Could COVID-19 see the end of Halsey?

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The impact of the COVID-19 pandemic on the administration of justice has led to commendable judicial innovation, such as the use of virtual hearings, while much of the workload has been postponed until the resumption of face to face hearings is declared safe.

In a message to judges in the UK Civil and Family Courts in March, the Lord Chief Justice said:

"It is clear that this pandemic will not be a phenomenon that continues only for a few weeks. At the best it will suppress the normal functioning of society for many months. For that reason we all need to recognise that we will be using technology to conduct business which even a month ago would have been unthinkable. Final hearings and hearings with contested evidence very shortly will inevitably be conducted using technology. Otherwise, there will be no hearings and access to justice will become a mirage. Even now we have to be thinking about the inevitable backlogs and delays that are building in the system and will build to an intolerable level if too much court business is simply adjourned. I would urge all before agreeing to adjourn any hearing to use available time to explore with the parties the possibility for compromise."

Unless or until overturned by legislation or judicial decision, the situation in the UK is governed by the 2004 decision of the Court of Appeal in Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576 (11 May 2004) , in which Dyson LJ (with whom Laws LJ and Ward LJ agreed) said:

"…it seems to us likely that *compulsion* of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6 [of the European Convention on Human Rights]."

In 2010 the European Court of Justice differed, holding that a mandatory out-of-court settlement procedure is not contrary to European law so long as it does not result in a binding decision, does not cause a substantial delay in litigating, does not oust the court's jurisdiction due to limitation periods and is not excessively costly: Rosalba Alassini and others v Telecom Italia SpA and others.

That was not the end of *Halsey* however, because Dyson LJ continued:

"Even if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it. We would adopt what the editors of Volume 1 of the White Book (2003) say at para 1.4.11:

'The hallmark of ADR procedures, and perhaps the key to their effectiveness in individual cases, is that they are processes voluntarily entered into by the parties in dispute with 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.'"

Comment: that unfortunately erroneous passage from the White Book fails to address the substance of Harvard Professor Frank E A Sander's well-known and compelling statement: "*There is a difference between coercion into mediation and coercion in mediation.*"

Dyson LJ went on:

"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… we reiterate that the court's role is to encourage, not to compel."

Halsey established a regime whereby the courts may impose cost sanctions against successful litigants on the grounds that they unreasonably refused to engage in ADR. Such penalties are, of course, necessarily imposed after the decision on the merits of the case, whereas a power to order parties into mediation would be exercised before the final decision.

Even before the 2010 *Alassini* decision, Sir Anthony Clarke, in *The Future of Civil Mediations*, (2008) 74 Arbitration 4, 419 said:

"It is of course a cliché that you can take a horse to water but whether it drinks is another thing entirely. That it is a cliché does not render it the less true. But what can perhaps be said is that a horse (even a very obstinate horse) is more likely to drink if taken to water. We should be doing more to encourage (and perhaps direct) the horse to go to the trough. The more horses approach the trough the more will drink from it. Litigants being like horses we should give them every assistance to settle their disputes in this way. We do them, and the justice system, a disservice if we do not."

Using the same cliché, in Wright v Michael Wright Supplies Ltd & Anor [2013] EWCA Civ 234 (27 March 2013) , Sir Alan Ward said:

"You may be able to drag the horse (a mule offers a better metaphor) to water, but you cannot force the wretched animal to drink if it stubbornly resists. I suppose you can make it run around the litigation course so vigorously that in a muck sweat it will find the mediation trough more friendly and desirable. But none of that provides the real answer. Perhaps, therefore, it is time to review the rule in *Halsey…*"

A year later, in Bradley & Anor v Heslin & Anor [2014] EWHC 3267 (Ch) (09 October 2014) , Norris J said:

"…The Court cannot oblige truly unwilling parties to submit their disputes to mediation: but I do not see why, in the notorious case of boundary and neighbour disputes, directing the parties to take (over a short defined period) all reasonable steps to resolve the dispute by mediation before preparing for a trial should be regarded as an unacceptable obstruction on the right of access to justice."

In its 2017 Interim Report on ADR and Civil Justice , the Civil Justice Council ADR Working Group said at 9.32:

"… if the Working Group were free to choose we would be minded to allow judges to make orders *in particular cases* compelling an unwilling party or unwilling parties to attend a mediation or engage in some form of ADR."

In its 2018 Final Report, the Working Group refrained from suggesting such a course, instead advocating increased encouragement into ADR at various stages and, at 9.24, proposing a system, as in British Columbia, in which a formal Notice to Mediate from one party to another triggers mediation by a mediator on a court-approved panel. The court is not involved unless the parties cannot agree on the mediator or otherwise seek its intervention.

While such a scheme would undoubtedly be useful, both in disposing of cases and in increasing awareness of ADR, the missing element is what I see as the clearly desirable power of the court, as it considers appropriate, to order parties into mediation whether or not they consent. In my 2018 Kluwer blog, I touched upon the way in which Australian courts use their statutory power to make such orders.

In his recent article Mediation – Don't panic in the Pandemic – be prepared , Colin Manning, mediator, says:

"If, as seems likely, there is a risk that the courts will become overwhelmed by a wave of commercial cases, a combination of the number of adjourned cases built up during the lockdown together with a rush of new litigation arising from the pandemic, then there will be lengthy delays to hearings and trials. It must be possible that the judges will have to take practical steps to ease the pressure. One obvious step is to require all parties to engage, or re-engage in some form of ADR, almost certainly mediation, as a condition of bringing or continuing litigation."

Perhaps the pressure caused by the COVID-19 pandemic makes this time for the UK to dump *Halsey* and adopt this approach.