Fully Charged! Recent decisions where the Court has been positive in compelling parties to engage in ADR

Published 30 March 2020

Parties to litigation have long been encouraged to consider Alternative Dispute Resolution (ADR). Its numerous benefits include assisting parties to resolve disputes more quickly and cheaply than through the litigation process. Parties are free to design creative solutions, tailored to their needs and which a Court may not or may not be able to order. ADR is confidential, and even if it does not produce an immediate settlement, can be a useful reality check for all parties, giving everyone the opportunity to evaluate their opponent and test arguments. Whilst there may be cases unsuitable for ADR, that is likely the exception rather than the rule, e.g. if precedent is required as there are a number of similar claims waiting in the wings.

Mediation is a popular ADR tool, promoted by the Courts. Whilst the Court of Appeal has declined to compel parties to mediate, litigants who unreasonably refuse to mediate risk being penalised in costs, even if they ultimately succeed at trial. Accordingly, an invitation to mediate should be declined only after careful consideration with your lawyers.

Two recent decisions on different aspects of ADR show that the Courts are increasingly prepared to exercise their powers to compel parties to engage in ADR.

Enforcing a pre-existing agreement to mediate?

Under existing law, parties will not be forced to mediate, but the Court will enforce a pre-existing agreement to mediate (or to use other ADR methods). In *Ophen* [1] the judge, Mrs Justice O'Farrell, stayed the claim because the parties had contractually agreed to use mediation before litigating. She identified the following as relevant to whether to enforce an agreement to use ADR:

1. The agreement must create an enforceable obligation to engage in ADR, clearly expressed as a condition precedent to court proceedings or arbitration.
2. The ADR process does not have to be formal, but must be objectively clear and certain, including the process to appoint a mediator or determine other necessary steps without the need for any further agreement by the parties.
3. In exercising its discretion to stay proceedings commenced in breach of an enforceable ADR agreement, the Court will consider the public interest in upholding commercial agreements and the overriding objective to assist in dispute resolution, as well as the interests of justice and the Overriding Objective as defined in the Civil Procedure Rules.

The judge found that the CEDR Model Mediation Procedure, as referred to in the contract, was a sufficiently clear and certain mechanism, which required no further agreement from the parties.

Professionals who wish to include a contractual agreement to use ADR in client retainers should review their contract wording to ensure, so far as possible, that it complies with the Court guidance in *Ophen* to minimise the risk that the relevant clauses will be found unenforceable.

Early Neutral Evaluation

In *Lomax* v *Lomax* [2] the Court of Appeal considered whether parties to litigation can be compelled, against their will, to engage in Early Neutral Evaluation ("ENE"). The Court held that it could.

Under CPR 3.1(2)(m) the Court has the power to *"take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case"*.

ENE is a process led by an independent third party who considers the facts, law and evidence and provides an opinion on the merits. Norris J described its advantages over mediation in Seals [3] when ENE was summarised as follows:

"a judge will evaluate the parties' cases in a direct way and may well provide an authoritative (albeit provisional) view of the legal issues at the heart of this case and an experienced evaluation of the strength of the evidence available…The process is particularly useful where the parties have very differing views of the prospects of success and perhaps an inadequate understanding of the risks of litigation itself."

Unlike mediation, where a mediator is involved in a facilitative capacity, in ENE the third party will be more directive. ENE

can be Court led, or engaged privately. As the process is undertaken at an early stage (the clue is in the name!), the facts and evidence may be not fully known, but in appropriate cases ENE can be used to find acceptable settlement terms before incurred legal costs become a settlement blocker.

Lomax was a contentious probate dispute, which the first instance judge identified as one which *"cries, indeed screams out, for a robust judge-led process to focus on the legal and factual issues…and perhaps even craft a proposed solution for the parties to consider"*. However, Parker J did not consider she had the power to compel parties to engage in ENE against their will. The Court of Appeal disagreed, and decided that implying a requirement for consent into CPR 3.1(2) was inconsistent with the Overriding Objective.

Professionals facing claims should consider, with their legal advisors (and insurers) whether ENE would assist in a dispute. Whilst it will involve additional costs, if the opposing party is refusing to accept the weakness of (parts of) their case, hearing that message from an authoritative third party could be invaluable.

Examples of ADR

Negotiation	Attempting to reach settlement by negotiation, without input from a third party.
Mediation	A mediator (neutral third party) assists the parties to identify and narrow the issues, and attempt settlement.
Early Neutral Evaluation	An independent third party considers the facts, law and evidence and provides an opinion on the merits. ENE can – by prior agreement – produce a binding decision to determine the dispute.
Arbitration	An independent third party is appointed by the parties to determine the dispute. The arbitrator acts as "judge" but in a private process, tailored to the dispute.
Expert Determination	An expert provides a binding opinion, for example, a valuation. Expert determination is often used where it has been specified as an dispute resolution mechanism in a contract.
Adjudication	A speedy procedure, often used in construction, where a third party provides an interim binding decision (pending final resolution of the dispute, e.g. by litigation, arbitration or other forms of ADR).

[1] *Ophen Operations UK Limited v Invesco Fund Managers Limited [2019] EWHC 2246 (TCC)*

[2] *[2019] EWCA Civ 1467*

[3] Seals and Seals v Williams [2015] EWHC 1829 (Chancery)

Authors

Suzanne Wharton
Leeds
+44 (0)113 251 4775
swharton@dacbeachcroft.com

Naomi Park
Leeds
+44 (0)113 251 4793
npark@dacbeachcroft.co.uk