WHY USE MEDIATION

BY MICHAEL GALLUCCI

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INTRODUCTION

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The motivations to use mediation are many and varied and include a perception that the costs of dispute resolution will be reduced, and settlement will be achieved more quickly and more closely to the point when the dispute arises. Mediation offers a forum to the parties that allows: control and flexibility of the process; confidentiality and 'without prejudice' principles to be adopted; the protection of future working relationships between the parties and the management and control of risk.

Conflict arises between parties from the assumptions made about the appropriate behaviour by individuals in particular situations. Different people have different expectations and different values. Many conflicts arise when the significance of one party is not properly recognised by the other, and it is the role of the mediator to develop an understanding of the different dimensions to the conflict and find ways to bridge the divide.

REDUCES COSTS

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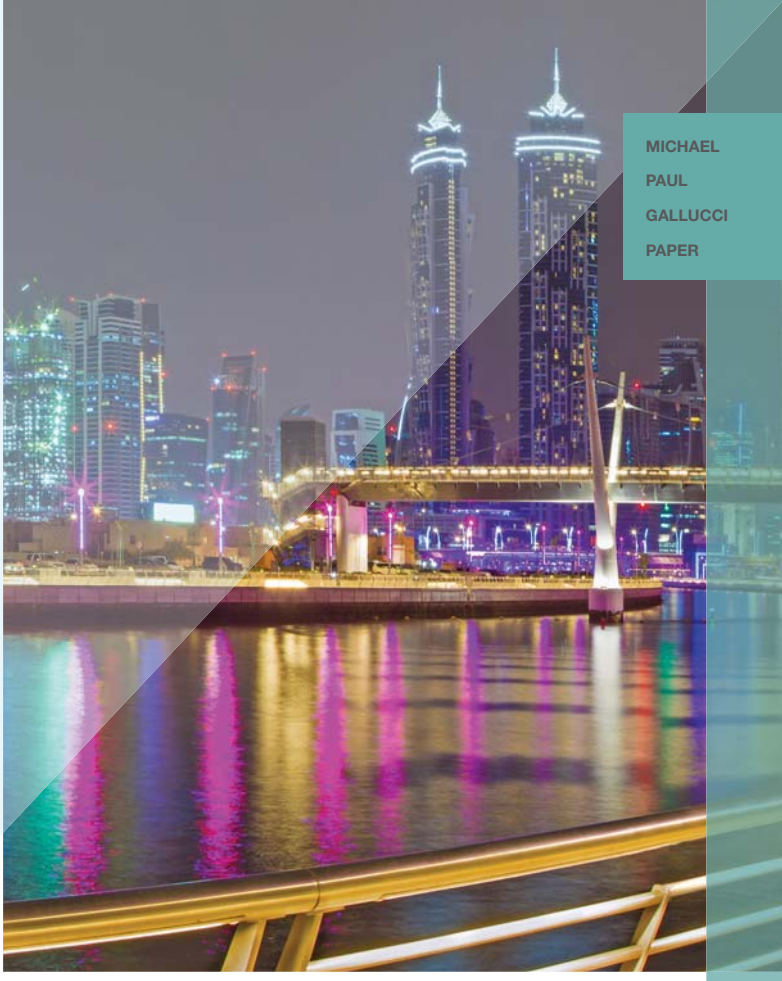
Since the Jackson Reforms of 2013[1] (and the Woolf Report in 1996), the overriding objective to reduce litigation cost and the time to resolve disputes has meant that the courts actively encourage the use of mediation as an alternative to litigation. If one party unreasonably refuses an invitation to mediate or partake in other forms of ADR, then this could be being unreasonable, and the courts may impose sanctions against the party that refused the invitation.

In **PGF II SA v OMFS** the claimant sent OMFS a **"carefully thought through and apparently sensible mediation proposal"**.[2] OMFS did not respond to the mediation request and the Court of Appeal decided that the non-response or silence to the request was regarded as unreasonable behaviour.

The consequences of the defendant's refusal to mediate were that it had spent more money on legal costs since making a Part 36 offer to the claimant. The claimant accepted the Part 36 offer on the eve of the trial commencing. Had the offer to mediate been accepted, then the matter may well have been settled at this point and the Court of Appeal deprived the defendant of recovering the costs between when they made the Part 36 offer and its acceptance. The claimant however was not entitled to recover his costs from the defendant due to his unreasonableness.

AVOID SANCTIONS



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The Court referred to the ADR handbook **"as the following practical steps to avoid a sanction: do not avoid an offer to engage in ADR. Failure to respond is likely to be treated as an outright refusal; respond promptly, in writing, giving clear and full reasons why ADR is not appropriate at this stage…; if lack of evidence is an obstacle to a successful ADR process being undertaken at that time, this must be canvassed with the other party to the dispute"**.[3]

The principles of unreasonable conduct in mediation had been previously defined by the courts in **Halsey v Milton Keynes** and in **Carleton (Earl of Malmesbury) v Strutt and Parker**[4], where a party that agrees to mediation and then takes an unreasonable position is the same as a party that unreasonably refuses to mediate.[5]

Issues relating to mediation are a common occurrence in construction disputes. In **Rolf v De Guerin**, Rix LJ remarked in the case between a homeowner, Mrs Rolf and the builder John De Guerin, that is was a **"sad case about lost opportunities for mediation. It demonstrates, in a class of dispute, how wasteful and destructive litigation can be."**[6] Jackson LJ's report into costs was also examined, particularly para 4.5 on page 299, wherein he wrote of encouraging ADR: **"The two principal forms of ADR are conventional negotiation and mediation ADR has proved effective in resolving construction disputes of all sizes. In relation to small building disputes, however, it is particularly important to pursue mediation, in the event that conventional negotiation fails."**[7]

The refusal to mediate between homeowner and builder was also explored in the Court of Appeal in **Burchell v Bullard**[8] where Burchell built two home extensions for Mr and Mrs Bullard and where, whilst the first two stage payments (of four) were paid, the third payment was not made and a dispute arose. Burchell wrote to the other party referring the matter to ADR through a "qualified construction mediator", but Mr and Mrs Bullard refused and the case went to court. Burchell was awarded nearly his entire claim and the Bullard's were awarded 15% of their counterclaim, whilst the combined cost incurred by the parties was more than £185,000 for a £5,000 dispute.

The bulk of the costs incurred were for the Mr and Mrs Bullard's counterclaim and the costs order against Burchell made him responsible for a bill of £136,000. He appealed and he was successful in that Mr and Mrs Bullard were ordered to pay 60% of Burchell's costs of the claim, counterclaim and Part 20 proceedings and the costs of appeal. Burchell was not ordered to pay any of Mr and Mrs Bullard's costs.

Also **Farm Assist v The Secretary of State for the Environment** where the mediator was compelled by Ramsey J to give evidence in the TCC when Farm Assist sought to set aside a mediation settlement that they argued they had entered into whilst under economic duress.[10] The mediator applied to have the witness summons set aside, but in the interests of justice the application was refused.

Whilst there is plenty of pressure from the Courts to mediate, it can only proceed if both parties agree. In May 2012, CEDR[11] carried out a study of mediation usage in commercial and civil matters. They estimated that around 8,000 cases are mediated per year. This is against a backdrop of around 50,000 claims being issued each year in the High Court. It is certain that many claims settle before proceeding to trial, but the take-up rate of mediation is still quite low.

CONFIDENTIALITY

Generally, the 'without prejudice' rule exists in mediation; however, the parties can choose to waive the privilege. There are some exceptions to this, particularly the decision in **Brown v Rice** where the court decided that communications made during mediation could be admitted as evidence to confirm whether a settlement had actually been achieved.[9]

HAVING YOUR DAY IN COURT

If a party is seeking vindication or an apology, or just needs to get things 'offtheirchest',mediationcan achieve this without the associated cost of litigation. Disputes bring about a lot of emotion and the admittance from one or both parties that they got it wrong can clear the air to allow matters to settle.

POUR ENCOURAGER LES AUTRES

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n Voltaire's operetta **Candide**, the fate of Admiral John Byng who was executed in 1756, is referred to in the quote **"dans ce pays-ci, il est bon de tuer de temps en temps un amiral pour encourager les autres"**. The translation being **"in England, it is good, from time to time, to kill an admiral, to encourage the others"**.

In **PGF v OMFS**, Briggs LJ warned litigants of the perils of ignoring the call to mediate in his statement **"this case sends out an important message to litigants, requiring them to engage with a serious invitation to participate in ADR, even if they have reasons which might justify a refusal…the more proportionate conduct of civil litigation is so important in current economic circumstances that it is appropriate to emphasise by sanction which, even if a little more vigorous than I would have preferred, nonetheless operates pour encourager les autres"**.

This encouragement is not new, and each case that ends up in court is taken on its own merits. In **Dunnett v Railtrack** the parties were encouraged to use ADR and when Railtrack said they were unwilling to cooperate, cost sanctions were applied against them.[12] Going back to 2001 in **Hurst v Leeming**[13], the refusal to mediate was discussed in court and it was found that it was reasonable for Leeming to refuse to mediate due to the attitude and poor character of the claimant which meant the ADR would be wasted. In **Wills v Mills and Co**, Mills were entitled to take the view that the basis of the case was made known to them before mediation be considered.[14]

[1] UK Ministry of Justice website <http://www.justice.gov.uk/civil-justice-reforms>

[2] PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288 (23 October 2013)

[3] Blake, Brown & Sime, The Jackson ADR Handbook (OUP 2013) Para 11.56

[4] Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576, [2004] 1 WLR 3002

[5] Carleton (Earl of Malmesbury) v Strutt & Parker [2008] EWHC 424 (QB)

[6] Rolf v De Guerin [2011] EWCA Civ 78

[7] Jackson LJ, Review of Civil Litigation Costs: Final Report (TSO, 2010)

[8] Burche11 v Bullard [2005] EWCA Civ 358, [2005] BLR 330, [2005] 3 Costs LR 507

[9] Brown v Rice and Patel [2007] EWHC Ch 625

[10] Farm Assist Limited (in Liquidation) v The Secretary of State for Environment, Food and Rural Affairs (no. 2) [2009] EWHC 1102 (TCC)

[11] Copeman, Julian, 'Gentle Persuasion' (Litigation Focus, 2012) <http://sites.herbertsmithfreehills.vuturevx.com/20/2615/landing-pages/p07-to-p09-sj-litigation-focus.pdf >

[12] Dunnett v Railtrack plc [2002] EWCA Civ 303

[13] Hurst v Leeming [2001] EWHwC 1051 (Ch), [2003] 1 Lloyd's Rep 379

[14] Wills v Mills & Co Solicitors [2005] EWCA Civ 591

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ABOUT THE AUTHOR

Michael Gallucci is the Founder and Managing Director of MPG, providing quality surveying, project management, expert witness and dispute resolution services. With more than 25 years' experience in the construction industry, Michael is an expert in mediation, arbitration and dispute resolution. He is an accomplished and experienced MEP Quantity Surveyor, Project Manager and Quantum Expert Witness.

Michael is a member of the Society of Construction Law, the Chartered Institute of Arbitrators and the Royal Institution of Chartered Surveyors, and is an RICS Accredited Mediator.

Having graduated with a MSc in Construction Law and Arbitration, Michael has completed an I-GDL at the University of Law.

He enjoys travel, which is fortunate as the MPG network of offices grows across Europe and the Middle East. Michael spends his time away from work competing in triathlons, playing golf, watching West Ham and looking after his twins, although not necessarily in that order.

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