



"The factors affecting the choice of arena for the resolution of disputes between parties have undergone some significant change in recent years. Mediation presents an alternative to litigation that is overlooked at the risk of the parties. In the Winter edition of Serle Quarterly we examine the present climate in favour of resolution outside the courts. On this page I review the latest authorities on the costs consequences of a failure to mediate. Inside various of the mediators from Serle Court share their experiences of how mediation operates beneficially in certain of our core areas of practice. The article on the back page gives some practical advice on choosing a mediator."

Beverly-Ann Rogers

## refusal of mediation: a high risk strategy

In the last year the debate on mediation in the courts has moved from the question whether it is appropriate, in effect, to compel parties to mediate by applying costs sanctions against a refusing party to the question as to why or when a refusal to mediate might be justified.

Following *Hurst v Leeming* [2002] 1 All ER (PN) 508 the answer appears to be that a refusal to mediate will only be justified if it can be demonstrated that mediation would have no real prospect of success. That is a difficult test to satisfy and certainly a test which it is difficult to be wholly confident of satisfying. The mere fact that the parties are intransigent is not sufficient for as Lightman J expressed it "what appears to be incapable of mediation before the process begins often proves capable of satisfactory resolution later." Lightman J rejected a number of factors advanced as a justification for a refusal to mediate, namely the high legal costs already incurred, the seriousness of the allegations of professional negligence and the total lack of merit of the claimant's case. However, he found "quite exceptionally" that Mr Hurst was incapable of taking a balanced view of the litigation and would therefore only have settled for a substantial sum which was not justified by a claim which, in the Judge's view, "plainly entitled him to nothing." Accordingly the mediation had no real prospect of success and the Defendant's rejection of mediation had no adverse cost consequences.

In *SITA v Watson Wyatt, Maxwell Batley (Part 20 Defendants)* [2002] EWCH/2401 (Ch) Park J also rejected a claim that there

should be adverse costs consequences against the successful Part 20 Defendants on the grounds that they had refused requests by the Part 20 Claimants, Watson Wyatt to mediate not just once but three times. The thrust of his judgment is that, given the success of Maxwell Batley in the litigation, Watson Wyatt were unrealistic and unjustified in their heavy handed attempts to use mediation to obtain a substantial contribution by Maxwell Batley to the sum which Watson Wyatt paid in settlement to SITA:

*"..it is clear to me that the only reason of substance why Watson Wyatt wanted Maxwell Batley to take part was so that pressure could be brought on them to make a large contribution to whatever sum SITA was eventually willing to accept in settlement of its claim against Watson Wyatt."* and *"There is no hint or impression of Watson Wyatt saying or even thinking that, if Maxwell Batley would participate in the SITA/Watson Wyatt mediation, Watson Wyatt, influenced by the good offices of the mediator, just might be persuaded that there was no realistic claim against them."*

Although Park J placed some reliance on timing issues (the first proposed mediation being held to be too early and the last too late), it is difficult to justify a refusal to engage in mediation on that basis alone, particularly since the experience of mediators and mediation users is that mediation at an early stage often facilitates settlement before major costs have been incurred and many successful mediations take place in the weeks before trial. In both *Hurst v Leeming* and *SITA v Watson Wyatt, Maxwell Batley,*

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it was possible for the successful Defendant, who refused to engage in mediation, to demonstrate that the party proposing mediation had a fixed settlement agenda which was wholly at odds with the merits of the case as perceived or found by the court. Railtrack plc, might say, with some justification, that the same was true in *Dunnett v Railtrack* [2002] 1 WLR 2434; Railtrack was successful both at first instance and in the Court of Appeal thus vindicating its refusal to contemplate a settlement in excess of the sum of £2,500 offered to and rejected by Mrs Dunnett. However the distinction lies in the fact that despite the rejection of the maximum offer, Railtrack could not demonstrate that mediation had no realistic prospects of success; Mrs Dunnett was unrepresented at that stage and given the emotionally charged nature of the dispute, a mediation might well have succeeded where a mere offer of money had failed.

Refusal of mediation remains a high risk strategy and one only to be followed if you are confident not only that mediation has no real prospect of success but that you will be able to demonstrate the lack of any benefit of mediation to the Court.

*Beverly-Ann Rogers has acted as a mediator in over 50 mediations and also represents parties in mediations.*



## where there's a will, there's a war

**Disputes about trusts and wills often involve more than just legal and factual issues. They also include strongly held feelings and emotions on the part of some of the family members. To get a settlement a mediator needs to be able to recognise and handle these feelings and emotions, as well as deal with the legal and factual issues.**

A typical example is a mediation which took place in September. Charlie and Sue (not their real names) were the children of Tony by his first wife. Tony left his estate to Anne, the daughter of his second wife. Charlie and Sue brought claims against their late father's estate. Both Charlie and Sue had been estranged from their father for a number of years, but recently Charlie had become reconciled, and had been taken on in his father's business. Charlie claimed that he had relied on various promises made by his father that the business would eventually be his, and therefore his father's business (which comprised 90% of the estate) was now held on constructive trust for him. He and his sister Sue also claimed against their father's estate under the Inheritance (Provision for Family and Dependents) Act 1975.

The mediation started at 9.30 a.m. Charlie, Sue and Anne were all represented by counsel and solicitors. The mediator held a joint meeting with everybody present, and each side summarised how they saw the dispute.

After about an hour the parties split up into three rooms, one for Charlie, one for Sue, and one for Anne. Sue's claim involved mainly legal and factual issues – analysing with each side what she would be likely to get under the Act, considering the price of local housing, and negotiating until a settlement was reached by 3 p.m. Charlie's claim was much more difficult to resolve. He needed to have his day in court, to explain why what had happened was so unfair. He felt his father would have wanted him to do this. He did not want to settle. Getting Charlie over the crunch of wanting his day in court took another two hours of listening, explaining, acknowledging his feelings, taking him for a walk, and helping him work things through. A settlement was reached at 6 p.m., and written up and signed by 7 p.m.

*James Behrens was the mediator in this dispute. He acts regularly as a mediator in disputes over trusts, wills and estates, as well as in other areas.*

## property mediations

Settlement of property disputes by mediation offers real benefits, not least the possibility of mending bridges in what may be, of necessity, an on-going relationship whether as landlord and tenant, neighbours, partners in a joint venture or as players within a particular market. From both sides of the fence (mediator and party representative) I have discovered the benefits of forward planning. In particular:

- Other issues/parties: the apparent dispute may be only the tip of the iceberg; are there any other issues or parties (eg Part 20 parties) which should be brought into the mediation?
- Valuation evidence: credible information on value is usually essential to enable the parties to feel comfortable in agreeing a figure for damages, rent, or a buy-out.
- No Go Zones: if one party has a preferred settlement route and it is not a realistic option (eg one party wants to buy the property in dispute but it is subject to a recent option or

contract for sale) it is often better to be open about that in advance so that all parties come to the mediation with realistic expectations and don't spend time wandering down blind alleys.

- Proposed settlement: anticipate solutions and draft in advance. If a new lease or contract for sale are possible options, advance drafting will avoid months of chewing over 'heads of agreement' agreed at the mediation. A draft settlement document also provides a focus for resolution.
- Tax or other advice: have your tax or other advisers available on the end of a telephone and make sure they are available out of hours; tax issues always emerge late in the day or night!

*Beverly-Ann Rogers regularly mediates all kinds of property disputes, as well as other disputes.*

## mediation in fraud cases

When I trained as a mediator, there was a discussion about whether there were any cases which were not suitable for mediation. My practice had, at the time, been largely in the area of fraud for some years, and I remember expressing a fairly forceful view that fraud cases were unlikely to be suitable for mediation.

Since then, I have been involved in 5 mediations where fraud was an issue. Two were as counsel to a party (one the defrauded victim, the other a victim of fraud who was – in my view wrongly – suspected of fraud by the Defendant.). The others were as mediator. One settled on the day (but the fraudster was not a party to the mediation). Three settled after the mediation, and the last has yet to settle. As a result I have changed my view to some extent. Nevertheless, such mediations are tricky for mediator and parties. Here are some of the lessons I have learned.

1. Claimants who believe they have been defrauded are very emotional. Worse, solicitors and counsel can fall in love with their cases.

Reality testing is even more difficult than usual. If there is really an issue about whether there has been a fraud, the mediator probably needs to start exploring with the claimant's side well before the day whether they are actually prepared to come with an open mind – or even a half open mind – on that issue.

2. Reality testing is perhaps even harder with a defendant where there is a strong prima facie case, but the defendant is resolutely denying fraud. The mediator has to tread a fine line between the twin dangers of simply insulting the defendant on the one hand and failing to help the defendant understand his true danger on the other. I see my job as a mediator as helping the parties to the best informed decision possible about whether to settle or not. I think that in at least one mediation I have failed to help the defendant properly assess his position by getting this balancing act wrong.

3. Fishing expeditions are a worry. I have seen claimants trying to open up lines of enquiry which would not be open to them in the

litigation. Confidentiality is little help here, since disclosure applications can be made after the mediation knowing documents are there but without overtly referring to what happened at the mediation. Mediators, and parties, need to be alive to this danger.

4. Recoverability of any judgment is always an issue for a fraud claimant. But defendants who seek to suggest that they can't pay will always be met with the supposition that they won't pay. If defendants wish to run such "defences", they need to understand that in fraud cases (even more than others), assertions of inability to pay are unlikely to carry much weight unless backed by hard evidence and warranties that information provided is true.

*Elizabeth Jones QC frequently acts as a mediator in cases across the chancery and commercial field.*

## mediating shareholder disputes

In theory, it should be possible to settle the vast majority of disputes which give rise to proceedings under s. 459 of the Companies Act 1985. Most petitioners are seeking an exit route from the company – on acceptable terms. There may be an argument about whether unfair prejudice has been made out, but many respondents are happy to see the petitioner go – on acceptable terms. But such disputes are commonly very bitter and difficult to settle. Charged with bitterness, parties rush into notoriously expensive and unwieldy proceedings. They want their day (an optimistic under-estimate) in court and nothing less will do.

*Re X Limited* involved a company which was established by M, S and T, who were equal shareholders and directors. After years of friction, the 3 had irretrievably fallen out. S was dismissed and served a s.459 petition. There were allegations of unfair dismissal, poor work and idleness on the part of M and T, exclusion from management and all-round bad faith. For their part, M and T alleged that, whilst S was still an employee, A had been seen buying machinery and had set up in business on his own and that S had given confidential information to A about the company's prices and customers. S had then gone on to join A and steal the company's customers.

The statements of case were (as always) extensive and, by the time of the mediation, costs were already well over £10,000 on each side with little real progress made.

It rapidly became apparent at the mediation that, in private, both sides took a very practical view of what they needed. S knew that there was not an unlimited pot of money available to

buy him out. M and T knew that, if they were to move the business on, they would have to buy S out. They each knew that they could not afford to go to trial. The principle obstacle to settlement or even negotiation was the legacy of enormous bitterness.

The parties made a presentation of their cases in a joint meeting. To the horror of the lawyers present, there was an eruption of emotion and the exchanges fierce. The session was lengthy and, superficially, did nothing to engage the issues. However, when the parties met the mediator privately shortly afterwards, they were ready to talk business. They had let off enough steam. The negotiations that followed were difficult and still testy at times, but terms were eventually agreed and the proceedings settled. This mediation is a good example of a case in which the parties would truly like to settle if they could, but are carrying too much baggage to do so without assistance. The structure of the mediation itself was a sufficient forum for them to feel they had said what needed to be said to

each other. The private sessions with the mediator enabled them to focus on their real objectives. They were able to reach a conclusion without either simply having to capitulate because costs had exhausted all available funds.

*James Corbett QC frequently acts as a mediator in company, commercial and partnership matters.*



## the perfect mediator?

In a survey of Australian mediators they identified the essential qualities of a mediator as patience, friendliness, sense of humour, good organisation skills and empathy. But why ask mediators? There must be a tendency, even if only a sub-conscious one, for mediators to identify the attributes they believe they possess as the key qualities. So I have taken off my mediator hat and write this from the standpoint of what I look for in a mediator when I am representing a party.

Top of my list (in addition to the people skills highlighted by the Australian mediators) come integrity, mediation experience and judgment. I need to know that the mediator will maintain confidentiality and impartiality and has the experience to persist through the inevitable sticky phases. Superficially it may be attractive if the mediator appears to favour your client but it destroys his credibility with the other party, as I found to my cost in a recent mediation where I was representing a party. During the joint session the claimant's representative waxed lyrical about how there was an open and shut case on liability until the mediator intervened to the effect that he could see real problems for the claimant on liability. It was hardly surprising that, after that, he received short shrift from the claimant and we had lost one of the main advantages of mediation; the benefit of a neutral third party negotiator.

One of those benefits is that, being privy to all parties' attitudes and sometimes, in confidence, to key information, the mediator will be able to guide and facilitate the negotiation process; hence my emphasis on the need for judgment. If the mediator questions whether an offer at a certain level is likely to be constructive, my client needs to be able to trust both the mediator's impartiality and his judgment.

A hotly debated issue is whether you should appoint a mediator with expertise in the area of the dispute. Traditionally it has been suggested that a good mediator can mediate any type of dispute and that a mediator with expertise will have the difficulty of resisting the parties' attempts to cast him in the role of an adjudicator. As mediation becomes an accepted part of the dispute process and the mediator's role is known to be that of a facilitator parties rarely seek an evaluation, unless by agreement at the end of a mediation which has not otherwise resolved the dispute.

Experience demonstrates a marked preference for specialist mediators. Specialism helps give the mediator credibility with the parties but most importantly it gives him the tools to reality test effectively. I suspect I am not alone in thinking that I can assist my client to be realistic but look to the mediator to introduce an element of realism on the other side! Some cynics suggest that if you have a strong case you should seek to appoint a specialist mediator who is prepared to be evaluative whereas if you have a weak case you should opt for a non-specialist and facilitative mediator who will not engage in the merits. There is also the question of mediator style. As parties' advisers become more familiar with mediation, they also become more knowledgeable about mediators and their different styles. Just as solicitors choose counsel with particular qualities according to the demands of the case or client, careful consideration of the type of dispute, the character of the parties and the hurdles to be surmounted in reaching resolution may help you to choose, if not the perfect mediator, at least the most appropriate mediator for your client's dispute.

*Beverly-Ann Rogers has acted as a mediator in over 50 mediations and also represents parties in mediations.*



## chambers news

We are delighted to welcome James Corbett QC from St Philips Chambers in Birmingham as a new tenant. Widely recognised as one of 2 top silks in the Midlands, James has a broad chancery commercial practice. James has been an Associate Tenant at Serle Court for some years, and is now moving his practice to London.

James is Chairman of the Midlands Chancery & Commercial Bar Association. He is recommended in Chambers & Partners Guide for Commercial Litigation, Chancery and Insolvency work and described as a "terrific silk", known for "meticulous preparation" and "polished performances". He recently appeared in the largest case yet heard in the Birmingham Mercantile Court (*Dunkin Donuts Inc v. DD UK Limited*).

In addition to his practice at the Bar, James is also experienced in Alternative Dispute Resolution. He is a Fellow of the Chartered Institute of Arbitrators, a Chartered Arbitrator and a CEDR Registered Mediator. He also sits as a Recorder.

We are also delighted that Rt Hon Lord Slynn of Hadley has joined our panel of arbitrators, following his retirement as a Lord of Appeal in Ordinary. Lord Slynn was appointed to the House of Lords in 1992, where he has been involved in many of the decisions concerning the impact of Human Rights law.

He remains by training and inclination a commercial lawyer with wide experience in the laws of European and Commonwealth countries and the USA. His understanding of the laws of countries other than the UK will stand him in good stead as an Arbitrator. Lord Slynn is a Fellow of the Chartered Institute of Arbitrators.

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