UPDATE: FAILURE TO AGREE MEDIATION PRE-PROCEEDINGS

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Judgment:

Burchell NF -v- Mr & Mrs Bullard & Others - Court of Appeal - [2005] EWCA Civ 358 - for the full Judgment, click here >>

Questions:

If there is a failure to agree to mediation at a time before the start of litigation, can a costs sanction follow in the subsequent proceedings?

Quick Overview:

Although no adverse costs order was made in this case on the particular facts, the Court of Appeal has warned that such cost consequences can follow in other cases. It may be easier to do so against *unsuccessful* parties (cf the discussion in Halsey which concerned *successful* parties).

The Detail: This was an appeal by a small builder, Mr Nicholas Burchell against the costs orders that were made in heavily contested litigation arising out of work done to the property of Mr and Mrs Bullard.

Mr Burchell and the Bullards had fallen out: Mr Burchell wanted a payment of £13,540.99. Mr and Mrs Bullard complained about the work and had written setting out what they said had to be done before any further payment would be made. Mr Burchell instructed solicitors, who sensibly wrote to the Bullards suggesting that, to avoid

litigation, the dispute be referred for alternative dispute resolution through "a qualified construction mediator". The response from the Bullards' chartered building surveyor was that "the matters complained of are technically complex and as such mediation is not an appropriate route to settle matters." That exchange of correspondence took place well before the decision in *Halsey v The Milton Keynes General NHS Trust*, in which the Court of Appeal set out guidelines in relation to the consequences that might follow an unreasonable refusal to mediate.

Proceedings began. Mr Burchell brought his claim against Mr and Mrs Bullard for £18,318.45. They counterclaimed £100,815.34 and further damages. Of that sum £23,646.88 related to the roof which the Bullards alleged needed to be "dismantled and reconstructed." In fact, the roof had been built by a sub-contractor, Mr Teversham and Mr Burchell brought a Part 20 claim against him. In due course, District Judge Tennant, in the Bournemouth County Court, entered judgment for Mr Burchell against the Bullards on the claim for £18,327.04 but gave judgment for the Bullards against the Mr Burchell on the counterclaim for £14,373.15. Allowing for VAT and interest the result was that he ordered the Bullards to pay Mr Burchell the difference between the two amounts, namely £5,025.63. In the Court of Appeal, it emerged that the total spent on costs by the parties to achieve a judgment of £5,000 was about £185,000.

In looking at whether a costs sanction against the Bullards was appropriate, Lord Justice Ward said that a small building dispute is *par excellence* the kind of dispute which lends itself to ADR; that the merits of the case favoured mediation; and that the Bullards behaved unreasonably in believing, if they did, that their case was so watertight that they need not engage in attempts to settle. He added that the stated reason for refusing mediation because the matter was too complex was "plain nonsense" and that the costs of ADR would have been a drop in the ocean compared with the fortune that had been spent on this litigation. Finally, he was satisfied that the case was suitable for mediation and that the Bullards could not rely on their own obstinacy to assert that mediation had no reasonable prospect of success. Lord Justice Ward concluded:

"It seems to me, therefore, that the *Halsey* factors are established in this case and that the court should mark its disapproval of the [Bullards]' conduct by imposing some costs sanction. Yet I draw back from doing so. This offer [to mediate] was made in May 2001. The [Bullard]s rejected the offer on the advice of their surveyor, not of their solicitor. The law had not become as clear and developed as it now is following the succession of judgments from this court of which *Halsey* and *Dunnett v Railtrack plc* & are prime examples. To be fair to the [Bullards], one must judge the reasonableness of their

actions against the background of practice a year earlier than *Dunnett*. In the light of the knowledge of the times and in the absence of legal advice, I cannot condemn them as having been so unreasonable that a costs sanction should follow many years later.

The profession must, however, take no comfort from this conclusion. *Halsey* has made plain not only the high rate of a successful outcome being achieved by mediation but also its established importance as a track to a just result running parallel with that of the court system. Both have a proper part to play in the administration of justice. The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate. The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued. With court fees escalating it may be folly to do so. I draw attention, moreover, to & the Pre-action Protocol for Construction and Engineering Disputes - which I doubt was at the forefront of the parties' minds - which expressly requires the parties to consider & whether some form of alternative dispute resolution procedure would be more suitable than litigation. The [Bullards] have escaped the imposition of a costs sanction in this case but defendants in a like position in the future can expect little sympathy if they blithely battle on regardless of the alternatives."

Lord Justice Rix added:

"In *Halsey*, this court was particularly concerned with the problem of whether an unreasonable refusal of mediation could prejudice a *successful* party in costs. The present case illustrates that the problem may arise in many different situations, as here where the counterclaiming defendants were (a) the overall losers in the litigation and (b) exaggerated their counterclaim so as to receive only a small percentage of it. In such circumstances, it seems to me to be in principle easier than in the *Halsey* situation to give effect to an unreasonable refusal of mediation in costs."

In *Halsey v Milton Keynes NHS Trust* (2004), Lord Justice Dyson had said"All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR." Add to that what has been said in *Burchell v Bullard* and it is clear that the policy of the courts is to encourage mediation and to consider whether or not to apply cost sanctions if there is an unreasonable refusal to mediate by either a successful or unsuccessful party.