

Mediation: how can you refuse it?

A significant consequence of the civil litigation procedural reforms introduced in 1999 following the Wolfe report is the increase in the use of alternative dispute resolution (ADR) by litigants to resolve their differences. However, not all want to go down this route, so on what basis can you refuse?

“Alternative dispute resolution” is defined in the Civil Procedural Rules as a “collective description of methods of resolving disputes otherwise than through the normal trial process”. In practice, it usually takes the form of mediation by a third party.

The increased use of mediation is a result of the courts’ own efforts to encourage parties to use it and their willingness to penalise those who, for no good reason, refuse to use it. This is what happened in *Dunnett v Railtrack plc* [2002] 1WLR 2434, where the successful party, having refused to participate in a mediation, was not allowed to recover its costs from the unsuccessful party.

As a result of this and other similar decisions, the threat of having a costs sanction imposed at the end of litigation has had a serious effect on parties’ decisions on whether to participate in mediation. There is now a risk that claimants/defendants who consider their claim/defence weak will use mediation, and the threat of a costs sanction for refusing to participate, as a tactical weapon to extract a settlement.

The difficulty for litigants is assessing the risk of having a costs sanction imposed. This is because of a lack of judicial guidance on the circumstances where it is reasonable for a party to refuse mediation. Fortunately, help is at hand in the form of the Court of Appeal’s recent decision in the case of *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.

This decision gives some useful guidance and takes a commonsense approach in identifying six factors which might be relevant when considering whether it is reasonable to refuse mediation:

the nature of the dispute – the subject matter of some disputes renders them intrinsically unsuitable for mediation, eg where parties wish the Court to determine issues of law or construction which may be essential to the future trading relations of the parties or where the case involves allegations of fraud or other commercial disreputable conduct

the merits of a case – where a case is clear cut it may be viewed as reasonable for the successful party to refuse to mediate. On the other hand, in a borderline case the fact that a party has refused to mediate because it believes it has a strong case should be given little or no weight

use of other settlement methods – if other settlement methods have been tried and settlement offers have been made, but rejected, this will be seen as a relevant factor. It may show that one party is making an effort to settle, and that the other has unrealistic views of the merits of the case

disproportionately high costs - where the sums at stake are comparatively small, consideration should be given to whether the cost of mediation is likely to be similar to litigating the matter formally

delay – if a mediation is suggested late in the day, acceptance of it may delay the trial so causing prejudice to a party

the prospects of success – this may be relevant to the reasonableness of a party’s refusal to accept an invitation to mediation.

The Court of Appeal emphasises that in many cases it would consider a combination of the above factors and no single factor is to be conclusive. It does not regard the list as exhaustive. Also, it makes it clear that the burden is on the unsuccessful party to show that the successful party should have a costs sanction imposed on it for an unreasonable refusal to mediate.

Although this decision by no means provides a charter for parties to refuse to participate in mediation it does offer a basis on which to make a reasoned assessment as to whether a costs sanction might be imposed if they refuse. If, having considered the relevant factors, a party concludes that it is reasonable to refuse to mediate it would be well advised to keep its decision under constant review given that the relevant factors may change during the course of litigation.

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