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With the judiciary's increasing willingness to be flexible on compulsory ADR, Paul Dorrans & Camilla Pratt look ahead to what may come next

- The scope of the order made by Master Davidson in which the parties were directed to 'meaningfully' engage in mediation, and were permitted to rely on evidence of the parties' conduct in mediation in support of an application on costs.
- Existing trends and procedural mechanisms to facilitate alternative dispute resolution (ADR).
- The issue of compulsion in mediation.
- Issues to consider for the future

Innovation and creativity are central to success in mediation. It is perhaps no surprise then to see the same qualities reflected in a novel order made before Christmas 2021 by Master Davidson, in which the parties were directed to 'meaningfully' engage in mediation and given the ability to police compliance with the order by reference to conduct in the mediation itself.

Although the order was made by consent, its text is significant and reflects a growing trend towards the enhanced use of innovative steps to encourage and support mediation.

Master Davidson's order

The order arose in the context of a claim under the Civil Liability (Contribution) Act 1978. By consent, Master Davidson stayed the proceedings to give the parties time to attempt to resolve the dispute by mediation. So far, so orthodox. However, the innovative 'stick' used by Master Davidson to encourage the parties to resolve the claim was to create a gap in the protection typically offered by without prejudice privilege. The relevant text of the order, dated 9 December 2021, required that the parties:

(1) '...meaningfully engage in the mediation process in a genuine attempt to reach settlement of these proceedings'; and that

(2) '...either party shall be at liberty to make an application relying on evidence as to the conduct of the parties at the mediation. Either with regards to the costs consequences of that conduct or with regards to the Court deciding whether or not either party has failed to engage with the mediation process'.

By permitting either party to rely on 'evidence as to the conduct of the parties at the mediation' in support of an application on costs or as to the other party's compliance with the order to 'meaningfully engage in the mediation process in a genuine attempt to reach settlement', the court has, in effect, been invited by the parties to supervise their conduct of the mediation process.

A new or existing trend?

Courts of all levels have long been highly supportive of parties who wish to engage in mediation. The procedural mechanisms available to enable to the court to do so are many, including:

- **Practice Direction on pre-action conduct**, which provides that parties should consider whether ADR may assist them to resolve the dispute without starting proceedings and empowers the court to (i) require parties to provide evidence that ADR has been considered; and (ii) take into account a refusal to participate in ADR or a party's silence in response to an invitation, when considering costs. Under the pre-action protocol for construction and engineering disputes, parties should normally meet at least once before proceedings are issued.
- **CPR 1.4** permits the court to further the overriding objective by actively managing cases. This can include encouraging the parties to use ADR if the court considers that appropriate and facilitating the use of such procedure, and helping the parties to settle the whole or part of the case.
- **CPR 3.1** empowers the court to 'make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an early neutral evaluation, with the aim of helping the parties to settle the case'.
- **CPR 26.4** permits the court, of its own volition, to order a stay to allow for ADR in appropriate cases and direct that the proceedings, either in whole or in part, be stayed for one month or such other period as it considers appropriate. The court may also extend the stay until such date or for such specified period as it considers appropriate. Where the court stays the proceedings under this rule, the claimant must tell the court if a settlement is reached. If the claimant does not tell the court by the end of the period of the stay that a settlement has been reached, the court will give such directions as to the management of the case.

Given the number and breadth of these provisions and the benefits which can accrue to the parties and the justice system alike from ADR, a willingness by the courts to employ existing procedural mechanisms to support parties who wish to engage in mediation is therefore to be expected. The courts have been similarly willing to enforce ADR clauses in commercial contracts (see for example

Ohpen Operations UK Ltd v Invesco Fund Managers Ltd [2019] EWHC 2246 (TCC), [2019] All ER (D) 86 (Aug)) to facilitate mediation.

The order is therefore best viewed in light of this context and understood as a recent practical example of the court's willingness to support and encourage ADR. Even in light of that context however, the extent of the court's ability to supervise the parties' engagement with the mediation process under Master Davidson's order is quite novel, certainly in a commercial context, and raises issues relevant to the debate on the legality and desirability of compulsory ADR.

Compulsory mediation: lawful & desirable?

The issue of compulsory ADR has been and remains the subject of sustained debate and detailed consideration by the courts and academics. Although on one view, compulsion is strictly not in issue here as the order was made by consent, it is observed that the orthodox view on the question—namely that expressed by Lord Justice Dyson in Halsey v Milton Keynes General NHS Trust; Steel v Joy [2004] EWCA Civ 576—that it is 'difficult to conceive circumstances in which [compulsory mediation] would be appropriate' appears to be in retreat.

A reshaping of the consensus on the legality and desirability of compulsory mediation appears to be underway, and is reflected in the Court of Appeal's approach to the issue in the context of early neutral evaluation in Lomax v Lomax [2019] EWCA Civ 1467, [2019] All ER (D) 87 (Aug) and the observations of Sir Geoffrey Vos in McParland & Partners Ltd and another company v Whitehead [2020] EWHC 298 (Ch), [2020] All ER (D) 106 (Feb), where the validity of approach in Halsey was directly questioned.

Sir Alan Ward observed in Wright v Michael Wright Supplies Ltd [2013] EWCA Civ 234, [2013] All ER (D) 02 (Apr) that he would welcome a review of the issue of compulsion in the mediation context by a 'bold judge'. Lady Justice Asplin has been so bold, in the context of the Civil Justice Council report 'Compulsory ADR', published in June 2021.

The report highlighted, as we note above, that 'the rules of civil procedure in England and Wales have already developed to involve compulsory participation in ADR at a number of points. These compulsory processes are both successful and accepted.' The Civil Mediation Council welcomed the report, calling it a 'significant development', and called for ADR to be put 'at the centre of the civil justice process'.

The report went on to conclude that compelling ADR is, contrary to the position outlined in Halsey, compatible with Article 6 of the European Convention on Human Rights (the right to access the courts), and importantly observed that 'there is a tension between treating an order to mediate as a breach of Article 6 but then giving the court power when dealing with costs to penalise a party financially for unreasonably failing to mediate'.

The tension highlighted by Lady Justice Asplin is arguably apparent in the text of Master Davidson's order, with a seemingly voluntary process being subject to potentially highly intrusive judicial supervision which could result in both severe procedural and costs consequences.

Conclusion: more to follow...

Whether other civil and commercial litigants will wish to invite (let alone be compelled by) the courts to supervise the conduct of their mediations as the parties have done here remains to be seen. The free exchange of views during the mediation process, supported by the scaffolding of the without prejudice rule, is arguably one of the most effective platforms for the consensual resolution of commercial disputes.

Creating an ability to step back into the events of a mediation after discussions have collapsed to

extract evidence of alleged misconduct could imperil the integrity of the process, and in so doing diminish the prospect of disputes being resolved without recourse to trial. To adopt the language of Lord Justice Dyson in Halsey, we find it is difficult to conceive of many circumstances where the mediation of a commercial dispute would be enhanced by the kind of order in place here.

That is not to say that such circumstances do not exist; however, whatever the merits of the debate around the lawfulness and desirability of mediation under compulsion, Master Davidson's order demonstrates a welcome willingness by the judiciary to support and encourage the mediation process through the innovative and flexible use of existing procedural mechanisms.

As to what happens from here, in light of the joint statement issued by Sir Geoffrey Vos, Sir Andrew McFarlane, and Sir Keith Lindblom on 3 August 2021 as part of the foreword to the Ministry of Justice's call for evidence on ADR, that ADR 'need[s] to be mainstreamed within online processes, and within the culture of the legal system, those who work within it, and the consumers and businesses it serves', we expect that further reform will inevitably follow. The precise shape of that reform however, and how it will impact the mediation of commercial disputes in particular, remains to be seen.

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