Mediation and the Civilising Power of Costs

Parties who fail to mediate before entering into litigation will struggle to retrieve their costs even if successful. **Joanne Moss** asks, isn't it time for a culture change?

Cultural change comes rarely to lawyers. The last major shake-up was the Woolf Reforms of more than a decade ago. So perhaps it is time that some new shocks were administered to the legal system. Simply stated, parties who refused to mediate before ploughing ahead with litigation will now struggle when claiming costs even if victorious. So where is the cultural change?

Mediation

listening to cross-examination whereby one person's version of events is paraded and contrasted with another's. The real world beyond that inhabited by trial lawyers is often a world in which the truth does not lie anywhere remotely along the spectrum of available evidence and where witnesses cannot really recall anything at all because at the time frankly it didn't much matter to them. Encapsulated, this state of affairs is aptly described as litigation risk, and it is an uncomfortable thing.

Still nothing new, especially as most mediation is currently run by trial lawyers once they think they have a grasp of who is likely to win the litigation. However, the human tendency to grasp improvement where it appears should not be underestimated. Once industries like insurance, banking and professional negligence become aware of the existence of a body of trained professionals offering mediation support (ie, how to pilot a mediation and run the mediation file from the beginning) it cannot be long before the very process of litigation is relegated to a tiny number of ungovernable disputes. And why? Because mediation is not best a tool of litigation but of early business support – those supporting it are not necessarily going to be lawyers. The signs already are that other professions have scented a legitimate fees opportunity.

Early business support to mend trade relationships, to cooperatively solve construction disputes as projects proceed, to take account of personal circumstances in private, to issue apologies and to do many other things does not require the incision of the legal mind. Accountants, bankers, surveyors and many others will train to step into a mediation support role long before hostile litigation is issued.

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Calm before the storm

Doubtless there will be a period of calm before the full impact of this feeds through, during which conflict professionals will assume all is pretty much as it was. Mediation, after all, has been here in the civil sphere for some years and, in particular, has a track record in relation to family disputes precisely because hostile action frequently produces not simply pointless expense but also absolute bitterness.

Mediation is nothing more than the non-conflictual and confidential process whereby a third person, the mediator, tries to help the parties reach agreement by discussion and a creative approach to their relationship, not simply by focusing on the dispute they happen to have. This process is designed not just to do a deal but to create a better format for clients to control what happens to them and to take charge of the expense they face in litigation bills. Mediations ought to be oriented towards a creativity through which both parties "win".

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Mediation works

It sounds, of course, like pie in the sky, but mediation works. It works for the fairly obvious reason that the alternative is a narrow argument conducted at paralysing expense before an absolute stranger, the judge, whose views must be taken as correct and the mountainous costs are disposed of on the winner takes all basis. It is also assumed that this stranger will be able to get to "the truth" by the painful process of

End to hostilities

But it is not so. There is a very major cultural change taking place – such that contracts will change to require pre-litigation mediation and major economic players will take the stance that it is only decent to mediate. Any lawyer will tell in his cups that clients invariably ask – will I look weak if I make the first offer? The truthful answer must henceforth be – only in hostile negotiations but not in a mediation.

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