HAS MEDIATION HAD ITS HEYDAY?

An analysis of the decision in *Gore v Naheed & Anor [2017] EWCA Civ 369*

Mediation has long been an alternative dispute resolution mechanism of choice and, in the UK at least, its popularity is on the rise. The turn to mediation, away from litigation, is driven by a number of factors:

- Mediation allows the parties to maintain control over the outcome of their dispute;
- it is quicker than litigating a case all the way to trial; and, crucially
- an early mediation will nearly always be substantially less costly than litigating.

The court has also encouraged the drive to mediation. The “overriding objective” of the Civil Procedure Rules (CPR) is to enable the court to deal with cases justly and at proportionate cost. One of the ways in which the court can seek to further the overriding objective is to encourage the parties “to use an alternative dispute resolution procedure if the court considers it appropriate” (see CPR Rule 1.4(2)(e)).

Alternative dispute resolution (ADR) includes mediation, and the court has increasingly encouraged parties to mediate specifically (although not exclusively) by applying costs sanctions to those parties that unreasonably refuse to mediate. A recent Court of Appeal decision may reverse that trend, however, and this article looks at whether the decision is likely to have any lasting impact on the increasing popularity of mediation as a form of ADR.

HOW DO THE COURTS ENCOURAGE MEDIATION?

The “usual rule” in litigation is that the winning party will have a proportion of their costs paid by the losing party. However, the CPR gives the court a wide discretion when it comes to determining both who should pay the costs of litigation, and how much. One factor that has recently influenced the judicial exercise of discretion is whether or not a party has unreasonably refused to take part in a mediation. The decision in the 2013 case of *PGF II SA v OMFS Company 1* marked a high point for judicial encouragement of mediation. In the PGF case, the winning party was prevented from recovering any of its costs where it had failed to respond to an invitation to mediate. Emphasising the need for the courts to encourage parties to participate in ADR, Briggs LJ said in the PGF case that silence in the face of an invitation to mediate should, as a general rule, be treated as unreasonable. This is regardless of whether a refusal to mediate might in the circumstances have been justified.

Faced with the somewhat draconian and costly prospect of not recovering any litigation costs even if successful at trial, parties would need to have very strong grounds on which to refuse an invitation to mediate if they later wanted to avoid the adverse cost implications of doing so. Such were the potential penalties, it has not been unheard of for parties to litigation to participate in a mediation without any genuine intention or desire of settling the claim, the perception being that the wasted costs of the mediation was “money well spent” if it allowed a party to recover the more substantial costs of the litigation itself.

However, the recent Court of Appeal decision in *Gore v Naheed and Ahmed* is a reminder that a refusal to mediate will not always be seen as unreasonable and will not always preclude a successful party from recovering its costs. In *Gore*, the court held that a refusal to mediate may be considered reasonable. Putting the point succinctly, Patten LJ said:

> “I have some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated.”

Instead, Patten LJ noted that a failure to engage in mediation will not always be unreasonable and will not automatically result in a costs penalty. He emphasised that conduct as regards participation in
ADR is simply one factor, usually of many, to be taken into account when a judge exercises their discretion on costs. Here the case was complex, and the claimant’s solicitor suggested that the dispute was unlikely to be capable of settlement at mediation; both factors influenced the decision of the first instance judge, with whom Patten LJ agreed.

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The decision in Gore is reconcilable with earlier authorities, including the PGF case. Gore can be seen as a reminder that the PGF decision held only that silence in the face of an invitation to mediate will always be considered unreasonable, not that a justified decision not to mediate will always be unreasonable. Gore leaves open, and possibly widens, the opportunity to argue that mediation was not an appropriate means of ADR, particularly where cases involve complex areas of law and fact.

It remains to be seen whether the decision in Gore has a wider impact than on cost recovery and leads to a decline in the popularity of mediation. In the writer’s view it seems unlikely to do so. The success story of mediation is based on a whole raft of factors, the cost implication of refusing to mediate being just one driver (and usually a minor one at that).

Mediation will continue to offer parties an opportunity to reach a commercially acceptable resolution without the costs and risks associated with litigation. Further, complex cases and issues are often more suited to ADR and mediation. Complexity and risk are inextricably linked in the litigation matrix, and the more complex a case, the more difficult it is to predict prospects of success at trial. Those are the very cases where maintaining control over the outcome and the terms of any settlement are key. The fact that parties maintain control in a mediation will continue to be an important consideration when deciding whether to mediate.

There are other factors at play, too. Speed of resolution, principled negotiation and avoiding the stresses of time-consuming litigation are all benefits of mediation that survive the Court of Appeal’s decision in Gore.

It seems likely, therefore, that mediation will continue its steady march to being a preferred form of dispute resolution with litigation being an option of last resort.

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