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Halsey -v- Milton Keynes General NHS Trust [2004] EWCA Civ 576

Case Note

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Introduction

1. In this case the Court of Appeal (Ward, Laws and Dyson LJJ) has re-stated the principles relating to the power of the Court to direct and suggest ADR¹ to the parties, and laid down new guidelines in relation to the orders which should be made and the costs sanctions which can be imposed, should the parties decline to avail themselves of the opportunity.

Principles Stated by the Court

2. The principal conclusions of the Court were as follows:

¹ "ADR" is used in this Note to mean all forms of alternative dispute resolution including but not limited to formal mediation.

- 2.1. that the parties cannot be compelled against their will to participate in ADR. To do so would be to breach their rights under Article 6 of the Human Rights Convention. Further, and perhaps more realistically, the Court recognised that a party compelled to participate in ADR is unlikely to participate successfully in the process, given that the essence of ADR is consensus (see judgment paragraph 9). The decision in **Shirayama Shokusan Co Ltd v Danovo Ltd** (Blackburne J 5/12/03) to the contrary is no longer good law;
- 2.2. that the judge should “explore” with a party resistant to ADR his reasons for that stance. No doubt this will licence the judicial persuasion, with its varying degrees of subtlety, which already prevails (paragraph 10);
- 2.3. that “all members of the legal profession... should now routinely consider with their clients whether their disputes are suitable for ADR” (paragraph 11);
- 2.4. that where the successful party has declined to participate in ADR, the general principle remains that costs should follow the event and a departure from that rule must be justified: the burden of proving that such a departure should occur rests on the losing party (paragraph 13);
- 2.5. that the Court should not investigate the reasons why ADR, if unsuccessfully attempted, has failed. These remain confidential because that confidentiality is integral to the process of ADR (paragraph 14);
- 2.6. that it must be remembered that ADR has certain advantages over litigation, notably that in the context of ADR “remedies” (e.g. a formal apology) can be supplied which may go a long way towards achieving a settlement and which are unavailable within litigation. Comments in **Dunnett v Railtrack** [2002] 1 WLR 2434 to the same effect were cited with approval (paragraph 15).

Deciding about ADR: Relevant Factors

3. The Court identified the following factors as relevant to the question whether a refusal to participate in ADR is justifiable:
 - 3.1. the nature of the case: it was accepted that some disputes were by their nature inimical to ADR (paragraph 17);
 - 3.2. the strength of a party's case: a party who reasonably believes that he has a strong case, and whose belief is vindicated by the result, can refuse (disapproving certain dicta of Lightman J in **Hurst v Leeming** [2003] 1 LI Rep 379) (paragraph 18);
 - 3.3. that other methods of settlement have been tried without success (this seems to preserve the approach in **Alan Valentine v Allen** [2003] EWCA Civ 1274) (paragraph 20);
 - 3.4. the cost of ADR: where the cost of ADR may be disproportionate to the sum claimed, this is a relevant factor supporting refusal, particularly given that failed ADR merely adds to the overall burden of costs (this factor was prominent in the result of one of the appeals before the Court) (paragraph 21);
 - 3.5. delay: if ADR will delay the trial, this is a potential ground for reasonable refusal. The moral appears to be that ADR should be suggested sooner rather than later (paragraph 22);
 - 3.6. whether ADR would stand a reasonable chance of success (paragraphs 23-28). This is dealt with in more detail below;
 - 3.7. whether ADR was encouraged by the Court and if so how strongly. If the Court strongly urged that ADR should be attempted then the party refusing to do so will require a stronger basis if he is successfully to defend his refusal to participate.

This is because encouragement by the Court should only be given if the Court is of opinion that the dispute is suitable for ADR (paragraph 31).

Reasonable Prospects of Successful ADR

4. The question whether ADR had a reasonable prospect of success appears to be the most difficult issue arising from the judgment, and promises to give rise to further argument.
5. The Court held (consistently with point 2(4) above) that the burden rests on the unsuccessful party to show that ADR had a reasonable prospect of success: paragraph 28). It was held that the Court should not adopt an objective approach, but should consider the subjective willingness of the parties to enter into ADR (disapproving the approach in **Hurst v Leeming**).
6. As already noted, where there has been judicial encouragement to attempt ADR, this fact suggests that (to the Court at least) there appeared to be a reasonable prospect of success and in such cases it will be easier for the unsuccessful party to discharge the burden on him.
7. Finally, it was held that where ADR stood no reasonable prospect of success because the successful party unreasonably refused to consider the possibility, that party cannot rely on his unreasonable refusal to participate as showing that ADR had no prospect of success (paragraph 26).

Use of Standard Orders in Case Management

8. The Court approved the continued use of the ADR Order routinely made in the Commercial Court (Appendix 7 to the Commercial Court Guide refers). It described this as the “strongest form” of judicial encouragement to ADR. Approval was also given to the so called “Ungley Order”²: by this order parties are required to consider ADR, and a party refusing to participate must file a witness statement (on a without prejudice save as to costs basis) setting out the reasons relied on as justifying that refusal. The Court commented that this order could usefully be made more generally, especially in personal injury litigation.

Comment

9. It is submitted that the decision of the Court is generally to be welcomed; it introduces a sense of proportion in relation to the use of ADR which had been lost in some of the earlier decisions. In particular, this appears from:
- 9.1.1. the rejection of the proposition that parties should be forced to participate in ADR against their will;
 - 9.1.2. the recognition (see paragraph 18) that the stress hitherto laid on ADR has had the effect of permitting Claimants with weak cases effectively to extort settlement offers from a Defendant by obliging the Defendant to engage in ADR. The Court commented that judges should be astute to prevent such abuse of the ADR concept;
 - 9.1.3. the recognition that some cases (albeit a minority) are inherently unsuitable for ADR;
 - 9.1.4. the statement that the losing party bears the burden of displacing the general principle that costs follow the event, even where he takes an “ADR point”.
10. It is not clear that the actual result in the infamous case of **Dunnett v Railtrack** is consistent with the principles here laid down. It will be recalled that in **Dunnett** the Defendant took the view (vindicated at trial and on appeal) that it had a sound defence to the claim, and further took the view that the costs of ADR would be disproportionate to the sum in issue. These are both factors which, according to **Halsey**, would justify a refusal to participate. It may be that the more detailed consideration given in **Halsey** will consign the result in **Dunnett** to history. It is submitted that in

² Pioneered by Master Ungley in clinical negligence disputes.

so far as the decisions conflict, the judgment in **Halsey**, being the product of full argument (assisted by the Law Society and the ADR Group as interveners) should prevail over **Dunnett** (an extempore ruling following the dismissal of the appeal).

11. It is thought that the prohibition against ordering the parties to mediate against their will may not apply where the parties are in a contractual relationship which expressly provided that disputes will be mediated: enforcement of such a clause preserves the agreement between the parties and, it is submitted, does not conflict with their Art.6 rights. Thus it is submitted that the decision in **Cable & Wireless v IBM** [2002] EWHC 2059 remains good law.
12. It remains to be seen how far Courts will adopt the use of standard “ADR encouragement” directions, as envisaged in this decision, and if so what effect the greater use of such orders will have in this area. One potential difficulty, if orders are made as a matter of course, is that unsuccessful parties will later rely on the Court’s encouragement of ADR to show that it had a reasonable prospect of success. The consequence appears to be that parties who do not wish to mediate must marshal an effective argument against ADR at an early stage, so that they can either prevent such a standard order or at least show that they protested at the time (thereby underpinning a potential argument later that their refusal was shown to be well judged).
13. It appears that the pilot scheme introduced in the Central London County Court, with effect from 1 April 2004, may require amendment. By that scheme, cases are selected at random and referred to mediation. The parties are allowed to lodge objections and it is contemplated that in some cases the District Judge will hold a hearing to decide whether to direct mediation. It appears that a direction, against the will of one or both parties, that mediation should take place falls foul of **Halsey**.
14. In most cases where there is an argument over costs, the successful party will have refused ADR. The criteria by which the reasonableness of that decision will be judged remain a potential source of difficulty. The fact of eventual victory is now relevant, but the Court’s decision contemplates that some successful parties will nonetheless have refused ADR unreasonably. It can be envisaged that a successful party may face problems where:

- 14.1. he wins the case but loses a number of points on which he had expected to win;
and/or
 - 14.2. he fought expensive litigation where the indications are that the other party was prepared to enter into a reasonable compromise which would have been far cheaper in the long run; and/or
 - 14.3. the nature of the case changed (perhaps because of a change in the law or the discovery of new evidence) between the consideration of ADR and the trial;
and/or
 - 14.4. he gave reasons for his refusal which were unsustainable.
15. The overall effect of the judgment must be that a party must be in a position, at an early stage in any given litigation, to present a reasoned response to the question of whether ADR should be attempted, and should no doubt frame that response in the light of the guidance contained in this decision.

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