Why is the jury <u>still</u> out on mediation…? A consideration of recent caselaw

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Even the most ardent supporters of mediation accept that it is not a panacea for all disputes. But it very clearly IS the case that mediation has much more to offer than currently it is given credit for. Those of us who practice as mediators glance around at a global society riven with conflict, and see missed opportunities for some form of facilitated dialogue almost everywhere we look.

So we are right to be alert to obstacles to the wider application of our trade, and it is for this reason that two recent decisions in the courts will have caught the eyes of many. Both cases concerned who should pay what costs, and in both cases the judge concluded that a refusal by one side to mediate should not count against them.

In the first of those cases, *Liu v Matyas* [2020] EWWHC 2923 (Ch), that view was perhaps unsurprising. The case was conducted on one side by a litigant in person whose pre-trial correspondence was described by the judge as intemperate, disproportionate and inflammatory, and characterised by repeated allegations of fraud, for which there was not a scintilla of evidence. In the light of this, said the Judge, and despite three 'invitations' to mediate, settlement would not have been achieved. On the basis of the judge's summary of the background, this is difficult to argue with.

The outcome in *Patel v Barlows* Solicitors [2020] EWHC 2795 (Ch), which concerned a professional negligence claim, is perhaps more surprising. Applying the six well-known tests in *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576), the judge found a number of reasons to support the Claimant's refusal to mediate. Whatever the merits of that decision overall, one element of his reasoning stands out.

The final of the six *Halsey* tests is whether mediation would have had a reasonable prospect of success; the Judge concluded that it would not. Having noted that tentative offers of settlement were some way apart, and were accompanied by a degree of what would normally be described as 'posturing' he went on to say that, because "without prejudice correspondence had been attempted and proved wholly unsuccessful" he could not see "any basis upon which the Claimants can be criticised for refusing to mediate". Moreover, because "either party could have improved upon the offer made [but] neither did so [there was] no reason to explore mediation any further".

Remarks like these frustrate mediators. They also appear contrary to the thrust of the many relevant authorities – including in particular the other case cited by the judge: *Northrop*

Grumman v BAE Systems [2014] EWHC 3148 (TCC). In that case, for example, Ramsey J cautioned against relying on the "position taken by the parties" when assessing the prospects of success at mediation, noting that this "ignores the ability of the mediator to find middle ground" and that polarisation at the start "is the position in many successful mediations". Similarly, *Halsey* cites with approval the observation of Lightman J in *Hurst v Leeming* [2001] EWHC 1051 (Ch) that "what appears to be incapable of mediation before the mediation process begins often proves capable of satisfactory resolution later."

Mediators know all this. We are often asked to help resolve disputes in which the parties start a long way apart. But, as experience tells us, the gap between the parties at the opening joint session tells us very little about the likely position at six o'clock that evening. Moreover, the idea that failed previous negotiations indicates anything of substance about the prospects for success seems bizarre; mediation is (obviously) by definition necessary only in cases where the parties have failed to thrash out a deal themselves.

Mediation is increasingly the first port of call for some litigators in some areas of the law. But it does not yet sit right at the heart of the dispute resolution culture in the UK more generally. This will take time, and require education and incentivisation. This cause deserves support from those able to offer it from a position of influence. It will not be advanced by unhelpful judicial remarks that seem to betray a misunderstanding of the concept and what it can offer.