RSVP: "I accept". Mark Field explains why an invitation to mediate should not be ignored or refused

As Professor Dominic Regan of City Law School London has remarked, "mediation is like sex – it is thought about more often than it is practised".

But the judiciary is certainly playing its part in narrowing the disparity between the theory and what actually happens in practice.

Mediation is a concept that has been in existence for centuries, both in the legal and non-legal environment. But for civil litigation practitioners, mediation really came into focus following the introduction of the Civil Procedure Rules in 1999, with the requirement to complete the Allocation Questionnaire. The first section of the Allocation Questionnaire, "Settlement", encouraged settlement of the case at an early stage (as does the current Directions Questionnaire). A party's representative was required to confirm that "… I have explained to my client the need to try and settle; the options available; and the possibility of costs sanctions if they refuse to try to settle".

Representatives however soon began to regard completion of this section of the Allocation Questionnaire as merely a tick-box exercise: "Sure I'll think about settlement, but not yet. After all, the case has only just begun, I have a good case and my client expects to win". The "possibility of costs sanctions", if they refused to try and settle was not of concern to practitioners because that possibility never became a reality.

In *Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576*, the Court of Appeal stated that a party that unreasonably refused to mediate could be penalised in costs. The court then set out relevant factors to be considered when deciding whether a party that refused mediation had acted unreasonably. These included the nature of the dispute, the merits of the case, consideration of other settlement methods that had been attempted, whether the cost of mediation would be disproportionately high, any delay in the trial of the action if mediation was attempted late in the day and whether mediation had a reasonable prospect of success.

Halsey was seized upon by both the pro- and anti-mediation lobbies as support for their respective positions.

The pro-mediation lobby was encouraged by the court's general support for mediation and by the fact that the CPR itself was in favour of it and other forms of alternative dispute resolution. The anti-mediation lobby was comforted by the fact that whilst there was a risk in unreasonably refusing, it would not generally be too difficult to show that any refusal was reasonable by being able to satisfy the court that one or more of the factors set out above applied to the case.

But there has been a change in the judicial approach since *Halsey* which practitioners need to be aware of because consideration of mediation is no longer a "tick-box" exercise.

In *PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288*, the Court of Appeal made it clear that parties to a dispute must consider mediation. In this particular case, offers to mediate had been ignored. At first instance that silence was found by the judge to amount to unreasonable behaviour and this was confirmed by the Court of Appeal.

In *PGF*, months after the defendant had made a Part 36 offer, the claimant accepted it. In such circumstances the defendant would ordinarily have expected to be awarded its costs from the date that the claimant could have accepted the Part 36 offer until the date that it was actually accepted. At first instance the court found that the defendant's unreasonable behaviour in ignoring the claimant's offers of mediation warranted a sanction and it deprived the defendant of its costs for this period. The Court of Appeal did not interfere with that finding. In doing so the Court of Appeal swept aside the usual operation of Part 36 in circumstances where the defendant had made, months earlier, a "good" Part 36 offer.

There could hardly have been a clearer warning to practitioners but not all heeded it, for *PGF* was followed by a number of decisions where an offer to mediate did not meet with a positive response, such as *Garritt-Critchley v Ronnen [2014] EWHC 1774 (Ch*), *Northrop Grumman v BAE Systems [2014] EWHC 3148 (TCC)* and *Laporte v Commissioner of Police for the Metropolis [2015] EWHC 371 (QB)*. In *Laporte*, the defendant declined to engage in mediation. It successfully defended the case at trial and cited the emphatic nature of its victory as justification for its refusal to mediate.

Mr Justice Turner did not agree and reduced the defendant's entitlement to costs by one-third of what it would ordinarily have been entitled to. What these decisions demonstrate is that it is increasingly difficult, if not impossible, to bring oneself within the criteria laid down in *Halsey* so as to justify a refusal to mediate.

In fact, it is difficult to understand why any practitioner, certainly following *PGF*, would want to resist an invitation to mediate. A refusal to mediate that the court subsequently finds is unreasonable will more than likely result in a greater financial penalty for the refusing party than the cost of attending a mediation.

But more than ten years after *Halsey* the "message" from the judiciary was still not getting through. In the cases of *Reid v Buckinghamshire Healthcare NHS Trust [2015] EWHC B21 (Costs)* and *Bristow v the Princess Alexander Hospital NHS Trust & Ors [2015] EWHC B22 (Costs)*, Master O'Hare and Master Simons respectively applied to costs the same principles regarding mediation that had hitherto applied to substantive actions. In both cases the court found that there had been an unreasonable refusal to mediate and indemnity costs were ordered in favour of the receiving party – in *Reid* from the date that the defendant had received the offer to mediate and in *Bristow*, on the whole of the assessed costs.

So the message to practitioners is clear: the justifications that could be relied upon post-*Halsey* no longer hold good. If you receive an offer to mediate, you should accept it and do so promptly. Better still, issue the invitation yourself. For if your opponent is not as wise as you and does not accept your invitation, you may ultimately find yourself in an advantageous position when the order for the costs of the action is made.

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