serle court

ADR

The positive decision to mediate.

As a mediator and lawyer, I appreciate and understand that it is not easy being a party or an adviser in litigation. All claims and defences have/ involve (amongst other things):

- careful and robust presentation
- strategy
- flaws
- risk
- a winner
- a loser
- cost/ investment
- costs orders/ awards/ losses
- consequences – foreseen and unforeseen
- closing down opportunities to negotiate

I could go on. The litigation paradigm is a real challenge.

If parties simply adhere to the rules of combat to trial, one side will lose. But the rules also allow for a third way, mediation, now an established part of the dispute resolution landscape. It has huge value.

This article was prompted by two recent decisions: *DSN v Blackpool Football Club Ltd* [2020] EWHC 610 (QB) and W*ales t/a Selective Investment Services v CBRE Management Services & Anor* [2020] 4 WLUK 355. I have no wish to comment on the substance of the cases nor the strategy behind the decision by the respective defendants' refusal to mediate, save to note the following: one defendant refused to mediate and lost at trial; two defendants refused to mediate and won at trial; all defendants were criticised for the refusal to mediate and were penalised in costs.

In DSN the Judge considered the defendant's reasons for refusing to mediate to be "*inadequate. They were, simply, and repeatedly, that the defendant "continues to believe that it has a strong defence"…".*

A similar stance was taken by the defendants in the Wales t/a Selective Investments case.

I wholly accept (and so does the court and its procedures) the fundamental right of a party to have their case heard at trial. The rules provide that if a party "unreasonably refuses to mediate" they can suffer cost consequences. What the decisions show is that the court is now considering the reasons for the decision not to mediate in a far more forensic manner. See the judgment of HHJ Halliwell in *Wales t/a Selective Investments.*

I prefer to focus on the positive rationale for mediation. Too often, we find reasons **not to do** something to the detriment of reasons **to do** something.

To explain, I am going to adapt the outline above with comments (in italics):

- require careful and robust presentation – *it is important to have sufficient understanding of each party's case*

- strategy – *every case or group of cases has a strategy with input from clients, insurers, lawyers, accountants and third parties, which often needs to be understood when considering the 'drivers' underpinning the litigation*
- flaws – *every claim or defence has its flaws – for example, whilst there may be a breach of duty it may not be causative of the loss – such flaws can be tested in a mediation*
- risk – *the prospects of success in the simplest "slip and trip" case can never be more than say 80% - in most cases, a party's openly stated prospects of success differ from those they express in private*
- a winner – *all parties want/ strive to believe they will win*
- a loser – *nobody wants to lose, but someone will*
- cost/ investment – *litigation is expensive (very expensive) and requires huge amounts of time, emotion and energy*
- costs orders/ awards/ losses – *the loser usually pays – but the winner cannot recover all expenditure*
- consequences – foreseen and unforeseen – *a failure to beat a Part 36 offer/ a without prejudice save as to costs offer – the inability to recover the judgment sum – insolvency – loss of reputation*
- the closing down of opportunities to negotiate – *a reliance on the litigation process and rules can prevent prevent meaningful and constructive communication – a failure to achieve a commercial solution can break relationships*

I will add the following:

- To offer mediation and to consider such a request to mediate positively is **NOT** a sign of weakness
- I refer to the judgment of Mr Justice Griffiths in DSN: "*Experience has shown that disputes may often be resolved in a way satisfactory to all parties, including parties who find themselves able to resolve claims against them which they consider not to be well founded. Settlement allows solutions which are potentially limitless in their ingenuity and flexibility, and they do not necessarily require any admission of liability, or even*

payment of money …"

- The mediation process provides a confidential environment with private time and space for discussion, understanding and resolution.
- A trial is extremely stressful. Mediation, whilst a significant challenge for parties feels more comfortable for those taking part.
- A settlement cannot be imposed on the parties. It is they who decide the outcome. At trial the claim and defence are presented to the judge for a decision to be made by the judge. At a mediation, the focus is on consensual resolution by the parties.
- The terms of settlement are usually confidential.
- The terms of settlement often fall outside the parameters of what could be ordered by a judge.
- The cost/ investment in a mediation is always a fraction of the costs of a case proceeding to trial.
- It really does work. I have lost count of the number of times parties are astonished (against their very negative expectations) at the fact settlement achieved at mediation. The statistics show that 8 out of 10 disputes reach a settlement at mediation or very soon thereafter.

I finish with two thoughts.

- First, to use and endorse an observation made by Gavin Lightman QC, a former High Court Judge who said that the outcome of a successful mediation often equates to an "approximation of justice."
- Second, I estimate the costs savings from disputes mediated by me to be in excess of £200m. I think that speaks for itself.

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Mediator
Year of Call: 2006