The old case of the horse and the water

In the light of recent case law Ian Pease reviews the courts' stance on parties' use of mediation as a form of alternative dispute resolution

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It's often said that you can lead a horse to water but you cannot make it drink. Whilst the old saying may be true at the extreme, the courts are bringing increasing pressure to bear on parties to choose alternatives to the state-based court system for resolving their disputes, particularly in the form of costs penalties if ADR is eschewed or followed in name only. The case of *Carleton & ors v Strutt & Parker* [2008] is the latest in a line of such cases.

Viewed from one angle, this process is a concerted attempt by the courts to dissuade citizens from using their services, a kind of privatisation of justice. Indeed, it is the inverse of the 19th century attitude of the courts to arbitration, the then-new kid on the block, and the original method of ADR.At the beginning of the 19th century the courts were regularly concerned at the privatisation of justice via the use of arbitration, thereby ousting their jurisdiction to hear suits. At that time they took a rather prohibitory attitude to this, see for example Lord Gorell in *TW Thomas & Co v Portsea Steamship Company* [1912]:

> But there is a wide consideration which I think it is important to bear in mind in dealing with this class of case [as to incorporation of arbitration clauses into contracts]. The effect of deciding to stay this [court] action would be that... either party is ousted from the jurisdiction of the courts and compelled to decide all questions by means of arbitration. Now I think, broadly speaking, that very clear language should be introduced into any contract which is to have that effect...

The present trend began with the Woolf reforms of the late 1990s, which had as their mantra the reduction of litigation through the use of pre-action protocols before the case, and costs penalties at the end if the parties had held to unsustainable arguments during the proceedings. In particular, the courts started investigating whether the parties had addressed the possibility of mediation (the most popular type of ADR, involving facilitated negotiations between the parties, assisted by a trained mediator).

The first in the series of cases addressing the perceived reluctance of the legal profession to use mediation came (appropriately) before a Court of Appeal headed by Lord Woolf himself. In *Cowl & ors v Plymouth City Council* [2002] he said:

> The importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible. Particularly in the case of these disputes both sides must by now be acutely conscious of the contribution ADR can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves time, expense and stress.

He went on to decide that the court might have to hear from the parties as to what steps they had taken to resolve their disputes without recourse to litigation, concluding:

> If litigation is necessary the courts should deter the parties from adopting an

> unnecessarily confrontational approach to the litigation.

The first of the cases addressing the costs penalties if the parties were, in retrospect, too confrontational was *Dunnett v Railtrack plc* [2002], where Railtrack, despite being successful on appeal, did not get its costs, Brooke LJ (in the Court of Appeal) indicating:

> court, as happened on this occasion, they may have to face uncomfortable costs consequences.

Although Railtrack's case had been good in law, and it had won, its attitude to the Court's suggestion of ADR had been dismissive and it had failed to show that objectively there was nothing that mediation could do to resolve the parties' differences. This was also the case in *Hurst v Leeming* [2002], though there the court did hold (exceptionally) that the defendant's view that mediation had no reasonable prospect of success was correct and hence the failure to mediate did not affect its order as to costs. However, *Hurst* was an unusual case and ordinarily a litigant would be taking a great risk by refusing mediation.

'If litigation is necessary the courts should deter the parties from adopting an unnecessarily confrontational approach to the litigation.'

Lord Woolf in *Cowl*

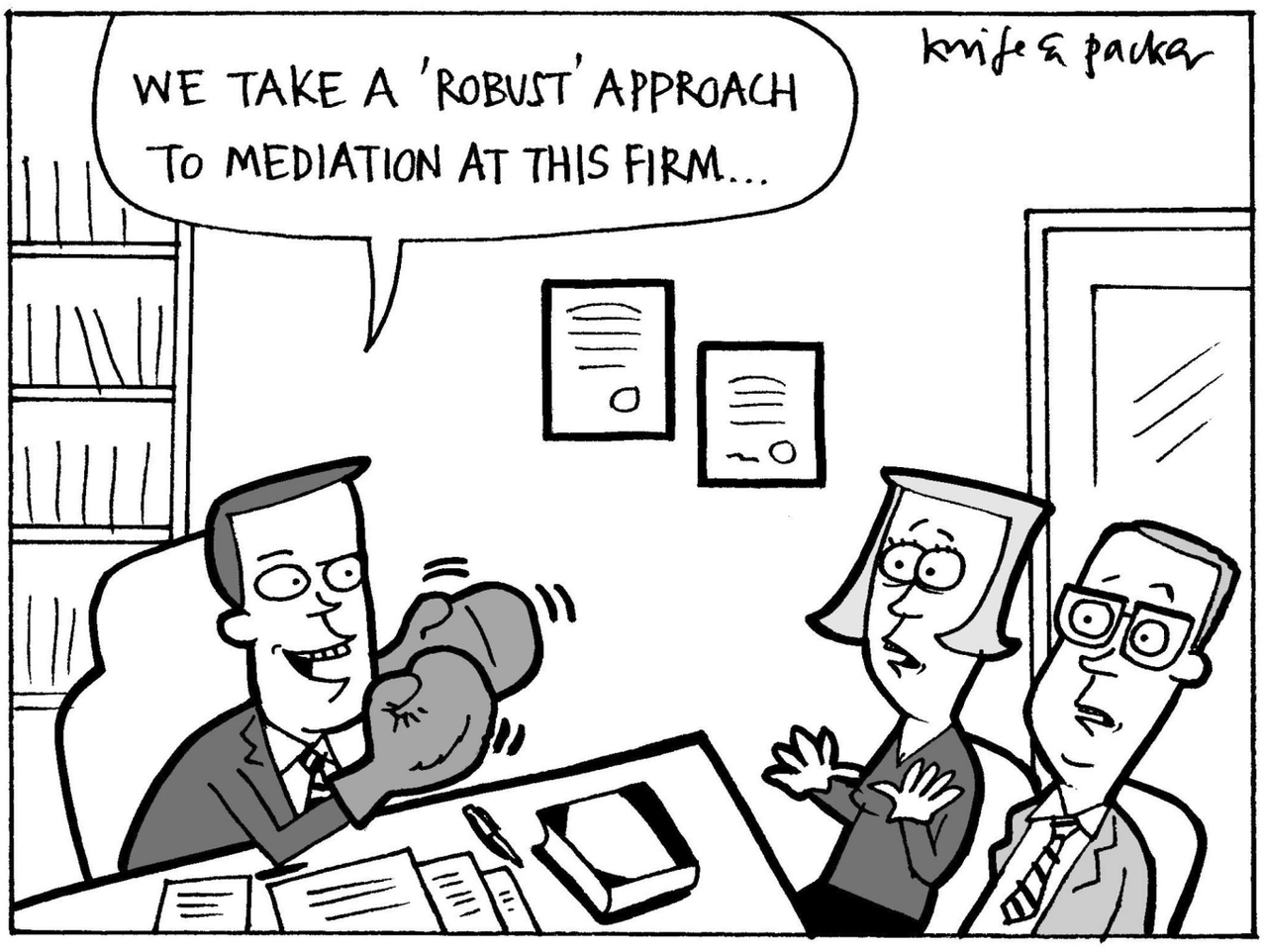
The next major milestone (which involved the courts rowing back on the high water mark of *Railtrack*) was *Halsey v Milton Keynes General NHS Trust* [2004], where Dyson LJ said:

> We heard argument on the question whether the court has power to order parties to submit their disputes to mediation against their will. It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court.

He continued:

> It is to be hoped that any publicity given to this part of the judgment of the court will draw the attention of lawyers to their duties to further the overriding objective in the way that is set out in CPR Pt 1 and to the possibility that, if they turn down out of hand the chance of ADR when suggested by the

> If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute



> and damage the perceived effectiveness of the ADR process. If a judge takes the view that the case is suitable for ADR, then he or she is not, of course, obliged to take at face value the expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR. But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it.

And he concluded:

> 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.
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> We make it clear at the outset that it was common ground before us (and we accept) that *parties are entitled in an ADR to adopt whatever position they wish, and if as a result the dispute is not settled, that is not a matter for the court.*
> (Emphasis supplied.)

The Court of Appeal in *Halsey* set out a useful (non-exclusive) checklist of factors to assess when a party's actions will be unreasonable:

- 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; and
- whether the ADR had a reasonable prospect of success.

The most recent judgment

And so to Jack J's judgment in *Carleton & ors v Strutt & Parker.* The case involved a split trial on liability and quantum. The claimant won on certain issues of liability. Each side then instructed experts on the assessment of damages. A mediation prior to the trial of issues of quantum took place at which the claimant offered to accept £9m plus 80% of his costs, but this was rejected. At trial the court awarded the claimant £915,139, not including interest. The court had to decide the effect of the failed mediation on the costs order that it would make, Jack J holding:

> I consider that the claimants' position at the mediation was plainly unrealistic and unreasonable. Had they made an offer which better reflected their true position, the mediation *might have succeeded.* It would be wrong to say more. As far as I am aware the courts have not had to consider the situation where a party has agreed to mediate but has then taken an unreasonable position in the mediation. It is not dissimilar in effect to an unreasonable refusal to engage in mediation. For a party who agrees to mediation but then causes the mediation to fail by reason of his unreasonable position in the mediation is in reality in the same position as a party who unreasonably refuses to mediate. In my view it is something which the court can and should take account of in the costs order in accordance with the principles considered in *Halsey.*
> (Emphasis supplied.)

Comment

Jack J recited the principles that he derived from *Halsey* (these were derived from his earlier case of *Hickman v Blake Lapthorn* [2006]) saying that they had been cited to him in the case without demur. However, they did not include the sections emphasised above that strongly imply that the courts will not investigate the parties' conduct in the mediation as Jack J did in this case. There are good justifiable reasons for the position the Court of Appeal took in *Halsey*. It will not always be privy to the positions that the parties took in what, by definition, will still remain a without prejudice process. Even if the process is opened up and privilege is waived (as was the case in *Malmesbury*), the evidence of the parties' positions and reasons for not settling may be incomplete or self-serving. More fundamentally, there seems to be something wrong in depriving a claimant of the normal order as to costs because a process 'might have succeeded' had it had not been 'plainly unrealistic and unreasonable'. The court appears to be making that judgement with a good deal of hindsight.

Halsey (and its albeit non-exclusive list of factors that are relevant to the question of whether a party has unreasonably refused ADR) is a useful judgment, but its criticism of Lightman J in *Hurst v Leeming* is indicative of the fact that the lower courts needed guidance. One of the scenarios that *Halsey* did not cover in detail was attending a mediation without a bona fide intention to settle. *Malmesbury* addresses this but probably comes to the wrong conclusion. The horse is at the water, concluding that its plainly not drinking for an unreasonable reason is probably not objectively ascertainable. ■

'A party who agrees to mediation but then causes the mediation to fail by reason of his unreasonable position in the mediation is in reality in the same position as a party who unreasonably refuses to mediate.'

Jack J in *Malmesbury*

James Carleton Seventh Earl of Malmesbury & ors v Strutt & Parker [2008] All ER (D) 257 (Mar)

Cowl & ors v Plymouth City Council [2002] CP Rep 18

Dunnett v Railtrack plc [2002] 2 All ER 850

Halsey v Milton Keynes General NHS Trust [2004] 1 WLR 3002

Hickman v Blake Lapthorn [2006] All ER (D) 67 (Jan)

Hurst v Leeming [2002] All ER (D) 135 (May)

TW Thomas & Co v Portsea Steamship Company [1912] AC 1