



Commercial Mediation: the Impact of the Courts

By

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1. INTRODUCTION

Private commercial mediation does not take place in a legal vacuum. Many legal principles are highly relevant to mediation, such as confidentiality, without prejudice, impartiality, conflicts of interest, privilege and so on. To write comprehensively about the law relating to mediation would require a short book. So the aim of this article is only to deal with some of the judgments of the High Court in England and Wales and parts of the Civil Procedure Rules (CPR) where mediation has been referred to and from which some threads can be drawn and general principles established.

2. THE CPR AND THE PRE-ACTION PROTOCOLS

The Woolf reforms to civil procedure required more work to be done on a dispute before proceedings were issued. This has had the inevitable effect of causing costs to be incurred earlier than they used to be. It also means that sufficient facts and expert opinions are often available pre-proceedings in good enough detail to enable the parties to have the information they need to be able to make informed decisions about settlement earlier. Consequently, more mediation is possible pre-proceedings than was possible before Woolf. For example, the court must further the overriding objective by actively managing cases.¹ Active case management includes encouraging the parties to use an alternative dispute resolution procedure, if the court considers that appropriate, and facilitating its use.²

When a party files the allocation questionnaire, it can make a written request for the proceedings to be stayed while the parties try to settle the case by alternative dispute resolution or other means.³ Where either all parties request a stay of the proceedings to facilitate mediation or the court, of its own initiative, considers that a stay would be appropriate, the court has power to order a stay for one month.⁴ The court's own initiative, however, does not extend to ordering mediation in the face of opposition from one or more parties.⁵

Further, there are specific pre-action protocols separately for each of clinical negligence, construction and engineering disputes, defamation, diseases and illnesses, housing disrepair, judicial review, personal injury, professional negligence (other than construction, engineering and healthcare) and, from October 2, 2006, possession claims based on rent arrears. Each of those protocols requires the parties to consider at the pre-action stage whether, and if so how, the issues might be resolved without recourse to litigation. The Practice Direction—Protocols, which is the overriding practice direction, makes it clear that failure to comply with the protocols can later be taken into account by the court when determining costs,⁶ and provides for cases not within the specific protocols by saying⁷:

“The courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned

¹ CPR r.1.4.

² CPR r.1.4(e).

³ CPR r.26.4(1).

⁴ CPR r.26.4(2).

⁵ *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576.

⁶ Practice Direction—Protocols, para.4.7.

⁷ *ibid.*



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that if this paragraph is not followed then the court must have regard to such conduct when determining costs.”

One of the methods of settlement expressly referred to is mediation. The requirement to consider mediation is at the heart of pre-action conduct in civil litigation.

3. COMPULSORY MEDIATION?

There has long been a debate as to whether mediation should be compulsory in the sense that it should be required as a necessary incident to court proceedings. Those against compulsion say that mediation is a voluntary process; that compulsion is anathema and that some cases are unsuitable for mediation (injunctions, the need for a precedent, etc.). Those in favour of compulsion say that mediation has a good success rate; that it could be compulsory subject to an opt-out, such as a judge agreeing that it is not appropriate in a particular case; that nothing is lost by attempting it; that, subjectively, mediators feel the rate of success is no different where cases have been vigorously pushed (but not ordered) by judges into mediation; where some attempt to measure this has been looked at in Australian research,⁸ it seems that the rates of settlement in court-ordered mediation are much the same as when mediation is voluntary. Whatever the rights and wrongs of that debate, the current position is that parties are not compelled into mediation by the courts of England and Wales. That was not always so.

In *Kinstreet Ltd v Balmargo Corporation Ltd*⁹ in 1999, in the face of a party’s opposition to mediation, the court nevertheless ordered alternative dispute resolution (ADR). Arden J. took the view that r.1.1 of the CPR, the “overriding objective”, opened the way and that the then Appendix 7 to the Admiralty and Commercial Courts Guide provided the structure for such an Order. Then in *Muman v Nagasena*¹⁰ in 2000, a dispute over the administration of a charity, a stay had been ordered for reasons unconnected with mediation. Mummery L.J. said:

“I would also direct that the stay on the proceedings should not be lifted until after an attempt has been made by both parties to resolve this dispute by mediation.”

In *Shirayama Shokusan Co Ltd v Danovo Ltd*¹¹ in 2003, Shirayama was in dispute with their tenant which owned and operated the Saatchi Gallery. Relationships had been exacerbated by the issuing of proceedings by Shirayama and by Mr Saatchi making allegations of dishonesty against people associated with Shirayama. Shirayama said their rights under the lease were very clear; either they were right or they were wrong but either way they were not prepared to mediate because there was nothing they could compromise. Danovo asked the court for an order requiring mediation. Blackburne J. ordered mediation, deriving support from both *Kinstreet* and *Muman* that he had jurisdiction so to do. So by 2003, it looked as if the courts were adopting the jurisdiction to order mediation.

However, by 2004 that position was altered when the Court of Appeal decided that courts cannot order mediation: *Halsey v Milton Keynes NHS Trust*¹² and *Steel v Joy and Halliday* (cases heard together in the Court of Appeal). Dyson L.J. was in no doubt that the courts should encourage the use of mediation and referred to the government pledge¹³ to use it in appropriate cases, including the commitment of the National Health Service Litigation

⁸ “Court Referral to ADR: Criteria and Research”, NADRAC, 2003.

⁹ Unreported, but available at: www.adr.civiljusticecouncil.gov.uk

¹⁰ Court of Appeal, [2000] W.L.R. 299.

¹¹ [2003] EWHC 3006, Ch.

¹² [2004] EWCA Civ 576.

¹³ The “ADR pledge”, which was announced by the Lord Chancellor in March 2001; available at: www.dca.gov.uk.

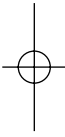


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Authority to mediation in clinical negligence cases. As to compelling parties into mediation, against their will, the court's decision was largely based on the following analysis:

"9. 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 *Deweere 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.'



The comparison with arbitration is interesting: arbitration agreements, by their very nature, oust the jurisdiction of the court on the substantive issues that comprise the dispute (save as otherwise provided by statute); mediation, on the other hand, seeks to do no such thing because it can take place with or without the need for the court proceedings to be stayed or even before court proceedings are started. So, if mediation were court-ordered, the right of access to the court is not in reality "waived" at all; a judgment might possibly be delayed by a month if a stay is ordered for mediation. Can that mean it was an "improper constraint", given the policy of the courts, here and elsewhere in Europe, to encourage mediation? It seems more likely on balance that the answer to that question should be "no". As to the point that mediation is most effective when it is voluntary, experience is different in jurisdictions where mediation is court ordered. Whatever the arguments, *Halsey* has decided that judges should not compel parties into mediation and that is the end of the debate about compulsion for the foreseeable future. There is no doubt that mediation would have grown at a very fast rate since 2004 if the Court of Appeal had come to a different view.



4. COST SANCTIONS WHERE THERE IS A REFUSAL TO MEDIATE

In *Frank Cowl v Plymouth CC*,¹⁴ Lord Woolf said:

"Today sufficient should be known about ADR to make the failure to adopt it, in particular when public money is involved, indefensible . . . This case will have served some purpose if it makes it clear that the lawyers acting on both sides of a dispute of this sort are under a heavy obligation to resort to litigation only if it is really unavoidable. If they cannot resolve the whole of the dispute by the use of the complaints procedure they should resolve the dispute so far as is practicable without involving litigation."

The scene was now set to take those ideas forward and when *Dunnett v Railtrack Plc*¹⁵ came to the Court of Appeal, the climate moved on again. Susan Dunnnett sued Railtrack for damages caused when one of her horses strayed onto a railway line owned and maintained by Railtrack. Railtrack disputed liability. At first instance, the judge had suggested mediation, but Railtrack refused to consider it. The Court of Appeal decided that even though Susan Dunnnett

¹⁴ [2001] EWCA Civ 1935; [2002] 1 W.L.R. 803.

¹⁵ [2002] EWCA Civ 303; [2002] 1 W.L.R. 2434.

had not succeeded, either before the judge or on appeal, she should not be ordered to pay Railtrack's costs of the appeal, because it had unreasonably refused to consider mediation. This was a seminal moment for the development of mediation in England and Wales.

There was then a series of court decisions¹⁶ where the *Dunnett* principle was used to apply the cost sanction in some cases and not in others, depending on the particular facts of each case. It was difficult to see a theme running through these cases. One of them was *Royal Bank of Canada Trust Corp Ltd v Secretary of State for Defence*¹⁷ in 2003. The Secretary of State for Defence was deprived of costs because of his refusal to comply with the government pledge¹⁸ to use ADR. However, in *Halsey* in 2004, the Court of Appeal said¹⁹ that the judge had been wrong to attach such weight to the pledge.

By 2004, it was clear that some guidance was needed from the Court of Appeal as to how this costs sanction should be applied. This came in *Halsey v Milton Keynes NHS Trust*.²⁰ All the earlier decisions on costs should now be read in the light of *Halsey*, where the Court of Appeal gave some guidelines as to how an unreasonable refusal to mediate should be assessed but stressed that the guidelines were not exhaustive. Dyson L.J. set them out (my comments in brackets):

- The nature of the dispute. It was said some disputes may not be inherently capable of mediation, such as fraud, the need for a binding precedent, a point of law or injunctive relief. On the other hand, “most cases are not by their very nature unsuitable for ADR”. (The practical reality in mediation is that most of the categories mentioned are suitable for mediation, except injunctive relief and, possibly, the need for a binding precedent. Points of law are routinely in issue in mediations.)
- The merits of the case. If a party reasonably believes it has a strong case, that is relevant to the question whether it has acted reasonably in refusing ADR. An unreasonable belief that a case is watertight is no justification for refusing mediation. Dyson L.J. said: “. . . Large organisations, especially public bodies, are vulnerable to pressure from claimants who, having weak cases, invite mediation as a tactical ploy. They calculate that such a defendant may at least make a nuisance-value offer to buy off the cost of a mediation and the risk of being penalised in costs for refusing a mediation even if ultimately successful.” (Both of those points arise regularly in the course of mediations and are usually dealt with satisfactorily by parties and the mediator being aware of power imbalances *in both directions*.)
- Other settlement methods have been attempted. Dyson L.J. said: “The fact that settlement offers have already been made, but rejected, is a relevant factor. It may show that one party is making efforts to settle, and that the other party has unrealistic

¹⁶ e.g. but by no means an exhaustive list: *Malkins Nominees v Société Finance* [2002] EWHC (costs sanction amounting to a 15 per cent reduction); *Hurst v Leeming* [2001] EWHC 1051, Ch (no costs sanction—the attitude of one party was believed to render a mediation pointless); *Neal v Jones Motors* [2002] EWCA Civ 1731; [2002] EWCA Civ 1730; and [2002] EWCA Civ 1757 (costs sanction applied: £5,000 reduction in costs payable); *McCook v Lobo* [2002] EWCA Civ 1760 (personal injuries—no sanction—the Court of Appeal thought it would have been inappropriate to have mediated in any event); *Leicester Circuits Ltd v Coates Brothers Plc* [2003] EWCA Civ 290 (costs sanction applied in respect of period after Coates withdrew from a mediation that had been agreed); *Corenso (UK) Ltd v The Burnden Group Plc* [2003] EWHC 1805, QB (no sanction—the judge drew a distinction between mediation and ADR, which included “negotiation”); and *McMillan Williams v Range* [2004] EWCA Civ 294 (costs sanction—appellant pulled out of mediation at short notice—both parties deprived of costs of the appeal by reason of the “posturing and jockeying” of each party).

¹⁷ [2003] EWHC 1841, Ch.

¹⁸ See *Shirayama v Danovo*, above fn.11.

¹⁹ *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576 at [34] & [35].

²⁰ [2004] EWCA Civ 576.

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- views of the merits of the case. But it is also right to point out that mediation often succeeds where previous attempts to settle have failed.” (This leaves open scope for considerable debate when such matters are argued in court.)
- The costs of mediation would be disproportionately high. This was said to be most likely in cases where the sums in dispute are small. (There are mediation schemes²¹ in existence that may be able to deal with such disputes cost-effectively.)
 - Delay. If mediation is suggested late in the day, acceptance of it may have the effect of delaying the trial of the action. This is a factor which it may be relevant to take into account in deciding whether a refusal to agree to ADR was unreasonable. (This is clearly right in principle, although it begs the question as to why it was not suggested earlier by *each* party.)
 - Whether the mediation had a reasonable prospect of success. The Court of Appeal accepted that this test will sometimes be difficult to apply in practice. That one party is obdurate may be a good reason for the other party refusing mediation, but, conversely, it may be a bad reason for the obdurate party to refuse mediation offered by the other party. (Most cases have a reasonable prospect of success. This guideline in particular may impact adversely on the number of cases coming to mediation if it is regularly accepted by the court as making reasonable a refusal to mediate. However, this guideline will be extremely hard for the courts to apply, except perhaps in very clear cases. There are also issues as to certain information being privileged from production that the court otherwise needs to exercise its discretion.)

Since *Halsey* there have been a number of reported cases²² on costs where there was a determination as to whether or not there had been an unreasonable refusal to mediate that merited a costs sanction. It remains difficult to draw lessons from them because the courts properly continue, as they did before *Halsey*, to look at the particular circumstances in each case, albeit now within the framework set out in *Halsey*. What is clear is that a costs sanction will not inevitably follow a refusal to mediate, but that such a refusal may carry the risk of a costs sanction. That is itself an encouragement of mediation.

Whether the court, in reviewing the conduct of the parties, was permitted to look at without prejudice material in relation to a mediation was considered in *Reed Executive Plc and Reed Solutions Plc v Reed Business Information Ltd, Reed Elsevier (UK) Ltd and Totaljobs.com Ltd*.²³ The Court of Appeal decided that the rule²⁴ in *Walker v Wilsher*²⁵ remains good law after *Halsey* and that it could not order disclosure of without prejudice discussions against the wishes of one of the parties. It follows that in some cases the court will not be able look at information that might otherwise assist it to decide whether one party has unreasonably refused mediation.

In *Burchell NF v Mr & Mrs Bullard*,²⁶ no adverse costs order was made on the particular facts, but the Court of Appeal warned that such costs consequences can follow an

²¹ Such as the CI Arb’s “Cost Controlled Mediation Scheme”.

²² e.g. but by no means an exhaustive list: *Yorkshire Bank Plc and Clydesdale Bank Asset Finance Ltd v RDM Asset Finance and J.B. Coach Sales*, 2004, unreported but available at the website of CEDR in their “EDR Law” section: www.cedr.co.uk; *Reed Executive Plc and Reed Solutions Plc v Reed Business Information Ltd, Reed Elsevier (UK) Ltd and Totaljobs.com Ltd* [2004] EWCA Civ 887; *Longstaff International Ltd v Evans* [2005] EWHC 4, Ch; *Burchell v Bullard* [2005] EWCA Civ 358; *The Wethered Estate Ltd v Davis, Davis and Foundations for Living* [2005] EWHC 1903, Ch; and *Hickman v Laphorn* [2006] EWHC 12, QB.

²³ [2004] EWCA Civ 887.

²⁴ In essence, the rule is: letters or conversations written or declared to be “without prejudice” cannot be taken into consideration in determining whether there is good cause for depriving a successful litigant of costs.

²⁵ (1889) 23 Q.B.D. 335.

²⁶ [2005] EWCA Civ 358.

unreasonable refusal to mediate at a time prior to the commencement of proceedings. Costs sanctions may also be possible against *unsuccessful* parties (cf. the discussion in *Halsey* which concerned *successful* parties).

In *Hall v Pertemps Group Ltd*,²⁷ threats made at the mediation were alleged by one party and denied by the other in this “satellite litigation”.²⁸ It was those pleadings that allowed the judge to find that there had been a mutual waiver of privilege in this case. However, that kind of analysis did not apply to the circumstances of the withdrawal of a Pt 36 offer in this case, which remained covered by the protection of the without prejudice cloak. So what happened in the mediation in relation to the threat allegations could be taken into account in looking at costs, whilst the withdrawal of the Pt 36 offer could not.

5. ENCOURAGEMENT OF MEDIATION BY JUDGES

So, if mediation cannot be compelled by judges, what actually happens in the courts to encourage mediation in advance of any need to consider costs sanctions as described in *Halsey*? Some high court judges are very keen to try to get parties to agree to mediation, but, subjectively viewed, many judges appear to be not so keen. The Court of Appeal has its own mediation scheme instigated by Lord Woolf when he was Master of the Rolls. Mediation is not compulsory under the scheme, which is administered by the Centre for Effective Dispute Resolution (CEDR). Mediator appointments are made by CEDR from a panel of mediators approved by the Court of Appeal. The attention of the parties to an appeal is drawn to the scheme. Further, when the Court of Appeal considers an application for permission to appeal, it is expressly required to say whether the matter is suitable for mediation. If so, the court sends details of the case to CEDR and writes directly to the parties seeking agreement to mediation.

In reported cases in the High Court and Court of Appeal, there are innumerable examples²⁹ of judges encouraging parties to mediate in a diverse range of types of dispute. A recent example is a dispute about the construction of the new Wembley Stadium, *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd*.³⁰ Jackson J. said:

“Finally I wish to say something directly to the parties. It has been obvious to me that no settlement could be achieved whilst certain fundamental issues were unresolved. The present set of preliminary issues was drafted by counsel precisely in order to break that deadlock. Both parties have had a measure of success on the preliminary issues. Neither party has won an outright victory. With the assistance of this court’s decision on the ten preliminary

²⁷ *The Times*, December 23, 2005.

²⁸ See *Venture Investment Placement Ltd v Hall* [2005] EWHC 1227, Ch for the related case.

²⁹ e.g. but by no means an exhaustive list: *Rose v Cox* [1999] EWCA Civ 608 (a long-running case); *Kinstreet Ltd v Balmargo Corp Ltd* (1999, unreported; transcript available on the CEDR website, ownership of shares, breach of contract, conspiracy and breach of duty, whether property was held on trust); *Hurst v Leeming* [2001] EWHC 1051, Ch; [2003] 1 Lloyd’s Rep. 379 (partnership: consequences of dissolution); *Jiad v Byford* [2002] EWCA Civ 1224 (employment); *Cowl v Plymouth CC* [2001] EWCA Civ 1935; [2002] 1 W.L.R. 803 (judicial review of a decision to close residential care homes); *Dunnett v Railtrack Plc* [2002] EWCA Civ 303; [2002] 1 W.L.R. 2434 (horses killed on a railway line); *Baddeley v Barker* [2003] EWCA Civ 742 (nuisance, drainage problems); *Lewis v Barnett (t/a Windmill Racing Stables)* [2004] EWCA Civ 807 (settlement); *Halsey v Milton Keynes NHS Trust* and *Steel v Joy and Halliday* [2004] EWCA Civ 576 (cost sanctions for unreasonably refusing mediation); *Couwenbergh v Valkova* [2004] EWCA Civ 676 (will); *Dr SR Burne v A* [2006] EWCA Civ 24 (clinical negligence claim); *IDA Ltd v University of Southampton* (costly litigation over who owned a patent); *Gorne v Scales* [2006] EWCA Civ 311 (dissolution of a partnership); *Keen v Commerz Bank AG* [2006] EWHC 785 (Comm) (employment); see also the cases referred to in this article under “Costs Sanctions for Refusal to Mediate”.

³⁰ [2006] EWHC 1341, TCC.

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issues, it may now be possible for both parties to arrive at an overall settlement of their disputes, either through negotiation or else with the help of a mediator, who is unconnected with this court.”

In suggesting a mediator unconnected with the court, Jackson J. appears to have been suggesting, by implication, that the pilot Court Settlement Process³¹ in the Technology and Construction Court was not appropriate for this dispute. In that process, judges in that court can act as mediators but not in the cases assigned to them for interlocutory applications or trial. Up to October 2006, five months into the pilot, it is not thought that any cases have been referred by parties for such judge-mediation.

6. WILL THE COURT ORDER A STAY FOR MEDIATION?

Where there is an agreement to mediate in the underlying contract This issue first arose in 1998 in *Halifax Financial Services Ltd v Intuitive Systems Ltd*.³² There was an escalating dispute procedure in the underlying contract: negotiation, mediation and finally arbitration. The court refused to grant a stay of proceedings for mediation, finding that the contractual provision for mediation was, on its true construction, not a pre-condition to proceedings. Further, the court decided that it had no jurisdiction to order a stay to support structured negotiation, such as mediation.

However, in 2002, the point came before Colman J. in the Commercial Court in *Cable & Wireless Plc v IBM United Kingdom Ltd*.³³ The underlying contract provided that the ADR procedure should be “as recommended to the parties by” CEDR. Cable & Wireless declined to take part in ADR. Accepting that a contract to negotiate was unenforceable in English law,³⁴ Colman J. drew a distinction between that and an agreement to follow a particular procedure in a climate where mediation was gaining recognition both generally and under the CPR, the courts were encouraging it and imposing costs sanctions where there was an unreasonable refusal to mediate. He added that the courts should be astute not to accentuate uncertainty. So he decided that the court had jurisdiction to order a stay (partly by analogy with stays for arbitration) and he did order a stay for ADR on the facts of this case. It seems that if the ADR procedure had not been referred to in the underlying contract a stay would not have been ordered.

Where there is no agreement to mediate in the underlying contract It is common practice now for proceedings to be stayed by the court for a short period, usually a month,³⁵ to allow mediation to take place even where there is no contractual provision to mediate such as that in the underlying contract in *Cable & Wireless*, but such applications must be made at appropriate times. In *Slough BC v Prashar*,³⁶ the Court of Appeal refused a stay for mediation in circumstances where the application was extremely late, in this case on the same day as the substantive hearing of the appeal.

7. WILL THE COURT COMPEL ATTENDANCE?

In *Shirayama Shokusan Co Ltd v Danovo Ltd*,³⁷ Danovo told the court it was essential that Mr Okamoto of Shirayama attend the mediation previously ordered by the court³⁸ (before

³¹ Running from June 1, 2006 to July 31, 2007. At the end of this pilot, a decision will be taken as to whether or not the scheme (after any necessary modifications) should be adopted in the long term. The CSP is at: www.hmcourts-service.gov.uk.

³² [1999] 1 All E.R. 664.

³³ [2002] EWHC 2059, Comm.

³⁴ *Courtney & Fairbairn Ltd v Tolaini Brothers Hotels Ltd* [1975] 1 W.L.R. 297.

³⁵ CPR r.26.4(2).

³⁶ [2004] EWCA Civ 671.

³⁷ Unreported on this aspect. Transcript: John Larking Verbatim Reporters, 91 Temple Chambers, 3–7 Temple Avenue, London, EC4Y 0HP.

³⁸ *Shirayama Shokusan Co Ltd v Danovo Ltd* [2003] EWHC 3006, Ch.

the decision in *Halsey* that the courts must not compel parties to mediate), but that it had been advised he would not be attending. In giving the previous order, the court had indicated that Mr Okamoto, amongst others, should be at the mediation. Danovo applied for an order that Mr Okamoto be required to attend the mediation. Blackburne J. declined to make the order because he thought it inappropriate on the facts and, in any event, he doubted that the court had jurisdiction to make such an order. He declined to follow the position in Australia where, as a necessary adjunct to the courts' power to order mediation against the opposition of one or more parties, the court has taken jurisdiction³⁹ to compel attendance of *parties* to make court-ordered mediations efficacious.

8. MEDIATION AND WITHOUT PREJUDICE

Two disputes have recently been in the courts on without prejudice issues. In *Venture Investment Placement Ltd v Hall*,⁴⁰ during the mediation there had been a meeting between Mr Hall and his fiancée, on the one hand, and Mr Watts, the Chairman of Venture on the other. Venture said that on three occasions Mr Hall had made statements to third parties making allegations as to things that it was said Mr Watts had threatened to do to Mr Hall and his family. An injunction was granted, until trial or further order, restraining Mr Hall from referring to or disclosing any part of the discussion that took place during the mediation. The question as to whether threats had been made and whether they were or were not without prejudice was expressly left over to the trial of the action. In *Robert Aird and Karen Aird v Prime Meridian Ltd*,⁴¹ the point arose whether a signed joint expert's statement was without prejudice because it had been used in a mediation or whether it could be used in evidence in accordance with CPR r.35.12 (i.e. once such a statement in litigation is agreed and signed, it is evidence). On the particular facts, it was found to be a privileged document prepared for the mediation. When such a document is prepared for use only in a mediation not for the proceedings, the moral is always to be very clear that the document clearly so states on its face.

9. CONCLUSION

In a wide variety of ways, the CPR and the decisions of the courts are facilitating and encouraging the use of mediation, but not forcing parties into mediation. That means mediation remains a voluntary process, with the possibility of costs sanctions on a party who unreasonably refuses mediation. Mediation numbers still remain relatively low compared with the number of claims started in the court. The time may be right for a further debate as to whether the CPR should make mediation compulsory, but with an opt-out if a judge accepts it is inappropriate in a particular case. Such compulsion works well in Australia and parts of the United States. The fundamentals of mediation, confidentiality and without prejudice, are being protected and respected by the courts. Many possible issues in mediation have not yet been considered by the courts: for example, whether the mediator has a right to privilege independent from that enjoyed by the parties and whether there are circumstances in which a mediator can be required to give evidence about what happened in a mediation.

³⁹ *Rajski v Tectran Corp* [2003] N.S.W.S.C. 478.

⁴⁰ [2005] EWHC 1227, Ch.

⁴¹ [2006] EWHC 2338, TCC.