TO MEDIATE OR NOT TO MEDIATE:  
The Advantages of Alternative Dispute Resolution Mediation

By Donna Goldsworthy

Refusal to Mediate

Recent cases in the Court of Appeal of Halsey–v–Milton Keynes NHS Trust and Steel–v–Joy & Halliday have clarified the position on what happens to a party that refuses to mediate.

The Court of Appeal declined to penalise the successful parties in each case who had refused to mediate. However, the Court emphasised that it does have the power to impose costs sanctions and gave some guidance as to how the courts should approach such issues.

Earlier cases such as Dunnett–v–Railtrack and Hurst–v–Leeming lead to a view being formed by some commentators that any party that refused to mediate would automatically face costs sanctions. This reasoning seemed to be applied even when the Court had found that the claimant’s case had no merit.

In the case of Halsey–v–Milton Keynes NHS Trust the Court of Appeal clarified the issues relating to mediation and set out general principles to be applied when considering whether an adverse costs order should be made if a party refuses to mediate:

• The burden of proving whether an adverse costs order should be made lies with the unsuccessful party.

• Solicitors conducting litigation on behalf of their clients should as a matter of routine consider with their clients whether Alternative Dispute Resolution (ADR) is suitable.

The Court recognised the value and importance of ADR. It was felt that the Courts cannot positively order mediation against the wishes of a party. However, the Court can make a judicial recommendation and if a party refuses to mediate in the face of the Court’s recommendation, this may be enough to justify sanctions.

In the light of these cases, best practice will always be that a party should not reject mediation without just cause and the test remains whether a party has acted “reasonably” in the circumstances if rejecting mediation.

Advantages of Mediation

It is useful for parties entrenched in litigation to bear in mind the advantages of mediation which are:

• The mediator does not impose a decision, or make any judgment of the issues acting like a judge or arbitrator; by contrast the mediator assists the parties in reaching their own solution.

• The mediation process is entirely voluntary and the outcome of the mediation is within the control of the parties.

• Mediation is a facilitated negotiation, which assists the parties to explore the issues, to include a combination of legal and commercial issues which are of real importance to them. The parties are encouraged to address their present and future needs, rather than dwelling on their “rights” or what has occurred in the past.

• The mediation process is relatively fast and disputes can often be resolved within a day.

• Mediation can be significantly less expensive than litigation. This is because months or years of litigation are avoided, thereby saving management’s time as well as fees of experts and lawyers.

• A further attraction of mediation is that the process is entirely confidential, unlike court proceedings.

• The parties are able to confide in the mediator who will keep confidential any informa-
tion given by one party unless he has express permission to disclose that information to the other party.

- Any agreement reached is not binding until an agreement in writing is reached. In addition, the process is without prejudice so information cannot be passed on to the court or third parties.

- The actual mediation process can be tailored to the parties' needs, for example, mediation can be conducted at a mutually convenient venue and at a time preferable to the parties.

- The success rate of mediations is fairly high and most mediations do settle.

If you have any questions on mediation please contact Donna Goldsworthy, who is a CEDR accredited mediator in Paul Hastings’ London office, at +44-20-7710-2044 or via email at donnagoldsworthy@paulhastings.com.