Independent Mediators Limited

IS THIS THE TIME FOR A NEW HALSEY?

Michel Kallipetis QC

T	+44 (0)20 7127 9223
E	imoffice@independentmediators.co.uk
W	www.independentmediators.co.uk

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In 2004 the Court of Appeal's seminal decision in Halsey changed the landscape of civil litigation in England and Wales for ever. The message of the Woolf Reforms was reinforced and 'litigation is a last resort' was firmly established among litigation practitioners. Nowadays pre-action protocol letters are the norm, and at that stage all disputants are obliged to consider alternatives to litigation as a matter of professional conduct. Most commonly parties engaged in mediation. Not every case of course is suitable for mediation[2] and not every case where the parties tried mediation succeeded. The impetus for the change in approach to litigation was given by the courts powers to disallow costs for a successful party because of an unreasonable failure to engage in mediation.

The fallout from the Covid-19 lockdown for mediation has been a cancellation of traditional person to person mediations, and a switch to virtual mediation via a number of platforms. We in Independent Mediators have found the change relatively painless and curiously, in many respects, as satisfying and successful. The feedback we have received from the parties and their representatives has been pleasant surprise, universally favourable from commercial organisations in respect of the savings in costs, management time and the ease with which they adapted to negotiating face to face via a screen. A frequently expressed view of what the future 'after Covid-19' holds for the legal profession is "a tsunami of litigation" arising out of disputes caused by the disruption to business, commercial contracts, building projects and collapsed companies. The Courts are bracing themselves for the expected case load and in a recent meeting on the 7th April at the British Institute of International and Comparative Law, Lord Phillips, former President of the Supreme Court, said "parties should consider mediation, and conciliation should be encouraged at an early stage of legal proceedings"[3]. Similar sentiments were echoed by Lord Neuberger on the Today programme on the 27th April[4], encouraging parties to mediate rather than wait for the courts to reopen.

The generally expressed view in the profession is that until an effective vaccine has been developed, social distancing will be a feature of all inter-action for the resolution of disputes by any of the traditional methods. Arbitration is struggling with the difficulties of determining disputes remotely; the family courts deal with all applications remotely and the commercial court is working towards trials under social distancing conditions. Criminal jury trials are still suspended while arguments rage over their abolition, reducing the number of jurors and facilitating client/lawyer face to face communication during the process.

1 Halsey v Milton Keynes NHS Trust [2004] EWCA (Civ) 576

2 Eg some cases involving administrative law where the dispute is over the application of public policy or human rights

3 https://www.lawgazette.co.uk/law/judicial-heavyweights-call-for-breathing-space-to-save-dispute-resolution-system/5104038.article

4 https://www.biicl.org/documents/10301_biicl_publishes_a_concept_note_on_the_effects_of_the_pandemic_on_commercial_contracts_and_legal_consideration_in_mitigating_mass_defaults.pdf

There is a palpable opposition to engage in remote mediation in some quarters and this monograph examines some of the arguments put forward by those who 'prefer to wait for in person mediations to be resumed'. We examine from our collective experience the effectiveness of the remote mediations we have conducted and test whether the reasons put forward for not engaging in remote mediation might survive a 'Halsey' application for relief from costs by an unsuccessful party at the end of a contested case.

Our positive experience has been that the percentage of cases which have been resolved by remote mediation is not less than that we experienced in previous years from traditional mediations. In many cases the mediation has moved faster, and the parties have eschewed the 'ritual dancing' and engaged in the settlement at an earlier stage than sometimes we have experienced with in person mediations. We have successfully mediated multi-party disputes with parties in different countries and time zones and using different platforms. The range of disputes is no less diverse from that we experienced in previous years with conventional mediations. A small sample will suffice to demonstrate that as far as the nature of the disputes is concerned there is little or no difference.

- £3million claim by purchaser of company against sellers for allegedly failing to disclose that sales figure was inflated by commissions paid to customer.
- £1+million professional negligence claim against a builder for failing to remove non fire-resistant cladding to building.
- £2million professional negligence claim against solicitors by overseas residents who bought properties off plan.
- Long running bitter dispute between former partners over shared property and profits where one partner had died and action being pursued by executor.
- £2+million claim over alleged mis-use of confidential information by former employee.
- US$10million claim by investors over a domain name involving issues of international insolvency law, English law of trusts and the Domain Names Tribunal.
- Several insolvency cases by liquidators, litigation funders and creditors.
- Partnership dispute between siblings who had fallen out after 30 years in a very successful business together.
- Recovery by a liquidator of unlawful dividends from former directors of an insolvent company.
- Several billion-dollar claim by a multinational company against a nation state involving a long running dispute resolution process now moved on to the zoom platform. Zoom meetings have involved sessions with groups of people taking part from several areas of the world.

Our experience so far is that Zoom offers the best flexibility in terms of breakout rooms, and now that Zoom has upgraded its security provisions, we are comfortable in using it as a platform although of course one can never guarantee complete security with any absolute certainty. The ability to 'lock' a mediation once it has started has, so far, prevented the egregious interference which anecdotally some have apparently experienced.
We have also found that using a mobile or the chat facility serves just as well as the 'knock on the door' of one party's breakout room before we enter. Equally, making sure that the lay clients are moved out first from the plenary room back to their breakout room prevents any embarrassment which might be caused by separating them from their lawyers and leaving them alone with the other party! In a recent mediation one party in its break out room wanted to share an excel spread sheet with its clients who were in different locations and asked the mediator to prove that putting it on their screen in their room did not provide it to the other party's break out room. The concerned party put an anodyne document on its screen and circulated it to all the other members in their break out room; then the mediator entered the opposing party's room to see whether or not that document appeared on their screen: it did not. For the rest of the mediation that party was able to work with its clients and lawyers on a changing excel spread sheet formulating offers without any problem. "A further benefit of using online mediation has been the ease of arranging a short follow up meeting with some or all of the participants online where the dispute has not settled on the mediation day. The absence of the need to travel coupled with the ability to see the other participants has enabled such meetings to be set up at short notice and for the mediation process to be continued "face to face"."

Documents can easily be shared using the share facility, and by attaching an I-pad we have found it easy to use a white board if we need it. One useful by-product in terms of procedure is that we find that most lawyers prefer to write out the terms of offer and counter offers so that they can take their clients' instructions and be certain of a client's intention even though they may be far away. Once approved that document is given to us as mediators and easily fulfils our usual practice of writing out and agreeing messages from one party before taking it to the other party. It also serves as a handy aide memoire of the course of the negotiations. There are many other positives we have discovered (not least the ability to be in shorts while wearing a suit above board!) and we share the musings of our good friend John Sturrock[5] on his Damascene conversion to remote mediation.
We are also of the view that it is hardly likely that we shall return to 'life as it was'.
As Haydn observed after hearing one of Beethoven's symphonies: 'life will never be the same again', and we suspect that the experience of remote mediations could well make them the norm in the future. One solicitor told our CEO Nicky Doble that he had calculated that he saved some sixty hours of travel time for one of the international commercial mediations conducted by one of our number where several parties in different jurisdictions and time zones successfully concluded a long running dispute in one day on-line. The saving in terms of costs of travel, hotel and attendances are obvious. Carbon footprint, air traffic pollution and concern for the environment generally is likely to influence future commercial relations in general and dispute resolution in particular.

5 Kluwer Mediation Blog May 29, 2020

With these thoughts in mind the title of this monograph became an obvious topic of discussion. We looked at the various reasons which were advanced in previous cases by successful parties resisting an application that they be mulcted in costs for failing to mediate, and pose the question: "If these were to be advanced as a defence to such an application where remote mediation was on offer, what might a court's decision be"? In the early days of mediation unsuccessful arguments included 'belief in the strength of one's case'[6] ; there was no time to prepare; the costs did not justify an extra layer of litigation; and no response to an invitation is not a refusal[7]. Some successful parties have defeated an application but an examination of the facts in each of those cases demonstrates that the decision was very much on the facts and no general principle can be gleaned. The courts in those cases were referred to paragraph 19 of the Judgment in Halsey in which Dyson LJ (as he then was) set out a number of relevant, but non-exclusive, factors to be taken into account in deciding whether a refusal to undergo ADR was unreasonable[8].

In the sixteen years since Halsey, successive decisions of the Courts and the promulgation of pre-action protocols has whittled down the chances of succeeding without a cogent explanation given at the time. All the principles have been enshrined in CPR 44.2(4) and (5) and are well known to all practitioners. The principles to be gleaned from those cases flesh out the background to the provisions of the CPR.

1 Silence of itself in the face of an offer to mediate is of itself unreasonable conduct[9],

2 Belief in the strength of one's case is not a sufficient reason to refuse to consider mediation, save in exceptional circumstances where the facts would justify such a position[10],

6 Dunnett v Railtrack [2002] EWCA Civ 302 and 303, and more recently: DSN v Blackpool Football Club Ltd [2020] EWHC 670 and BXB v Watch Tower and Bible Tract Society of Pennsylvania & Ors [2020] EWHC 656

7 PGF II SA v OMFS Company 1 Limited [2013] EWCA Civ 1288

8 "…The question whether a party has acted unreasonably in refusing ADR must be determined having regard to all the circumstances of the particular case. We accept the submission of the Law Society that factors which may be relevant to the question whether a party has unreasonably refused ADR will include (but are not limited to) the following: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success. We shall consider these in turn. We wish to emphasise that in many cases no single factor will be decisive, and that these factors should not be regarded as an exhaustive check-list."

9 See PGF II SA v OMFS Company 1 Limited [2013] EWCA Civ 1288

10 Swain Mason & Others -v- Mills & Reeve (a Firm) [2012] EWCA Civ 498, where the deceased Claimant had misled his solicitors on facts which rendered a claim for alleged failure to give IHT advice unarguable, and the court found that the Defendants assessment of their case on breach of duty had been vindicated in full. Nonetheless the court warned that such cases were rare as Davis LJ observed: "After all, it is indeed a relatively rare case where a party succeeds on every issue raised."

3. A deliberate misuse of litigation has been held to justify a rejection of a costs application by the unsuccessful party[11].
4. Parties seeking to raise such a defence must accept that the test is NOT an objective test[12].
5. All parties must address the issue of ADR constructively at an early stage and, if necessary, seek the court's help in the form of orders to assist them to a mediation[13];
6. Parties cannot rely upon the result of a trial to justify a refusal to engage in mediation;
7. Adopting positions which are 'miles apart' does not justify a refusal to mediate[14];
8. Belief that the animosity between the parties makes the prospect of a successful mediation remote is not a sufficient reason[15];
9. The Court has power to order a refusing party to swear an affidavit setting out the reasons for refusing to mediate which is sealed and only opened by the trial judge after judgment on the question of costs[16].
10. The courts' discretion is extremely wide: ranging from disallowing costs in whole or in part[17].

Therefore what good reason could a party advance for refusing to take part in a remote mediation? All the previously tried arguments in previous cases clearly would not work just because it is a mediation by remote. Exactly the same principles apply.
Some solicitors have said that they would be uncomfortable in a mediation without being next to their client to 'protect them from saying something damaging'.

11 Birmingham City Council v Lee [2008] EWCA Civ 891 in which the court "concluded that it was not a genuine claim and that it was brought in the way in which it was without the usual pre-action correspondence OPUS 2 DIGITAL TRANSCRIPTION and adherence to protocols because the claimant sought to recover his pre-action costs and his legal advisers could see no other obvious route to do so. The consequence, in my judgment, is that the pursuance of the car claim to trial, at wholly disproportionate expense and unnecessary use of judicial resources, was an abuse of process."

12 Hurst v Lemming [2003] 1 Lloyd's Rep 379 where the Court of Appeal reversed Lightman J's decision that the decision must be judged objectively with Dyson LJ observing: "That is an unduly narrow approach, it focuses on the nature of the dispute and leaves out of account the parties' willingness to compromise on the reasonableness of their attitudes."

13 Richard Wales v CBRE Management Services Ltd [2020] EWHC 1050 for a comprehensive summary of the Courts' approach and the application of the provisions of CPR 24.2 (4) and (5)

14 Gaith v Indesit Company UK Ltd [2012] EWCA Civ 642)

15 David Frost v Wake Smith and Tofields Solicitors [2013] EWCA Civ 1960

16 Often referred to as the Master Ungley Order as he devised it. See Phillip Garritt-Critchley & others v Andrew Ronnan & Solarpower PV Ltd [2014] EWHC 1774 (Ch) where it was ordered on the directions hearing

17 Jane Laporte, Nicholas Christian v The Commissioner of Police for the Metropolis [2015] EWHC 371 (QB) and Briggs LJ (as he then was) in PGF II SA v OMFS Company supra paragraph 16: ""…a finding of unreasonable conduct constituted by a refusal to accept an invitation to participate in ADR or which is more serious in my view, a refusal even to engage in discussion about ADR, produces no automatic results in terms of a costs penalty. It is simply an aspect of the parties, conduct which needs to be addressed in a wider balancing exercise. It is plain both from the Halsey case itself and from Arden LJ's reference to the wide discretion arising from such conduct in the Hewitt case [SG v Hewiit [2012] EWCA Civ 1053], that the proper response in any particular case may range between the disallowing of the whole, or only a modest part of, the otherwise successful party's costs."

Even if this was a serious concern, there is nothing to prevent the solicitor and their client meeting physically in an office (observing social distancing of course) and being in the same virtual mediation room. Others considered that the remoteness of a virtual mediation predicates against an atmosphere for settlement. We can say that has not been our experience at all, nor has any of the feedback from the dozens of on-line mediations we have conducted suggested anything but the contrary. Besides, mediation under current restrictions with full PPE, Perspex screening and two metre distancing, staggered visits to the lavatories, limited overall numbers and a long meeting in an enclosed space seems hardly more conducive to settlement. Moreover, the recently introduced track and trace policy would mean that all participants are potentially at risk of an enforced quarantine period if one of the attendees has been in contact with a virus victim within 14 days of the mediation.

There are of course differences with an on-line mediation which can cause difficulty. Working to a screen for a length of time is more wearing and exhausting than we have experienced sometimes in our in-person mediations. The opportunity for those serendipitous meetings in the corridor or even the 'washrooms' and the inconsequential social chit chat which help build up a rapport is removed. However, we have found that pre-mediation meetings on the chosen platform serve very much the same purpose. There is hardly any cost and (apart from time), none at all to the lay clients. No travel is involved and minimum disruption to a work routine. It starts the process of familiarisation at an earlier stage and we have found that hugely beneficial when the actual mediation day starts.

Given all the advantages and the actual saving in costs we consider that a court may well require as good a reason for refusing an on-line mediation as it does with conventional mediations. As it happens Singapore, always at the forefront of innovation in terms of streamlining litigation, has announced a scheme to provide an expedited dispute resolution protocol[18]. We understand that the protocol applies to in person and on-line mediation. The last sentences of the press release is worth repeating: "With expedited mediation, businesses can devote their resources towards navigating other challenges, instead of diverting them to conduct potentially protracted and expensive legal proceedings. This will put them in a stronger position to recover amidst the growing economic uncertainty".

Surely those sentiments apply equally in the UK? Thus we pose the question: is it time for a new Halsey? Perhaps the answer is 'no' but the principles are equally applicable to on-line mediation.

18 "In collaboration with SIMC, we are pleased to share that SIMC has launched the Covid-19 Protocol, which provides businesses with an expedited, economical and effective route to resolve any international commercial disputes during the Covid-19 pandemic period. The Protocol responds to the pressing need to resolve cross-border disputes in a swift and inexpensive manner. As you know, the pandemic has severely impacted business communities - fracturing business and contractual relationships, sparking disputes and destroying the value and viability of businesses. With expedited mediation, businesses can devote their resources towards navigating other challenges, instead of diverting them to conduct potentially protracted and expensive legal proceedings. This will put them in a stronger position to recover amidst the growing economic uncertainty."