

HUMAN RIGHTS & ADR : Q&A

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I'm a Swedish law student currently working on a paper on the relationship between ADR and article 6 of the European Convention on Human Rights. I would be very grateful if you could recommend material from the U.K dealing with that subject.

“ARTICLE 6 : RIGHT TO A FAIR TRIAL

1. *In the determination of his civil rights and obligations..... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”*

Sir, There are a number questions in the letters section (ADR News Vol. 5 Issue No 2 July 2005) which refer to the courts having power *“to impose mediation”* I would be interested in you views of how this sits with the **Halsey v. Milton Keynes General NHS Trust¹** judgement. In particular with the words of Dyson L J where he said

*“We heard argument on the question whether the court has power to order parties to submit their disputes to mediation against their will. It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court. The court in Strasbourg has said in relation to article 6 of the European Convention on Human Rights that the right of access to a court may be waived, for example by means of an arbitration agreement, but such waiver should be subjected to particularly careful review to ensure that the claimant is not subject to constraint: see **Deweert v Belgium** (1980) 2 EHRR 439, para 49. If that is the approach of the ECtHR to an agreement to arbitrate, 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. 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.

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.”

This implies that compelling mediation is just not on except in exceptional - possibly even inconceivable - circumstances.

RESPONSE : It is convenient to answer both queries by addressing the question *“To what extent, if at all, in the light of the ECHR and the HRA 1998, can the UK courts mandate mediation?”*

Since the early 1990'ies the UK courts have gradually embraced the concept of mediation, recognising it as an additional method for the parties to disputes to broker settlements that would otherwise require the good offices of the court. The win-win concept has received judicial approval, recognising that the adversarial nature of litigation is not conducive to continuing relationships. Furthermore, an over-loaded judicial system welcomed the opportunity to reduce the court lists.² The courts soon distinguished between unenforceable agreements to agree or good faith negotiation agreements and agreements to mediate. A mediation agreement, they found, is an enforceable agreement to engage in the mediation process, albeit that it may not

¹ **Halsey v Milton Keynes General NHS Trust ; Steel v Joy & Halliday** [2004] EWCA (Civ) 576

² See inter alia **Dunnett v Railtrack plc** [2002] EWCA Civ 303 and **Hurst v Leeming** [2001] EWHC 1051 (Ch).

be successful, which can be supported by a stay of action pending engagement in the process. However, since a stay pending a refusing defendant's engagement in mediation would deprive a consenting claimant of a forum, it is pointless issuing a stay in such circumstances.

The Civil Procedure Rules 1998 explicitly endorse the concept of ADR / mediation firstly in Rule 1(4) on case management, as a means of achieving the over-riding objective of enabling the court to deal with cases justly in a speedy, cost effective manner, proportionate to the issues at stake. The ability to stay an action to afford the parties a window of opportunity to attempt to negotiate a settlement is set out in Rule 26(4) and finally, by virtue of s44(3) the unreasonable refusal of a party to engage in negotiations can lead to cost penalties, displacing the traditional rule that costs follow the event. There is a duty of legal advisors to inform clients of the benefits of mediation and to ensure that the client had given the concept due consideration. The list of cases encouraging mediation and extolling its virtues grows ever longer.

However, all of this, whilst providing support for the mediation process, even in the absence of a contractual mediation agreement, falls short of mandating mediation. Indeed, it is clear from Lord Justice Dyson's judgement in **Halsey v. Milton Keynes General NHS Trust** that his Lordship considers that it is unlikely that the UK courts would go so far as to mandate an "ad hoc" reference to mediation against the will of the parties to a dispute.³ Whether or not the ability to be able to do so exists is yet another matter. It would appear that some members of the judiciary would favour such as power, as demonstrated by the judgement of Hobhouse J in **Automotive Patterns (Precision Equipment) Ltd v. A.W. Plume Ltd**⁴ where he expressed the view that this case would have been an appropriate case for court ordered mediation if such a facility existed in the UK.. That "IF" demonstrates that he did not think at that time that such a power existed.

However, it is not beyond question that this is something the courts cannot do. Consider the order given by the court in **Rickards v Jones**.⁵ The court order stated "3 *The parties shall take such serious steps as they may be advised, both between themselves and with the NHBC, to resolve any disputes by ADR procedures by the end of November 2000.* " The **Rickards v Jones** formula was adopted in the High Court Chancery Division decision of Blackburne J in **Shokusan Co Ltd v Danovo Ltd**.⁶ This concerned a rent dispute between the long leasehold owners of London County Hall and the owner and operator of the Saatchi Gallery, housed on the first floor of that building. Danovo requested Shokusan to mediate the matter and on being rebuffed applied for an Order substantially following Appendix 7 to the Admiralty and Commercial Costs Guide that the parties mediate their various disputes, the order to include a mechanism for the mediator's appointment, to require the parties to participate and if the mediation fails, to account to the court why it failed. Picking up at para 12 the transcript reads :-

- "12. *The first question which arises is whether the court has jurisdiction to order a party, who is unwilling, to have a dispute mediated in the terms applied for. Mr Andrew Hochhauser QC who appears with Mr Andrew Walker on behalf of Danovo, making the application, says that I have such jurisdiction. Mr Nicholas Taggart appearing for the defendants says that I do not.*
13. *There is no doubt that courts have assumed such a jurisdiction. That is apparent from an unreported decision of Mrs Justice Arden, as she then was, in the case called **Guinle v Kirreh, Kinstreet Limited v Balmargo Corporation Ltd**,⁷ judgment in which was given on 3rd August, 1999. A submission had been made that the court did not have such a jurisdiction. One party at any rate was not willing to undergo ADR. The court nevertheless directed ADR and did so in a form which has been largely followed in the draft Order attached to the application before me. Mrs Justice Arden took the view that Rule 1.1 of the Civil Procedure Rules, setting out the overriding objective, opened the way and that Appendix 7 to the Admiralty and Commercial Courts Guide provided the structure for such an Order.*

³ By contrast Court ordered / mandated mediation is the norm in 13 US States, Canada and Singapore - so the concept has, for better or worse been tried and tested (and arguably proved) elsewhere by democratic societies.

⁴ **Automotive Patterns (Precision Equipment) Ltd v. A.W. Plume Ltd** [1996] EWCA Civ 825

⁵ **Rickards v Jones** [2002] EWCA Civ 260.

⁶ **Shokusan Co Ltd v Danovo Ltd** [2003] EWHC 3006.

⁷ **Kinstreet Ltd v Balmargo Corporation Ltd** [1994] Ch 1994 G2999

14. Then there is the case of *Muman v Nagasena* in the Court of Appeal reported in [2000] WLR 299. That was a dispute over the administration of a charity. The court took the view that mediation would help. Towards the end of his judgment, Lord Justice Mummery, at page 305, said this:
"In this case very substantial sums of money have been spent on litigation without achieving a resolution. The spending of money on this kind of litigation does not promote the religious purposes of this charity. It is time for mediation. No more money should be spent from the assets of this charity until (i) the Charity Commissioners have authorised the proceedings and counterclaim and (ii) all efforts have been made to secure a mediation of this dispute in the manner suggested."
15. He had earlier said that there existed a mediation service for charities which had been established by the Centre for Dispute Resolution, jointly with the National Council for Voluntary Organisations, under the umbrella of the Home Office and that the purpose of the scheme was to achieve by voluntary action confidentially conducted, a healing process in which disputes within a charity can be resolved at a modest fee and without the use of funds which have been raised for charitable purposes. In suggesting the Order which he refers to in his judgment, he made it clear that a stay of proceedings until after an attempt had been made by both parties to resolve the dispute by mediation was quite separate from the requirement of authorisation under Section 33 of the Charities Act, 1993.
16. Those two cases plainly proceeded upon the basis that there is jurisdiction to make an ADR order even when one side is opposed to such relief."17 18
19. I take the view that the exercise of those powers is not confined simply to the case where the parties jointly wish to settle the whole or part of the case or to use alternative dispute resolution procedures. There is nothing binding on this court to the effect that there is no jurisdiction, to have recourse to those powers unless both parties are willing. I do not accept that the remarks of Mr Justice Lightman in *Hurst v Leeming* to which my attention was drawn (in particular in paragraph 12) are to be taken as a statement that mediation can only be ordered where both parties are willing. Nor do I take the view that the remarks in paragraph 11 of the judgment of Lord Justice Tuckey in *Tarajan Overseas Limited v. Donald Lee Kaye*⁸ are to similar effect. I notice, moreover, that in *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (11 October 2002) Colman J observed that the making of ADR orders was commonplace, (at any rate in the Commercial Court), even when one party objects to such an order and that, occasionally, such an order has been made even in the face of objections from both sides.
20. I, therefore, accept Mr Hochhauser's submission that there is jurisdiction to order ADR, notwithstanding that one side opposes the making of such an order.

Having concluded that he had jurisdiction to make such an order, Blackburne J considered why he should do so, noting that the applicant stated in favour of such an order that a) the parties were in long-term relationships and will need to talk to each other and work together in future, possibly for many years b) the claimant and defendant had a shared interest in the success of the gallery, in particular, in the profit rent arrangements c) wider issues than those covered by the claim needed to be addressed between the parties d) there was nothing to lose and everything to gain from mediation e) there was a need to take the heat out of the dispute f) mediation could potentially save both parties money. Blackburne J saw particular merit in points a) and b). Denying an assertion that mediation threatened confidentiality and privilege, Blackburne J made an order mandating mediation, on terms similar to those requested.

There are a number of judicial statements that express the view that the presiding judge did not have the power to mandate mediation and even opposing the notion of mandated mediation. Thus in *H (A Minor)*⁹ Wall LJ stated that *"There needs to be a mechanism to reduce the mother's anxiety, assuming for this purpose that the father's bona fides are established. But that is a matter for the parties. I cannot compel them to mediation and indeed compulsory mediation is a contradiction in terms."* Since these judicial statements are made by the way, in relation to proposals and recommendation by the court, rather than as matters that the court had to decide, they do not amount to authority for the proposition that the courts cannot mandate mediation. Whether compulsory engagement in the mediation process, as opposed to a requirement to settle, is in fact a

⁸ *Tarajan Overseas Limited v. Donald Lee Kaye* [2001] EWCA Civ 1859

⁹ *H (A Minor)* [1998] EWCA Civ 98 (29 January 1998)

contradiction terms is less than certain. It is true that whilst one can lead a horse to water, one cannot make him drink. That however does not mean one should not, even in the face of stubborn resistance, take the strongest reasonable measures available to present the horse with the opportunity to drink.

Both **Halsey** and **Rickards** are Court of Appeal decisions, as indeed was **Muman**, and are thus of equal standing. If anything, **Rickards** has the stronger pedigree. Inevitably therefore, **Halsey** had to leave the question open as to whether or not the courts can lawfully mandate mediation. Only a decision of the House of Lords or fresh legislation can provide a final answer to this question.

The 2004 London Court Scheme steered a mid-way course between **Halsey** and **Rickards**. Rather than merely require the parties as per the Civil Procedure Rules to be advised on, consider and chose whether or not to opt in to mediation (including explaining to the court how they reached a decision not to opt in) the Trial Scheme required the parties, selected on a random basis, to mediate their dispute, subject to a right to opt out (also requiring reasons). Therefore the court shifted its mediation service from "*opt in*" to "*opt out*", each time with reasons and potential cost consequences.

Whether the opt in or opt out version is adopted, critics of mediation complain that the "*coercive*", some would say "*blackmail*," penalty of costs for unreasonably failing to mediate is unconstitutional and amounts in practice to an economically enforceable requirement to participate in mediation, which undermines the law on consent. The courts however have not accepted that cost penalties are a constraint contrary to the ECHR and the HRA.

The clear exception to the above however concerns Public Law disputes. Following on from **Cowl v Plymouth CC**¹⁰ and **Royal Bank of Canada**¹¹, it is clear that the courts are able to refuse an application for Judicial Review (available as a discretion - not a legal right) for a failure to exhaust all other avenues of resolution, including a wide variety of forms of ADR, including negotiation. In **Anufrijeva**¹² this was held to conform with Human Rights, which were the central issue under consideration by the court.¹³ Without expressly mandating mediation, the equivalent effect is achieved, in that, in the absence of an unsuccessful attempt to mediate, the courts are able and willing to refuse an application for Judicial Review. Clearly, such a refusal can only operate against the applicant, though the **Royal Bank** case demonstrates that a refusing public authority can have cost penalties imposed upon it.

It is important to distinguish between "ad hoc" references and contracted references. Contracted ADR must be further divided into consumer and commercial.

Where the parties to a commercial dispute are subject to a mediation provision, participation in the mediation process is a pre-requisite to litigation (or even arbitration in the case of a med/arb clause). The courts can, will and indeed must order a stay pending mediation, exactly the same as in arbitration and in construction adjudication.¹⁴ Contrary to the reference to **Deweer v Belgium** made by Dyson LJ in **Halsey**, the courts have not hesitated to stay action to Arbitration under s9 Arbitration Act 1996 (because there is a consent to waive the right to arbitration) and similarly on five occasions the courts have confirmed that construction adjudication is not contrary to the ECHR. A mere delay in getting to the courts has not been accepted as a constraint.¹⁵ The underlying rationale is that enforcement of both mediation agreements and adjudication decisions provide the parties with their day in court - so Article 6 is not breached.

Consumer arbitration is different in that there is a requirement for the UK to comply with the Unfair Contractual Terms Regulations. Hence s89-91 Arbitration Act 1996 provides that s9 does not apply to consumer arbitration - at least from the consumer's point of view. On the other-hand an "ad hoc" reference as a post dispute agreement is not an unfair waiver and is enforceable. Even this is questionable and may

¹⁰ **Cowl (Frank) v. Plymouth City Council** [2001] EWHC Admin 734 : [2001] EWCA Civ 1935

¹¹ **Royal Bank of Canada Trust Corporation Ltd v Secretary of State for Defence** [2003] EWHC 1479 (Ch)

¹² **Anufrijeva v L.B. Southwark; R v SS for H.D. ex parte N & M** [2003] EWCA Civ 1406

¹³ See also **Rye v Sheffield City Council** [1997] EWCA Civ 2257

¹⁴ See **Torith Ltd v Stewart Duncan Robertson** [1999] LTL C8200316 : **Cable & Wireless v IBM** [2002] EWHC 2059 : **Haines v Carter** [2002] UKPC 49 : **Donwins Production Ltd v EMI Films Ltd** [1984] Times 9th March 1984 : **Courtney & Fairbairn v Tolaini Bros.(Hotels) Ltd** (1975) 1 WLR 397.

¹⁵ see **Fab-Tek Engineering Ltd v Carillion Construction Ltd** [2002] Dunfermline Sheriff Court : **Karl Construction (Scotland) Ltd v Palisade Properties plc** [2002] GWD 7-212; 2002 SLT 312 : **Austin Hall v Buckland Securities Ltd** [2001] BLR 272 :

have been too cautious. Consumer home owners who contracted in to adjudication have been held to be bound to the process and that it does not amount to an unfair constraint on the right to litigation.¹⁶ It would appear that mediation / adjudication clauses in standard form consumer purchase contracts may still be a problem - but where the parties actually negotiate the terms of the contract they are not. Consumer adjudication / arbitration schemes dealing with the travel industry and the like are now common.

Apart from the Courts, which are governed by the CPR, there are a diverse range of publicly funded adjudicators, arbitrators, ombudsmen and tribunals in the UK that have statutory authority to settle disputes and challenges to the decisions of public bodies and bodies that exercise authority over matters that are in the public interest, such as the disciplinary committees of many of the professional bodies.

The first thing to note is that, in common with the courts, all quasi-judicial decision makers fall within the judicial review jurisdiction of the Queens Bench Division, High Court, under Part 54 CPR. Thus such decision makers may be held to account for failure to adhere to the rules of due process and natural justice. This facility goes a long way towards fulfilling the requirements of Article 6 ECHR.

The second point however, is that apart from the general rules and procedures set out in the Tribunals and Inquiries Act 1992 and the guidance provided by the Council on Tribunals, the powers and procedures of each tribunal are set out by Act of Parliament. There is a distinct lack on uniformity in this regard. It is not possible therefore to make generalisations as to whether or not such statutory decision makers have the power to mandate mediation. In each case careful consideration should be paid to the relevant statute before forming a view as to whether or not that might be the case. A number of these statutes specifically provide for mediation and thus sets out the mediation powers and duties of the decision maker.¹⁷

There is no general bar to a decision maker recommending pre-emptive mediation. Thus whilst the Housing Grants Construction and Regeneration Act 1996 provides a process whereby either party to a relevant construction dispute has the statutory right to refer a dispute to adjudication, there are a number of instances where the adjudication process has been terminated as a consequence of a settlement, on times brokered with the assistance of a mediator. Indeed, whilst **Glencot v Barret**¹⁸ outlines the dangers inherent in an adjudicator performing the function of a mediation and reassuming his role as an adjudicator in the event of a failure to mediate, with appropriate cautions issued, there is nothing to prevent an adjudicator so doing. However, it has now been established that a mediation provision cannot inhibit the right to a party to refer a dispute to adjudication and having accepted the appointment the adjudicator must, in the absence of consent and an extension of time by the appointing party or by joint consent, render a decision within 28 days.¹⁹

Where statute does not proscribe the period of time for producing a decision, there is scope for an intervening mediation process. This is the model adopted by Nominet, the expert determination process for the settlement of domain name disputes. Under this scheme the parties have the option to fast track direct to determination but attempts at mediation are the norm. Thus mediation is not mandated. It would appear that it is highly unlikely that the courts would support satellite judicial and quasi-judicial decision makers adopting mandatory mediation procedures in the absence of express statutory authority to do so.²⁰

¹⁶ See **Westminster Building Company Ltd. v Beckingham** [2004] EWHC 138 : **Lovell Projects Limited v Legg and Carver** [2003]BLR 452 : **Bryen & Langley Ltd v Boston** [2005] EWCA Civ 973.

¹⁷ **Employment Rights (Dispute Resolution) Act 1998**

¹⁸ **Glencot Development & Design Ltd v. Ben Barrett & Son Ltd** [2001] EWHC TCC 15

¹⁹ **R G Carter Ltd v Edmund Nuttall Ltd** (2002) BLR 359

²⁰ **Secretary of State for Defence v Farrow System Ltd** [2005] BL O/008/05