Alternative dispute resolution, by its nature, must be entered into willingly by both parties. Julian Copeman asks to what extent lawyers have a duty to encourage their clients to use this method of settlement at an early stage in proceedings.

Over the past 15 to 20 years there have been a number of attempts to significantly increase the use of alternative dispute resolution (ADR), particularly mediation, by parties to civil and commercial disputes. These have included, in particular, the Woolf reforms leading to the introduction of the Civil Procedure Rules (CPR) in 1999; subsequent judgments in which the court has applied costs sanctions against parties who unreasonably refused to engage in ADR; and, most recently, the conclusions of Lord Justice Jackson in his review of civil litigation costs which are planned to take effect by April 2013.

In his final report on access to justice in July 1996, Lord Woolf referred to his reforms as creating a ‘new landscape’. People would be encouraged to start court proceedings only as a last resort and to use pre-litigation ADR instead. If proceedings were commenced, the court would encourage the use of ADR at case management conferences, and the court would be taking into account whether the parties had unreasonably refused to try ADR or had behaved unreasonably in the course of ADR. Indeed, the whole shift in emphasis towards front loading proceedings, including the introduction of pre-action protocols, was intended to ensure that the parties understood each other’s cases at an early stage and were in a position to settle claims earlier than had previously been the case.

Mutual agreement

The Woolf reforms and the new CPR led to a series of cases in which the courts considered the issue of costs sanctions against parties deemed to have unreasonably refused to engage in ADR, most notoriously Dunnett v Railtrack [2002] EWCA Civ 302 in which a successful defendant was deprived of its costs on the basis that it had refused to mediate even though it was of the view (rightly as it transpired) that it had a watertight case. Those cases led to the Court of Appeal decision in Halsey v Milton Keynes General NHS Trust [2004] 1WLR 3002 which set out the factors to be taken into account in determining whether a party has unreasonably refused to mediate, including the nature of the dispute; merits of the case; use of other settlement methods; costs of mediation; risks of delay; and whether the mediation has a reasonable prospect.

In a speech in March 2012 on the role of ADR in furthering the aims of his civil litigation costs review, Lord Justice Jackson stated that the Halsey factors have been considered in a decreasing number of cases since 2005 “because, together with a changing climate where an offer to mediate was no longer seen as a weakness, it changed the attitude of litigators.” He concluded that “there are now few cases where the Halsey argument needs to be dealt with when costs are dealt with.” Such cases do, however, still arise. In Rolf v De Guerin [2011] EWCA Civ 78, which Rix LJ referred to as “a sad case about lost opportunities for mediation”, the Court of Appeal exercised its discretion to make no order as to costs on the basis that the defendant’s refusal to participate in settlement negotiations or mediation was unreasonable and ought to bear materially on the exercise of the court’s discretion. By contrast, in Swain Mason v Mills & Reeve [2012] EWCA Civ 498 a differently constituted Court of Appeal held that the defendant had not been unreasonable in refusing to mediate, finding that where a party reasonably believed it had a watertight case that might well be a sufficient justification for refusal to mediate, even if on some issues the defence did not in fact succeed.

That ADR is encouraged through the risk of costs sanctions reflects the fact that ADR is not compulsory. It can only take place where both parties agree to it. In his speech in March 2012, Jackson LJ emphasised that what was needed to increase the uptake of ADR was “culture change, not rule change”, and that he did not agree with proposals for compulsion. This must be the right approach, since much of the impetus for a successful mediation comes from the positive message created by both parties agreeing to mediate and to commit time and senior resource to the process, whereas there is a significant risk that a mandatory ADR stage in litigation would become no more than a tick box exercise. Beyond that, of course, is the argument that mandatory ADR would be a breach of a party’s rights under article 6 of the Human Rights Act.

The most recent push by Jackson LJ, therefore, is in relation to that issue of a cultural change. This he suggests should involve a “serious campaign” to ensure all litigation lawyers and judges, as well as the public and small businesses, are informed of the benefits of ADR. In particular he has emphasised the need for the publication
of an authoritative and neutral handbook, of a standing equivalent to The White Book on civil procedure, containing information about ADR. Such a handbook is proposed to be produced under the editorial guidance of Lord Clarke of Stone-cum-Ebony in April 2013.

Therefore, parties to litigation are not obliged to engage in ADR, but a combination of a party’s obligations under relevant pre-action protocols and pursuant to the overriding objective of the CPR, as well as the costs risk of refusing to undertake ADR, means that litigation lawyers must advise their client as to the ADR options available and the risks of failing to attempt it in some form.

On that basis it may seem surprising that take up of ADR is not more widespread, but the figures suggest that there is some way to go. Gauging the take-up and success rate of ADR is difficult. In its May 2012 audit of civil and commercial mediation usage, CEDR estimated that around 8,000 commercial and civil cases are mediated per year (representing a year-on-year increase of about 15 per cent per annum since 2010). However, according to Ministry of Justice figures for 2011, the average number of claims issued each year in the Queen’s Bench and Chancery Divisions of the High Court is about 50,000. Further, some 1.5 million claims are issued in the County Court, excluding family claims. Many cases settle without the need for ADR, but plainly many other cases are not settling and the parties are not attempting ADR.

Disclosure

One reason that is suggested why parties may be wary of agreeing to mediation is that they are concerned that confidential information disclosed during the mediation may be used against them in subsequent litigation if the mediation is unsuccessful. However, it is well established that mediation is covered by without prejudice privilege, and indeed that the privilege is joint, so that it is not open to any one of the parties to the mediation to waive the privilege. Indeed, in Cumbria Waste Management v Baines Wilson [2008] EWHC 786 it was held that privilege was not waived in documents related to a mediation between the claimants and a third party, even though the claimants were pleading the reasonableness of the settlement arising out of that mediation in the litigation, because the third party had reserved its rights to confidentiality in the mediation. There are some well-established grounds for the court to open up the content of a mediation, set out in Unilever v Proctor & Gamble [2001] 1 All ER 783. They include where the issue is whether without prejudice communications have resulted in a concluded compromise agreement; whether an alleged compromise agreement should be set aside on the grounds of misrepresentation, fraud or undue influence; whether the without prejudice communications establish an estoppel; or where the exclusion of the evidence would act as a cloak for perjury or other “unambiguous propriety”. Attempts to open mediation on the basis of such impropriety have made it clear that this ground requires a very clear case of abuse of the without prejudice privilege. In Ofulue v Bossert [2009] UKHL16, the House of Lords underlined the wide protection provided to mediations by the without prejudice rule and stated that the court would be slow to find new exceptions. One such was...
established in *Oceanbulk Shipping & Trading S.A. v TMT Asia* [2010] UKSC 44 in which the Supreme Court applied the Chartbrook approach to contractual interpretation, holding that evidence of without prejudice communications could be admissible in disputes about the interpretation of a written settlement agreement.

Accordingly, the parties can enter into mediation safe in the knowledge that in ordinary circumstances communications will remain privileged. This does not, of course, mean that otherwise disclosable documents become privileged. Plainly, if a document falls to be disclosed in due course, it must be disclosed whether or not it was referred to in a mediation. This was underlined in *Aird v Prime Meridian* [2006] EWCA Civ 1866 where the Court of Appeal held that an expert joint statement ordered to be produced pursuant to CPR 35, but first produced at a mediation between the parties, had not acquired privileged status because it was used in the mediation. It may also be the case that if a point is raised in a mediation about the other side’s case and the mediation fails, the other party may seek to bolster its case in relation to that point. However, this is no different from any tactical decision as to when most effectively to raise a point during any dispute, and should not put parties off attempting ADR.

As noted above, gauging the success rate of ADR is difficult. However, it is often said that around 80 per cent of disputes settle on or after a mediation, and anecdotal evidence suggests this is about right in commercial disputes as long as the mediation is carried out at the right time and with appropriate engagement from the parties. Parties’ concerns as to risks of mediation such as to risks of mediation confidentiality may often simply reflect their lack of experience of the process.

Whether aided by Jackson LJ’s proposed ADR handbook, or schemes such as the Small Claims Mediation Service or the Court of Appeal’s year long mediation pilot scheme for personal injury, clinical negligence or contract claims worth £100,000 or less, further use of ADR can only help to promote more cost effective resolution of disputes.

Litigation lawyers are acting in their clients’ best interests when they are part of that process by advising on the appropriate use of ADR.

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