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Critical Examination of Alternative Dispute Resolution

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ABSTRACT

This research work will centre on, among many other things, matters which broadly affect "Alternative Dispute Resolution."
Alternative disputes resolution, is popularly known to be called **ADR**, has been noted to have embraced different methods of resolving different disputes, although it is commonly viewed as a form of assisted negotiations with a central objective of dispute resolution: alternative to traditional processes used by the law. Therefore, ADR is more of a consensual process, that is, it requires consent from the parties involved, and its outcome are non-binding, so as such the dispute might not have been resolved.
Prior to the development of Alternative dispute resolution, disputes are often resolved by courts through litigation process, and in most times, justice is not served. So ADR in its core field, encourages litigants to avoid going to court, and in some cases, with appropriate advice, avoid such legal processes altogether.
The expression "**alternative dispute resolution"** is also described in the glossary to the Civil Procedure Rules as a "**collective description of methods of resolving disputes otherwise than through the normal trial procedure**". In this broad sense, of course, ADR is by no means a novel phenomenon, encompassing everything from the last-minute "**deal**" at the door of the court to a formal arbitration.[1]

Keywords: Alternative dispute resolution, consensual process, assisted negotiations, non-binding and alternative to traditional processes.

INTRODUCTION

It has been observed from survey report that most people desire from our modern justice system, is to avoid going to trial. Most problems associated with litigation include illiteracy of the law and the legal system due to its complicated language and quaint procedures, and the ill faith in the court's fairness or its efficiency as a means of resolving disputes.[2] Also, this is associated with factors such as high costs, the endless delays, the tottering heaps of papers which take over their lives; therefore, litigants seem to prefer a simpler approach: a process conducted in plain language, based on common sense, and geared to getting problems sorted out around a table rather in the hot atmosphere of the court room.[3]

Lord Woolf, in his Interim Report[4], described how the use of ADR had grown worldwide and how it should be fostered. Litigation might not be best in all cases, and there was a need to increase awareness of ADR.[5] In his final report in 1996, Lord Woolf argues that where there was a satisfactory alternative to the resolution of disputes in court, the courts should encourage the use of this alternative. Court staff and judges should know about the forms of ADR that existed and what could be achieved through using ADR. At the case

[1] M. Supperstone *et al*, "ADR and Public Law", (2006) sum, *Public Law*, pp. 299-319

[2] A. Acland, *Resolving Disputes Without Going to Court*, (London: Century Ltd, 1995), p. 1

[3] ibid

[4] "*Access to Justice",* 1995

[5] H. Brooke, "Mediation in personal injury and clinical negligence cases", (2008) 4, *Journal of Personal Injury Law*, pp. 296-307

management conference and the pre-trial review, the parties should state whether ADR has been discussed and if not, why not. In deciding on the future conduct of a case, the judge should be able to take into account a litigant's unreasonable refusal to try ADR. He added that the Government should also treat it as one of their responsibilities to make the public aware of the possibilities which ADR offers.[6] Although, it was suggested that the American style should be considered, by making ADR compulsory, but this opinion was refused.[7]

However, Lord Woolf's recommendations have become both familiar and generally accepted by practitioners. Therefore, the Report concluded that the English civil justice system was:

"… too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion… too unequal… too uncertain … and too adversarial…" [8]

Alternative dispute resolution became the focus of much attention during the 1990s. The principal form of ADR nowadays is mediation. Other variants include conciliation, early neutral evaluation and mini-trials. There is also the traditional technique of inter-party negotiation--a technique which for many years has brought about the settlement of the majority of all civil cases commenced in the High Court.[9]

As court-based ADR as well as ADR initiated outside the court process, began to develop across the Atlantic, English commercial lawyers started to realise its value. In 1990, the non-profit Centre for Effective Dispute Resolution (CEDR) and the ADR Group entered the ADR marketplace, and they are still among the market leaders, although there are about 50 accredited civil mediation providers today.[10]

So far as court-based ADR in the UK is concerned, the beginnings occurred with the first Commercial ADR Company, the International Dispute Resolution (IDR) was introduced in Europe, in the early 1990s, when parties were required to exchange lists of neutral individuals; to try in good faith to resolve their dispute by ADR; or to take serious steps to resolve their dispute by ADR. The litigation might be stayed while these efforts were made.[11]

In the 1970s, there was an increasing concern about the costs and delays in the legal system, and the tainted effect it has on everything from insurance premiums to general consumer cost.[12] According to Sir Lightman, this has given rise to issue of how to provide the protection of the law where the citizen does not have the means to pay for such protection, or cannot afford the risk of losing, and in consequence incurring the risk for the opponent's costs and of consequent bankruptcy.[13]

Amongst the merits associated with ADR, it is faster and cheaper than litigation but if it is unsuccessful in resolving the disputed issues, it may only increase the cost and delay in resolving such dispute. Therefore, ADR may enable parties to settle disputes which could not be resolved by conventional inter-party negotiation. Also, in the case of disputes which are going to settle eventually, ADR may facilitate earlier resolution (thus avoiding door-of-court settlements). Again, ADR may lead to forms of resolution, which go beyond what the

[6] *Ibid,* p. 297

[7] Lord Phillips C.J, "Alternative Dispute Resolution: An English Viewpoint", (2008) 74(4), *Arbitration,* pp. 406-418

[8] K. Conway, "ADR- Does It Work in Landlord and Disputes?", (2005) 9(1), *Landlord and Tenant Review,* pp. 7-10

[9] J. Jackson, "Address by Jackson J. to TECBAR, TeCSA and SCL", (2005) 21 (4), *Construction Law Journal,* pp. 265-274.

[10] Brooke, "Mediation in personal injury and clinical negligence cases", p. 297

[11] Brooke, "Mediation in personal injury and clinical negligence cases", p. 297

[12] Acland, *Resolving Dispute,* p. 14

[13] G. Lightman, "Mediation: an Approximation to Justice", (2007) 73(4), *Arbitration,* pp. 400-402

court could order, and successful, ADR is quicker and cheaper than litigation.[14]

There exist, however, some disadvantages of ADR, which includes, by definition, ADR cannot result in a binding outcome. Also, if ADR is unsuccessful, the process has simply increased the costs and delay of the litigation. And even if ADR is successful, the outcome may not coincide with the legally correct resolution of the dispute. [15]

It is thus, clear from the growing popularity of ADR that there is a swathe of cases in which, from the litigants' point of view, the advantages of ADR substantially outweigh the disadvantages. In March 2001, the Government gave an "ADR pledge". This included a commitment that ADR would be "considered and used in all suitable cases whenever the other party accepts it". Subsequent monitoring shows that this pledge has been honoured. In the financial year 2002-03, there was a massive increase in the use of ADR in disputes involving government bodies. It has been estimated that this saved the public purse over £6 million in costs.[16]
As Lord Phillips noted that[17]:

"....That was my first lesson in the merits of ADR. It avoids the trauma of court proceedings. If.....then there is no alternative to alternative dispute resolution, and in the first 30 years of my life in the law, the only form of ADR was negotiation...."

Unfortunately, despite the growing use of ADR, there is only a small amount of serious research into its effectiveness. The Second Report of the Commercial Court Committee reveals that many cases in the Commercial Court simply do not lend themselves to ADR may be, because the parties need the court's decision on a point of law or because no form of consensual resolution will be possible. However, in those categories of case which are suitable, ADR makes an important contribution to achieving early settlement. Successful mediation depends heavily on the quality and skills of the mediator. Proper specialist training is required by all who practise as mediators.[18]

MEDIATION

However, it has been noted that, of all the alternatives ADR has on offer, by far the most widely used is 'Mediation', due to the fact that it is neutral, independent, flexible and effective of ADR processes.[19] The Centre for Effective Dispute Resolution, gave an accepted definition of mediation[20]as:

"....a flexible process conducted confidentially in which a neutral person assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution."

Therefore, mediation can be described as processes by which impartial third parties assist two or more parties resolve their conflicts. The parties, however, decide the terms of any agreement reached. Thus, mediation is said, to usually focus on the future rather than the past behaviour.[21]

Historically, mediation is quite a recent arrival in the judicial arena, and it was noted to have originated in the United States of America in the concluding half of the twentieth century. It has, however been noted that in the United States, there are different reasons for resolving disputes without recourse to litigation. Hence, a number of states have been observed,

[14] Jackson, "Address by Jackson J", p. 267
[15] Jackson, "Address by Jackson J", p. 267
[16] *ibid*
[17] Lord Phillips C.J, "Alternative Dispute Resolution", p.406
[18] Jackson, "Address by Jackson J", p. 268
[19] Acland, *Resolving Dispute*, p. 2
[20] http://www.cedr.com/CEDR_Solve/services/mediation.php, 28th April , 2010]
[21] M. Liebmann, *Community and Neighbour Mediation*, (London: Cavendish Publishing Ltd, 1998), p. 2

enthusiastically embraced the idea of ADR, and thus considering it in any judicial procedure. In English courts' enthusiasm for mediation has been much more muted and the growth of the term "court induced mediation" has been attributed in large measure to the enthusiasm of a comparatively small number of judges.[22]

The traditional approaches to civil disputes usually lead to a decision in favour of one of the parties involved. This has been noted, not to have solved the problem, according to the mediators, the process of mediation asserts that a 'win-win' solution can be reached.[23]

Further, some mediators feel that mediated negotiation is appealing because it addresses many of the procedural shortcomings of the most traditional approaches to resolving resource allocation conflicts. It allows for more direct involvement of those most affected by decisions.

The purpose of mediation is obvious. Mediation can be a lot cheaper and quicker than a court hearing and, in the event of a successful mediation, court time is saved. Further, the process is designed to give the parties a better understanding of their respective cases and it may lead to a more amicable settlement than one simply negotiated between counsel or solicitors. In mediation, the parties are not so restricted by the terms that they can reach and it may be that something agreed between the parties as a term of the settlement, which might not be feasible in a court order, turns out to be what breaks the logjam and brings about a settlement.[24]

Also, mediation is noted to offer many attractions in addition to that of avoiding the cost and trauma of litigation. It is private and confidential way of resolving a dispute; it is informal, voluntary, and it is a process that those involved can control.[25] Thus, parties on both sides are directly involved in assessing the risks of litigation with the help of a neutral third party. In particular, the claimants and their partners are directly involved in the settlement process. This human factor is extremely important. Mediation however provides a forum where the claimant is treated like an intelligent adult; is allowed to say what they want to say; and to ask all the questions that any intelligent adult would want to ask before taking an important decision.[26]

As earlier stated, mediation is voluntary. It is vital to note that parties should be encouraged to participate in mediation freely, and not because they have been ordered. The hallmark of procedures, and perhaps the key to their effectiveness in individual cases, is that they are processes voluntarily entered into by the parties in disputes with the outcomes, if the parties so wish, which are non-binding. Consequently the court cannot direct that such methods be used but may merely encourage and facilitate.[27]

Although, the mediation process is non-binding, both parties initiate a joint memorandum or a 'head of agreement', setting out their concluded agreement.[28] In light of this form, such result of mediation process, is however confidential. It is conducted in private, and the mediator will not divulge the occasion or its outcome to anyone outside the mediation without the agreement of those involved. In addition, private meetings between the mediator and each person separately during the mediation are also confidential.[29]

Finally, mediation is without prejudice, that is, the parties are allowed to

[22] Lord Phillips C.J, "Alternative Dispute Resolution", p.408

[23] *B. Van de Klundert and P. Glasbergen "*"The Role of Mediation in the Process of Integrated Planning", in P. Glasbergen (ed) *Managing Environmental Disputes,* (The Netherlands: Kluwer Academic Publishers, 1995), pp. 69-89

[24] N. Cooksley, "Mediation- needed in PI?" (2004) 3, *Journal of Personal Injury Law,* pp. 225-228.

[25] Lord Phillips. "Alternative Dispute Resolution", p. 407

[26] Brooke, *Mediation,* p. 301

[27] Lord Phillips. "Alternative Dispute Resolution", p. 414

[28] Acland, *Resolving Dispute,* p. 34

[29] *ibid*

express themselves freely, to make offers and demands as they desire, without fear that this will prejudice later legal proceedings, in case the dispute is not resolved.[30] Further, mediation is designed to do more than simply settle a dispute; functions best when there are fewest constraints on the parties.

Obviously, there are also some down sides to mediation. This is due to the fact that mediation is really suited for two parties who are, actually in disputes. As Lord Phillips again noted, amongst the unfortunate disadvantages of mediation, is the fact that it does not produce a judgement of the court setting the individual litigant's right. This has been noted to be associated to lack of education in mediation process.[31]

CIVIL PROCEDURE RULES

The Civil Procedure Rules under r.1.4**,** was noted to have boosted the practice of mediation concept of the court's duty to manage cases to include encouraging the parties to co-operate with each other in the conduct of the proceedings; encouraging the parties to use an ADR procedure if the court considers this to be appropriate; facilitating the use of ADR; and helping the parties to settle the whole or part of the case.[32] The practise direction, 2005 gave the court the power to consider ADR, as follows:[33]

"[I]n such cases as the court think appropriate, the court may give directions requiring the parties to consider ADR...."

Although the Court of Appeal has now held that the language of "encouragement" used in CPR 1.4(2) (e) does not confer upon the court a power to direct the parties to a dispute to enter into ADR, the courts in practice have the ability to place significant pressure on parties to use ADR through the potential sanction of costs. The encouragement and facilitation of ADR by the court is an aspect of active case management, which in turn is an aspect of furthering the overriding objective. By CPR 1.3, the parties to a dispute are themselves under a duty to assist the court in furthering the overriding objective. The unreasonable refusal to engage in ADR may constitute a breach of this duty. In any event, a refusal to use ADR is certainly an aspect of the conduct of the parties which the court is entitled to take into account in deciding what orders to make as to costs under CPR 44.3(4) (a). Further, under CPR 44.5, in deciding the amount of costs to be ordered to be paid, the court must have regard to the conduct of the parties, including the efforts made, if any, before and during the proceedings in order to try to resolve the dispute. [34]

In Hurst v. Leeming,[35] Lightman J in his ruling gave a number of reasons why the defendant's refusal for an offer of mediation, were without validity. It was noted, however, that it was reasonable to reject the request for mediation because such mediation may have a high possibility of failure. In general, it does not seem right to consider the argument that a mediation process may not succeed as a reason for a refusal to consider mediation. Typically for a mediation process to succeed, it must be tried.[36]

As earlier emphasised, Alternative dispute resolution (ADR) has become increasingly popular over the last few years and, the justice system also has shown a great deal of support from the Court of Appeal to the lower courts, the Department of Constitutional Affairs and the Civil Justice Council. The true importance of mediation is expressed by the attitude of solicitors and barristers whom have undergone different courses, so as to qualify as mediators. The courts in their own

[30] ibid
[31] Lord Phillips. "Alternative Dispute Resolution", p. 420
[32] Brooke, Mediation, p. 297
[33] Lord Phillips. "Alternative Dispute Resolution", p. 410; Pt 29 PD 4.10(9)
[34] Supperstone, "ADR and Public Law" p. 301
[35] [2001] EWHC 1051
[36] Lord Phillips. "Alternative Dispute Resolution", p. 413

different agendas have introduced their own pilot schemes and, as the authorities and case law will show in this paper, that parties who are considered to have refused to participate in mediation unreasonably, are increasingly likely to be penalised in costs.[37] This is, however the next focus of this paper.

In review of the decision of the Court of Appeal's judgment in Halsey v Milton Keynes General NHS Trust[38] on mediation and the costs consequences of refusing to consider or to take part in mediation, it was shown that mediation is appropriate, and parties are to be wary of refusing to consider mediation without good reason, as costs sanctions may be imposed on parties that ignores a chance of mediation. Although, the Court of Appeal also expressed its view that compulsion was likely to be regarded as an unacceptable constraint on the right to access to the court under Art.6 of the European Convention of Human Rights, and that the court's role was to encourage rather than compel ADR.

In Halsey v Milton Keynes General NHS Trust[39], the court held that the burden was on an unsuccessful party to show why there should be a departure from the general rule on costs so as to deprive the successful party of some or all of its costs on the grounds that it had refused to agree to ADR. The burden was to show that the successful party had acted unreasonably in refusing to agree to ADR. However that was a case in which the action against the successful party had been dismissed, the offer had come late in the day, the court had not suggested ADR and it would have been unlikely to achieve anything.[40]

In giving his judgement, Dyson LJ commented on the use of adverse cost orders as a sanction for an unreasonable failure to resort to ADR[41]. He, however, noted at para. [13]:

"In deciding whether to deprive a successful party of some or all of his costs on the grounds that he has refused to agree to ADR, it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. In our view, the burden is on the unsuccessful party to show why there should be a departure from the general rule. The fundamental principle is that such departure is not justified unless it is shown (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR. We shall endeavour in this judgment to provide some guidance as to the factors that should be considered by the court in deciding whether a refusal to agree to ADR is unreasonable."

Thus, Dyson LJ identified the following factors as being relevant to whether it was reasonable to refuse an invitation to mediate, as:

- The nature of the dispute.
- The merits of the case
- The extent to which other settlement methods have been attempted;
- Whether the costs of the ADR would be disproportionately high;
- Whether any delay in setting up and attending the ADR would have been prejudicial;
- Whether the ADR had a reasonable prospect of success

Thus, the judgment goes furthers to consider each of these factors in turn, commenting on how they should be approached by the courts. In some respects, the Court's observations restate truths that were already well recognised. Thus, in relation to 'the nature of the dispute', the judgment points out what even the most

[37] Cooksley, "Mediation- needed in PI?", p.225
[38] [2004] 1 WLR 3002
[39] *ibid*
[40] Cooksley, "Mediation- needed in PI?", p.227
[41] Lord Phillips. "Alternative Dispute Resolution", p. 414

committed devotees of ADR have always accepted, namely that mediation is unsuitable for certain situations: for instance, in a situation where a definitive legal ruling is required or where injunctive relief is essential to protect the position of one party[42]. However, the Commercial Court Working Party on ADR stated in 1999:[43]

"The Working Party believes that there are many cases within the range of Commercial Court work which do not lend themselves to ADR procedures. The most obvious kind is where the parties wish the court to determine issues of law or construction which may be essential to the future trading relations of the parties, as under an on-going long term contract, or where the issues are generally important for those participating in a particular trade or market. There may also be issues which involve allegations of fraud or other commercially disreputable conduct against an individual or group which most probably could not be successfully mediated."

Other examples falling within this category are cases where a party wants the court to resolve a point of law which arises from time to time, and it is considered that a binding precedent would be useful; or cases where injunctive or other relief is essential to protect the position of a party. But in our view, most cases are not by their very nature unsuitable for ADR.[44]

However, Dyson LJ agreeing with Lightman J, noted that it was not unreasonable to refuse mediation if by reason of the intransigence of other party, mediation had no prospect of success. He held that the burden was on the party seeking to avoid paying costs to show that mediation would have had a reasonable prospect of success, not on the party refusing mediation to show that mediation would not have had a reasonable prospect of success.[45] This judgement has been said to be controversial, and however, a wrong analysis.

Further comments on other factors, however, the Court of Appeal's pronouncements represent something of a departure from earlier authority. Considering the factor of 'merits of the case', the Court asserts at [18] that:[46]

"...a party's reasonable belief in the strength of his case is relevant to the question of whether he has acted reasonably in refusing ADR. If it were otherwise, there would be considerable scope for the exploitation of possible costs sanctions in the pursuit of unmeritorious claims, a danger which the courts should be particularly astute to guard against..."

However, Sir Lightman in a different opinion of the judgement of the Court of Appeal in Halsey's case noted that for an approximation of justice to be achieved, the obstacle placed by this judgement must be removed. He, then differ in the sense that the burden is not on the party against whom the sanction is sought to prove that his refusal was unreasonable.[47]

Further, in his critique, Lightman described the propositions in the judgement of the court of Appeal as unfortunate, wrong and unreasonable. In the first proposition in relation to the European Convention, he noted that[48]:

"...the court appears to have been uninformed about the mediation process and the distinction between an order for mediation and an order for arbitration or some other order which places a permanent stay of proceedings. Thus, an

[42] I. Grainger, "The Costs Consequence of a Failure to Mediate", (2004) 23(Oct), Civil Justice Quarterly, pp. 244-247

[43] Halsey v. Milton Keynes General NHS Trust [2004] EWCA Civ 576, Para. [17]

[44] iibid

[45] Lord Phillips. "Alternative Dispute Resolution", p. 415

[46] Grainger, "The Costs Consequence of a Failure to Mediate", p. 246

[47] Lightman, Mediation, p. 401

[48] Lightman, Mediation, p. 402

order for mediation does not interfere with the right to a trial: at most it merely imposes a short delay to afford an opportunity for settlement, and indeed the order for mediation may not achieve that purpose, for the order for mediation may require or allow the parties to proceed with preparation for the trial; and also the court of Appeal appears to be left in the dark as to the practice of ordering parties to proceed to mediation regardless of their wishes is prevalent elsewhere throughout the commonwealth, the United States and the world at large..."

In line with the second proposition as to the onus of proof of reasonableness or unreasonableness, he (Lightman), further noted that[49]:

"The decision as to onus must be guided by consideration of three factors.... All these factors point in the opposite direction to that taken by the Court of Appeal."

However, Sir Anthony Clarke M.R[50], noted that in his opinion, compulsory referral to mediation did not breach the European Convention on Human Rights, and that the courts should be ready to direct that mediation takes place, whenever appropriate.[51]

In addressing the issue of Dyson LJ's judgement infringing with Art. 6 of the European Convention on Human Right, Lord Phillips noted that the European Commission did show vast support for mediation although parties cannot be subjected to compulsory mediation.[52] Thus, the European Commission, in its drafted Directive (2004), encouraged mediation processes or ADR.

Following some amount of good degree of comment that has been generated from the Court of Appeal's decision in Halsey v Milton Keynes General NHS Trust,[53] there has until recently been relatively little discussion or application of the principles it sets out, except in the small flurry of cases that considered these principles.

In Nigel Witham Ltd v. Smith & Isaac[54], Judge Coulson Q.C., having identified the defendants as the successful party, assessed the application of Halsey at para.[8] that:

"...**Dyson LJ stressed that a departure from the general rule on costs was not justified unless it had been shown that the successful party had acted unreasonable in refusing to agree to ADR..."**

However, that was not the position in this case, as the judge noted at para. [9], the position which arose in the present case was entirely novel:

" ....the point now raised … on behalf of the Claimant, is not that the Defendants refused to mediate at all, but that they only consented to mediate very late in the process, when the vast majority of the costs had already been incurred. That raises the novel question as to the extent to which, as a matter of principle, the court should have regard to such matters dealing with costs."

It was noted in an article that, on the facts of Nigel Witham's case, those exceptional circumstances did not arise. This was due to the fact that, it was evident in respect to the claimant's attitude, that there was no reasonable prospect of any mediation succeeding, and it was also clear that the defendants had not refused to mediate. On the contrary, the defendants had adopted the stance from very early on that they would mediate when it was appropriate to do so during the course of the litigation. One of the problems in the course of the progress of the case, was that it was

[49] ibid
[50] Annual conference of the Civil Mediation Council, in May 2008.
[51] Brooke, Mediation, p. 299
[52] ibid
[53] [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002
[54] [2008] EWHC 12

not until sometime after the claim was issued, following what were described at [31] as "radical amendments" "to the claim that the defendants were in a proper position to consider mediation. In itself it was not unreasonable for the defendants to have waited until the claim was properly and finally formulated before considering whether to mediate.[55]

Further noted, this has given rise to, or rather highlighted a common problem which parties faced in assessing whether or not to mediate, and if to mediate when to do so[56]. Again, Judge Coulson QC described this problem at para. [32]:[57]

"It is a common difficulty in cases of this sort, trying to work out when the best time might be to attempt ADR or mediation. Mediation is often suggested by the claiming party at an early stage....A premature mediation simply wastes time and can sometimes lead to a hardening of the positions on both sides which make any subsequent attempt of settlement doomed to fail...."

In Shirayama Shokusan Company Limited v Danovo Limited,[58] Blackburne J. held that the court had jurisdiction to order a party who was unwilling to have a dispute mediated to have the dispute mediated because by CPR, Pt 1 the court was required to actively manage cases and encourage the parties to use ADR. The Judge decided to make such an order in this case on the grounds that the parties were in a long term relationship and mediation would be able to deal with such wider matters where litigation would not. However, the Court of Appeal in the subsequent case of Halsey expressed the view that compulsion was likely to be regarded as an unacceptable constraint on the right of access to court and that the court's role was to encourage rather than compel ADR.[59]

Lord Phillips, in determining the advantages and disadvantages of compulsory mediation, argues that strong views are being expressed, and those who are in opposition argues that such compulsory mediation is the exact opposite of mediation. The main purpose of ADR, as earlier noted, is that it ought to be deliberate, and the question bearing in mind, how to oblige parties to participate in a process which ought to be done willingly. Although statistics has revealed that the settlement rates between parties that were compelled to mediate and those who undertake mediation voluntarily are just about the same.[60]

Furthermore, it was argued that while the courts have recently extended the scope of the Halsey jurisdiction, it remains one which, as Ward L.J. acknowledged in S v Chapman[61] had not done as much as it was hoped to have done to facilitate the development of a culture of mediation; of settlement. It remains to be seen whether the 2008/2009 developments will render it a more efficacious facilitator and promoter. What might however be more desirable is that, the Court of Appeal, or Civil Procedure Rules Committee, revisits Halsey in light of four years' experience. If this were to occur, the court could consider not only the efficacy of the guidelines laid down in Halsey itself, but it could equally examine whether, and if so how those guidelines could be reformulated so as to properly encourage mediation.[62]

Thus, at the present time, Halsey case and the extensions established by the High Court in Carleton v Strutt & Parker,[63]

[55] J. Sorabji," Cost- Further Developments from Halsey: Nigel Witham v. Smith & Isaac, and S v. Chapman", (2008), 27(4), Civil Justice Quarterly, pp. 427-432

[56] Sorabji, "Cost- Further Developments from Halsey", P. 429

[57] *Nigel Witham Ltd v. Smith & Isaac[2008] EWHC 12*

[58] [2004] 1 WLR 2985

[59] Cooksley, "Mediation- needed in PI?", p.227

[60] Lord Phillips. "Alternative Dispute Resolution", p. 417

[61] [2008] EWCA Civ 800

[62] Sorabji, "Cost- Further Developments from Halsey", p.431

[63] [2008] EWHC 616 QB

and Nigel Witham Ltd v Smith & Isaacs[64], is limited in application. It is limited as it simply justifies the court departing from the general rule that costs should follow the event where an unsuccessful party can demonstrate that the successful party unreasonable refused to engage in mediation. In such circumstances where that can be established, a reduction in recoverable costs can be made. To increase the Halsey jurisdiction's utility, it might perhaps be time for the courts to consider extending it to permit indemnity costs to be recoverable by a successful party where it can be shown that the failure to enter mediation was caused by the unsuccessful party's failure to conduct the litigation in a way that facilitated identification of the critical moment and entry into mediation at a time when it was cost-effective for the parties to do so. Equally, the court could perhaps extend the jurisdiction to enable an unsuccessful party to straightforwardly rely on the successful party's failure to properly prosecute their claim so as to facilitate mediation or other ADR proceedings as demonstrating, or amounting to, an unreasonable refusal to enter into mediation proceedings. Steps such as these, which would increase the prospect of the imposition of penalties for failing to properly progress claims to facilitate mediation, ADR or other forms of settlement process, might well be a more effective mechanism for encouraging the culture of settlement which Lord Woolf emphasised was to be of such importance under the CPR.[65]

Therefore, it can be seen that the courts are becoming more prepared to penalise in costs the party who refuses to participate in the mediation process. Although the most recent case of Halsey may be perceived as a slight brake on that development, there is surely a distinction to be drawn between cases in which liability is the issue and the defendant refusing mediation is successful in having the whole case dismissed and where for example quantum only is in issue. The court felt that this would be a proportionate step in the light of the potential value of the case and the length and expense of the trial should there be no settlement. Therefore, the most important lesson to learn is that a party refusing mediation must have good reasons for doing so and, ideally, should state them at the time it refuses. Further, such a party is less likely to be penalised if it has during the process of the litigation, made attempts to settle it.[66]

CONCLUSION

In the comparison and contrasting decisions of case law and opinion of legal minds, it would seem obvious that parties to an action must be prepared to give acceptable reasons for refusing mediation. Thus, solicitors and barristers are however, obligated to understand the pros and cons of compulsory mediation and this may result in cost sanction if ADR is not considered ahead of litigation. The court should not be seen as the only means of resolving disputes, this notion was described as illusory. The cost of litigation is inconsiderably high which places more burden on the state and not only the individuals involved. Therefore, it was suggested that for mediation to strive, there must be increased efforts to secure public awareness of the benefits and availability of mediation; also adequate provision of funds, facilities and trained mediators in courts and tribunals, and as well as increased persuasion of ADR.

In tackling the high cost of litigation, Sir Lightman, suggest that the hurdles created in Halsey can only be solved by the removal by the legislature, on one hand, and the courts. These are made possible by creating more familiarity with the mediation process, and also by the recognition of the fact that in practice such hurdles are

[64] [2008] EWHC 12

[65] Sorabji, "Cost- Further Developments from Halsey", p. 431

[66] Cooksley, "Mediation- needed in PI?", p. 227

regularly sidestepped or overlooked without realising its effect on the justice system.

Finally, this paper has examines options such as; increasing public awareness of ADR; changes to civil procedure, costs and fees to provide greater incentives to use ADR; mandating ADR prior to litigation; improving assessment and referrals services; and using ADR techniques to improve court and tribunal hearing.

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