When is it Reasonable to Refuse Mediation?

Practical Advice for Medition Users

In general, businesses and organisations should seriously consider mediation for alternative dispute resolution (ADR). While voluntary, courts actively encourage it, and refusal to mediate may count against you when courts consider costs. There are also many other advantages to opting for mediation.

However, lawyers in particular should note that precedents exist that may, in certain circumstances, influence decisions about whether to opt out of mediation. We look at these below.

A summary of recent cases

Mr. Justice Lightman's judgment in Hurst v Leeming [2001] EWHC 1051, formerly the main source of advice on this topic, has been overtaken and enlarged upon by Halsey v Milton Keynes NHS Trust [2004] EWCA Civ 576, a decision of Ward, Dyson and Laws L.JJ in the Court of Appeal.

The key question is as posed at the beginning of Dyson LJ's judgement in Halsey:
"When should the court impose a costs sanction against a successful litigant on the grounds that he has refused to take part in alternative dispute resolution?"

Unsuccessful litigants who refuse mediation already face sanctions, such as indemnity costs – see Virani v Manuel Revert [2003] EWCA Civ 1651

Dunnett v Railtrack [2002] EWCA Civ 302 was the first example of costs penalties being imposed on a successful litigant because of their unreasonable refusal to mediate. In Hurst v Leeming, the court declined the unsuccessful claimant's request that costs sanctions be imposed on the defendant for rejecting mediation. Lightman J found that mediation had no reasonable prospect of success, having made an objective assessment of the facts.

In Halsey, the party declining to mediate again escaped sanction, but the Court reviewed the circumstances in which it might do so, and confirmed its power to do so where felt appropriate. Dunnett remains good law, as do other cases following that decision. Thus it still remains very important for lawyers to think carefully about advising clients whether or not to mediate a case. They may expect close questioning at case management conferences and pre-trial reviews and especially at the end of a case, as to why mediation was turned down, and the answers to such questions must be informed and sophisticated. All judges are undergoing mediation training with the Judicial Studies Board (designed and delivered by CEDR) and can be expected themselves to understand the issues more fully now.

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Court-ordered mediation

Although Halsey involved inter-party mediation proposals and not where the court had itself recommended or ordered mediation, the Court of Appeal reaffirmed that ADR Orders in Commercial Court form, and also as used by Master Ungley in relation to clinical negligence cases, were valid and worthy of wider application. The Court added that to fail to mediate after recommendation by the Court to do so could well of itself justify a costs sanction against a successful party. Thus to achieve virtual certainty about costs sanctions being ordered against a successful party, a court order recommending ADR should be sought. Any party ignoring this almost certainly faces sanctions.

Inter-party Mediation Proposals

Halsey essentially looks at cases where there is no Court order to mediate. It makes it clear that, although to deprive a successful party of costs is an exception to the CPR 44.3(2) that costs follow the event, the power still exists to do so on the basis of unreasonable conduct. Indeed, variations on traditional costs orders because of unreasonable litigation conduct, lack of proportionality or failure to win on certain issues and occupying court time doing so, have become commonplace since the CPR. The Court in Halsey identified six factors which might be considered as justifying refusal to mediate when determining costs issues:

- **The nature of the dispute,** as to which the Court warned that "most cases are not, by their very nature, unsuitable for mediation."
- **The merits of the case**, by which a party which reasonably believes it has a strong case might make refusal of mediation reasonable. Where a case is borderline, refusal is much riskier. In truth there is a vast number of cases which fall between those extremes, and little safe guidance is given there.
- **Other settlement methods have been attempted,** though again the Court noted that "mediation often succeeds where other settlement attempts have failed", and it regards this reason as part of whether mediation has reasonable prospects of success (discussed below).
- **Costs of mediation would be disproportionately high,** always a proper consideration late in a modest claim, but the cost benefit may be much better and justify mediation early in its life.
- **Delay to a trial date**, this has never occurred in CEDR's experience.

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- **Whether mediation had a reasonable prospect of success,** the burden of showing which lies with the unsuccessful party who proposed mediation, and not with the successful party who refused. This factor is actually rather played down by the Court in Halsey, since it may be the attitude of a party which means that mediation has no reasonable prospect of success. The burden is not regarded by the Court as being unduly onerous: the unsuccessful litigant must show that there was a reasonable prospect that the mediation would have succeeded. What amounts to 'success' in mediation remains open to debate.

In Reed Executive v Reed Business Information [2004] EWCA Civ 887, a decision since Halsey, the Court of Appeal makes it clear that the Court will have access to offers to mediate in correspondence marked "Without prejudice save as to costs" when considering costs orders at the conclusion of a trial.

Refusal to mediate - a high risk course

So while Halsey modifies Hurst v Leeming in two respects, the words of Lightman J remain in full force:

"Refusal is a high risk course to take... the hurdle in the way of a party refusing to proceed to mediation on this ground is high, for in making the objective assessment of the prospects of mediation, the starting point must surely be the fact that the mediation process itself can and does often bring about a more sensible and more conciliatory attitude on the part of the parties than might otherwise be expected to prevail before the mediation."

Halsey allows no room for lawyers to be complacent about advice to clients over ADR. Perhaps the most telling sentence in the whole of Dyson LJ's judgement reads:

"All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR."

It is understood that the Law Society is currently considering what formal advice to require solicitors to give to clients in the light of this ruling, which amounts to an articulation by the Court of Appeal of something tantamount to a professional duty, and goes well beyond any previous formulation of lawyers' responsibilities in relation to ADR.