# HAPPY BIRTHDAY, CPR?

As I write this, the world is in the grip of the coronavirus pandemic. We are all encouraged to wash our hands thoroughly to the accompaniment of "Happy Birthday", sung twice. Birthdays are generally joyous occasions but we have nothing to celebrate, other than perhaps that we are well enough to wash our own hands.

Today is the 21st birthday (or if you prefer, the anniversary) of the Civil Procedure Rules which came into force on Monday 26 April 1999.

The Rules encourage the parties to focus less on their perceived inalienable right to have a dispute resolved by a court but rather to consider less formal alternative methods of dispute resolution and to do so at an early stage.

This has been demonstrated by the introduction of pre-action protocols; (the requirement to conduct litigation in accordance with the overriding objective; the allocation/directions questionnaire, the first part of which requires the parties' representatives to consider settlement; Part 36 of the Rules (Offers to Settle); judicial decisions which punish or incentivise (according to one's standpoint) those who choose not to avail themselves of the opportunity to engage in ADR.

One would have thought that as the years passed, parties would "have got the message" but twenty one years later the reported cases still suggest otherwise - see https://bit.ly/lawsoc2016.

Three years ago, in my article "No mediation please – we're litigators" I wrote that where a defendant is represented by a solicitor appointed by the defendant's insurers, those insurers could and should be more proactive in promoting mediation – see https://bit.ly/claim17.

Of course I have an interest in promoting mediation. "He would say that, wouldn't he?" you will be thinking. But mediation is not only in the interests of mediators; it is also in the interests of the parties and insurers.

There is no better recent example than DSN v Blackpool Football Club, decided in March 2020, a case in which the defendant was insured. Mr Justice Griffiths gave two judgments. The first dealt with the allegation of sexual abuse suffered by the claimant, a young player at the time the alleged abuse took place. The claimant succeeded in his claim and was awarded a greater sum than his own Part 36 offer.

The second judgment dealt with the appropriate order for costs, in which the matter of the defendant's refusal to engage in mediation was considered. In his judgment (https://www.bailii.org/ew/cases/EWHC/QB/2020/670.html), Mr Justice Griffiths made it clear that he would have no truck with those who declined an invitation to participate in mediation. The two paragraphs of the judgment that follow warrant close attention for no commentator could put the matter more succinctly:

27. In summary, the Defendant in this case failed and refused to engage in any discussion whatsoever about the possibility of settlement. It did not respond to any of the three Part 36 offers (except to reject the final one). It was required by paragraph 4 of the Order of Master McCloud "to consider settling this litigation by any means of Alternative Dispute Resolution (including Mediation)". It was warned by the same Order that if it did not engage in any such means proposed by the Claimant it would have to give reasons, and it was also warned that the reasons it gave might in due course be shown to the trial judge when the question of costs arose.

28. The reasons given for refusing to engage in mediation were inadequate. They were, simply, and repeatedly, that the Defendant "continues to believe that it has a strong defence". No defence, however strong, by itself justifies a failure to engage in any kind of alternative dispute resolution. Experience has shown that disputes may often be resolved in a way satisfactory to all parties, including parties who find themselves able to resolve claims against them which they consider not to be well founded. Settlement allows solutions which are potentially limitless in their ingenuity and flexibility, and they do not necessarily require any admission of liability, or even a payment of money. Even if they do involve payment of money, the amount may compare favourably (if the settlement is timely) with the irrecoverable costs, in money terms alone, of an action that has been successfully fought. The costs of an action will not always be limited to financial costs, however. A trial is likely to require a significant expenditure of time, including management time, and may take a heavy toll on witnesses even for successful parties which a settlement could spare them. As to admission of liability, a settlement can include admissions or statements which fall short of accepting legal liability, which may still be of value to the party bringing a claim. In the present case, for example, I have already in my previous judgment commented (at [2020] EWHC 595 (QB) paras 188-189) on the opportunity missed by the Defendant at the very least to acknowledge and accept that the Claimant was sexually abused by Roper (it having no positive case to the contrary, and no evidence to support a case to the contrary). The passage in the Claimant's witness statement which I quoted in paragraph 188 of my previous judgment shows that the Claimant was not primarily motivated by money (and the low figure of his final Part 36 offer confirmed that). He "expected the club to want to engage and to understand what had happened". The club could have engaged with him (having received his statement, which was dated as long ago as 28 May 2019) without prejudice to what it presented at trial as its strongest defences: namely, that the claim was outside the limitation period and that the club was not vicariously liable for Roper's sexual abuse of the Claimant, even if that abuse were to be admitted. It did not engage at all.

Mediation is about people, not winners and losers. The adversarial approach that drives litgation and joint settlement meetings is absent from a mediation.

Those who engage in mediation will know that it is not at all unusual for the claimant to seek something other than the monetary remedy sought in the Particulars of Claim. In this case, the judgment records that the 'Claimant was not primarily motivated by money (and the low figure of his final Part 36 offer confirmed that). He "expected the club to want to engage and to understand what had happened".'

The flexibility of what parties can agree at a mediation could have resulted in a non-monetary agreement. This would not be a "win" for the claimant within the context of the proceedings

and there would be no undermining of the defendant's pleaded case. But it would have been possible for the defendant to have made a gesture that acknowledged what had occurred.

But if the Rules and the courts cannot oblige litigants to regard a trial as a last resort, perhaps CV-19 will do so.

During this crisis the civil justice system has almost ground to a halt. What better time for litigants and their representatives to finally embrace mediation with the same enthusiasm as they embrace litigation? Those dispute resolution lawyers tiring of "Happy Birthday" at the washbasin may wish to practise the recitation of the overriding objective so that when we return to more normal times they will be fully focussed on bringing a prompt resolution to the multitude of disputes that will undoubtedly ensue from CV-19.

26 April 2020