

Cowl v Plymouth City Council

CA: Lord Woolf CJ, Mummery and Buxton LJ: 14 December 2001

The Court of Appeal has now made very plain its view of the failure to use ADR. Here are some extracts from the judgment:

"The courts should ... make appropriate use of their ample powers under the CPR to ensure that the parties try to resolve the dispute with the minimum involvement of the courts. The legal aid authorities should co-operate in support of this approach.

To achieve this objective the court may have to hold, on its own initiative, an inter partes hearing at which the parties can explain what steps they have taken to resolve the dispute without the involvement of the courts.

In particular the parties should be asked why a complaints procedure or some other form of ADR has not been used or adapted to resolve or reduce the issues which are in dispute. If litigation is necessary the courts should deter the parties from adopting an unnecessarily confrontational approach to the litigation. If this had happened in this case many thousands of pounds in costs could have been saved and considerable stress to the parties could have been avoided.

The importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible.

Particularly in the case of these disputes both sides must by now be acutely conscious of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves time, expense and stress.

It is indeed unfortunate that.... instead of the parties focussing on the future they insisted on arguing about what had occurred in the past.

Without the need for the vast costs which must have been incurred in this case already being incurred, the parties should have been able to come to a sensible conclusion as to how to dispose the issues which divided them.

If they could not do this without help, then an independent mediator should have been recruited to assist. That would have been a far cheaper course to adopt. 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."

Lord Woolf could not have made his meaning clearer. Parties (and it seems unlikely to be limited to public bodies) who fail to consider ADR will be criticised by the court, and it will not be long before costs sanctions bite hard. (See the *Dunnett* case).

Lawyers who fail to advise their clients properly about ADR will find themselves in even deeper water. We await the first solicitors finding themselves at the wrong end of a negligence action by a disgruntled client, and an investigation by the OSS for inadequate professional services. Any volunteers?

See the relevant parts of the CPR at <http://www.consensusmediation.com/adrlegislation.html>