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# How Courts Are Encouraging Mediation In England And Wales

By **Leah Alpren-Waterman** (July 17, 2020, 1:58 PM EDT)

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As measures put in place to mitigate the immediate economic effects of COVID-19 begin to subside, and with predictions that the pandemic could lead to a deluge of contractual disputes, placing a strain on the entire global system of dispute resolution, attention has turned to alternative dispute resolution mechanisms.

One such mechanism is mediation, a form of ADR that has become increasingly familiar to commercial parties in recent years and now looks set to become an even more essential part of any disputes toolkit.

Mediation is characterized by flexibility, control and confidentiality. It offers parties almost limitless choice, from when and where the mediation should take place to who should attend (provided they have appropriate decision-making power) and the terms on which settlement may be reached.

In addition, although the mediator, a neutral third-party facilitator, will assist the parties to try to reach a resolution of their dispute, ultimately the decision of whether and if so, on what terms to settle, will be in the hands of the parties.

Finally, the mediation process is entirely confidential, covered by contractual obligations of confidentiality owed by both the parties and the mediator, as well as without prejudice privilege, giving parties confidence that information will only be disclosed to the opponent with their consent, and will not be referred to in subsequent litigation or arbitration.

In England and Wales, mediation is also a consensual process — the courts will not force parties to mediate against their will. The courts have nevertheless shown enthusiastic support for mediation and similar ADR processes, both when determining the implications of a party's refusal to mediate, and when assessing whether the normal restrictions on use of information deriving from a mediation do not apply, as a number of recent cases demonstrate.

The first of these is Berkeley Square Holdings & Ors v. Lancer Property Asset Management Limited & Ors,[1] a case in which the defendants sought to rely on information contained in their own mediation position paper to rebut statements made in a subsequent unconnected claim involving the same parties as to when the claimants became aware of certain payments.

It was accepted that the mediation position papers fell within the without prejudice privilege rule, and were subject to obligations of confidentiality, but the High Court considered that it would be unfair to allow the claimants to advance a case that they were unaware of the payments while evidence that arguably showed the contrary was excluded. The case therefore fell within one of the exceptions to the without prejudice privilege rule and the position paper could be relied on by the defendants.

Nevertheless the judgment demonstrates how cautiously the courts will tread in such circumstances, and the careful consideration given to any potential detriment to mediation. In this case, the court was comforted by the fact that the information regarding the payments in the position paper was

included by way of background and was largely irrelevant to the actual dispute which was the subject of the mediation.

Further, the defendant was not seeking to put in an admission made by the claimant, but only what it had said itself in the mediation. It was therefore held that admitting the material would not impair or fetter free and open exchanges by parties seeking to settle their dispute, and so would not undermine the public policy justifying the without prejudice rule.

Similar considerations were at play in Glencairn IP Holdings Ltd. & Anr v. Product Specialities Inc. (t/a Final Touch) & Anr,[2] where a claimant had brought separate proceedings against two defendants represented by the same firm of specialist solicitors.

After one claim settled following mediation, the claimants tried to have the solicitors removed from the second defendant's case on the basis that there was a risk that confidential information disclosed during the mediation, including the claimant's negotiating position and the terms on which it was proposed to settle, might become known to the second defendant.

The argument relied on principles concerning the potential for conflicts of interest where solicitors act for different parties, as established in Prince Jefri Bolkiah v. KPMG,[3] but the Court of Appeal of England and Wales did not agree that Bolkiah was applicable in this case. In particular, it was for the claimant, rather than the defendants' solicitors, to show that there was a real risk of disclosure, and in this case the claimant was unable to do so.

Again, the Court of Appeal gave careful thought to the effect of its decision on the use of mediation more broadly, but ultimately concluded that allowing the solicitors to continue to represent the second defendant would not deleteriously affect the public interest in the mediation and settlement of disputes, and in fact putting the onus on the defendants' solicitors to show no real risk of disclosure in such circumstances would act as a disincentive to mediation.

However, providing some reassurance to parties in a similar position, the court noted that if privileged information is misused or disclosed, or there is some threat that it will be, then an applicant can seek injunctive relief to restrain the opponent and their legal advisers from misusing that information.

Meanwhile the courts continue to demonstrate that they will not be shy to impose costs penalties on parties that have behaved unreasonably in refusing to mediate. And so in DSN v. Blackpool Football Club Ltd. (Rev 1),[4] a defendant who had rejected invitations to enter into settlement negotiations was ordered to pay costs on the indemnity basis after it was found vicariously liable to the claimant.

Ironically, the defendant had argued that the strength of its defense meant no purpose would be served by ADR, but notwithstanding such misplaced confidence, the court commented that no defense, however strong, by itself justifies a failure to engage in any kind of ADR. Indeed, extolling the benefits of mechanisms like mediation, the court noted that settlement allows solutions which are potentially limitless in their ingenuity and flexibility, and do not necessarily require any admission of liability or even payment of money.

The costs implications of a refusal to mediate can be similarly severe for a successful party. In Wales (t/a Selective Investment Services) v. CBRE Managed Services Ltd. & Anr,[5] up to 50% of a successful defendant's costs were disallowed on the basis that it had refused offers to mediate both at the outset of the claim and prior to trial. Although the defendant contended that mediation was premature before pleadings were concluded, and later that there was insufficient time to prepare for a mediation given the directions to trial, the High Court disagreed.

Indeed, the court considered that even if an early mediation had not led to compromise, at the very least it may have corrected some of the claimant's misapprehensions about his claim and, emphasizing the benefits offered by mediation, commented that given the nature and longevity of the historic relationship between the parties, a mediation would have provided them with an opportunity to address wider considerations that were not justiciable by the courts.

Efforts to prevent courts becoming overwhelmed by the anticipated influx of commercial disputes

may lead to even greater judicial encouragement to mediate. And the recent introduction of the Singapore Mediation Convention should go some way to abating concerns as to the international enforceability of settlement agreements reached in mediation.

Meanwhile, for parties who remain unable or reluctant to travel or meet in person, the flexibility of mediation means that online platforms will remain available as long as there is demand. Mediation is here to stay.

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*Leah Alpren-Waterman is an accredited mediator through the Centre for Effective Dispute Resolution and a professional support lawyer at Watson Farley & Williams LLP.*



[1] Berkeley Square Holdings & Ors v. Lancer Property Asset Management Limited & Ors , [2020] EWHC 1015 (Ch)

[2] Glencairn IP Holdings Ltd. & Anr v. Product Specialities Inc. (t/a Final Touch) & Anr , [2020] EWCA Civ 609

[3] Prince Jefri Bolkiah v. KPMG , [1999] 2 AC 222

[4] DSN v. Blackpool Football Club Ltd. (Rev 1) , [2020] EWHC 670 (QB)

[5] Wales (t/a Selective Investment Services) v. CBRE Managed Services Ltd. & Anr , [2020] EWHC 1050 (Comm)

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