two major cases in which this rule has been followed. The first is *Hurst v. Leeming,* and indeed it gives some guidance as to when a refusal to mediate might be justified. Here the court declined the unsuccessful party claimant's request that costs sanctions be imposed on the defendant for rejecting mediation. The claimant argued in fact that despite the dismissal of the action he should be entitled his costs as the defendant refused to mediate. If we look at the reasons for which Leeming refused to mediate these are:
- The legal costs already incurred;
- The seriousness of the allegation concerning the professional negligence;
- The lack of substance in Mr Hurst's claim;
- The lack of any real prospects of successful mediation and

The obsessive character and attitude of Mr Hurst. While Judge Lightman examined all the

points, he did not consider the first three which he regarded as insufficient, but he did consider the remaining two leading to the fact that on the basis of these elements it was highly unlikely that the claimant would have made any serious attempts to settle during mediation. Due to this reasoning, Leeming was not deprived of his full entitlement to costs. I am really pleased with the fact that Judge Lightman disregarded the first point. The matter of legal costs already incurred does not have to divert people from making the efficient choice. These costs are the one that economists would regards as "sunk costs", which are costs that cannot be recovered to any significant degree. If we let the sunk costs influence our decisions, we will not be assessing a proposal exclusively on its own merits. Economists in fact argue that a rational choice is the one which does not bear into consideration sunk costs. That is why a law and economics approach has to be taken into consideration when making a decision. Both Judges, Lawyer and also mediator in fact should be aware of some distortion that the interaction between law and economics can cause. There could be parties who are more "cost sensitive" or other who are "judgement proof". All elements that should be born in mind when assessing one party's behaviour. The case of *Halsey vs. Milton Keynes NHS Trust* give us other principles on which we can assess how a party can consider to avoid mediation without being penalized. In this case a widow made a claim against the hospital where her husband died. According to the claimant this was due to the fact that a naso-gastric feeding tube was incorrectly inserted into his airway instead of his stomach. Repeated offers where made by the claimants, but were all rejected on the fact that there was no liability and that mediation had little chance of success. Applying what already taken into consideration in the former case assessed, the Court found that the claimant's proposals were somehow tactical and made just to force the defendant to settle, while Trust had rightly considered the case to be appropriate to defend. The Judge then affirmed that the very aim of the CPR is not to induce parties to behave strategically trying to obtain what they are not entitled to get. That is the reason why the Judge ordered costs against the claimant without any penalty for declining to mediate.
The Court of Appeal went even further investigating:

- The nature of the dispute;
- The merits of the case;
- If other forms of settlements were attempted;
- If costs of ADR would be disproportionately high;
- Prejudicial delay to set up and attend ADR and,
- whether ADR had a reasonable prospect of success.

At the end of these considerations about all these disputes reviewed is appropriate, how effectively included in the Halsey judgement, to separate cases in which is the Judge who order or recommend ADR from cases where "voluntary" offers to mediate are made by one party to another without any judicial encouragement. Halsey makes it clear that, to ignore a court recommendation to mediate will be highly risky, simply because from my point of view, is implicitly clear that the Court has already tested the suitability of the case to be mediated. In this event is much more difficult for a party to prove the contrary and to discharge his refusal to mediate. On the other way, this does not imply that in voluntary offer cases, the judge can no longer impose costs sanctions on a successful party. It should be clear enough that whether a judge feels that the party should have been

accepted the proposal to mediate, a costs sanction may be imposed under the principles set out in CPR 44.