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ADR & Mediation

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What is Alternative Dispute Resolution?

- Discussion and Negotiation
- Mediation
- Early Neutral Evaluation
- Arbitration

NB: The parties can agree to stay proceedings at any time to attempt to resolve matters by ADR.

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Mediation

- The parties & advisors attend the same location, with a day allocated to try and seek settlement. The costs will be much less than full litigation.

- Zoom / Teams also work well.

- Mediation is confidential and conducted on a without prejudice basis.

- There is no determination, which means parties can choose to walk away – no one will impose an outcome.

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Mediation is the most common form of ADR in relation to inheritance proceedings. There are many reasons for this, including:

- Preserving family relationships
- "Hurt feelings"
- The costs of litigation

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Arbitration

- Parties agree to enter a binding agreement to arbitrate.
- The parties agree the identity of the independent arbitrator who will make a binding determination.
- Such a determination means that the parties will avoid the court proceedings entirely.
- The parties are free to design the arbitration process to meet the needs of the case and in regard to proportionality.
- An arbitration award is binding and only appealable in certain circumstances.

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Early Neutral Evaluation

- Akin to an FDR in family proceedings.
- More appropriate when there is no or limited factual dispute.
- An independent evaluator provides the parties with an assessment of the merits of their case.
- This is non-binding and held on a without prejudice basis.
- The evaluator will be a specialist in the area.

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- Early Neutral Evaluation can be voluntary.
- The Court also has the power to order it as part of case management.

- As per CPR r.3.1(2)(m) the court may "*take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties to settle the case*."

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WHY IS ADR IMPORTANT?

- There has been a growing trend of encouraging parties to try and settle litigation by way of ADR.
- This was emphasised in the 'Justice ADR Handbook'.
- The Handbook, mirrors the CPR and Chancery Guide in emphasising the importance of considering ADR at all stages of litigation.
- The overriding objective also seeks to enable the court to deal with cases justly and at proportionate cost.

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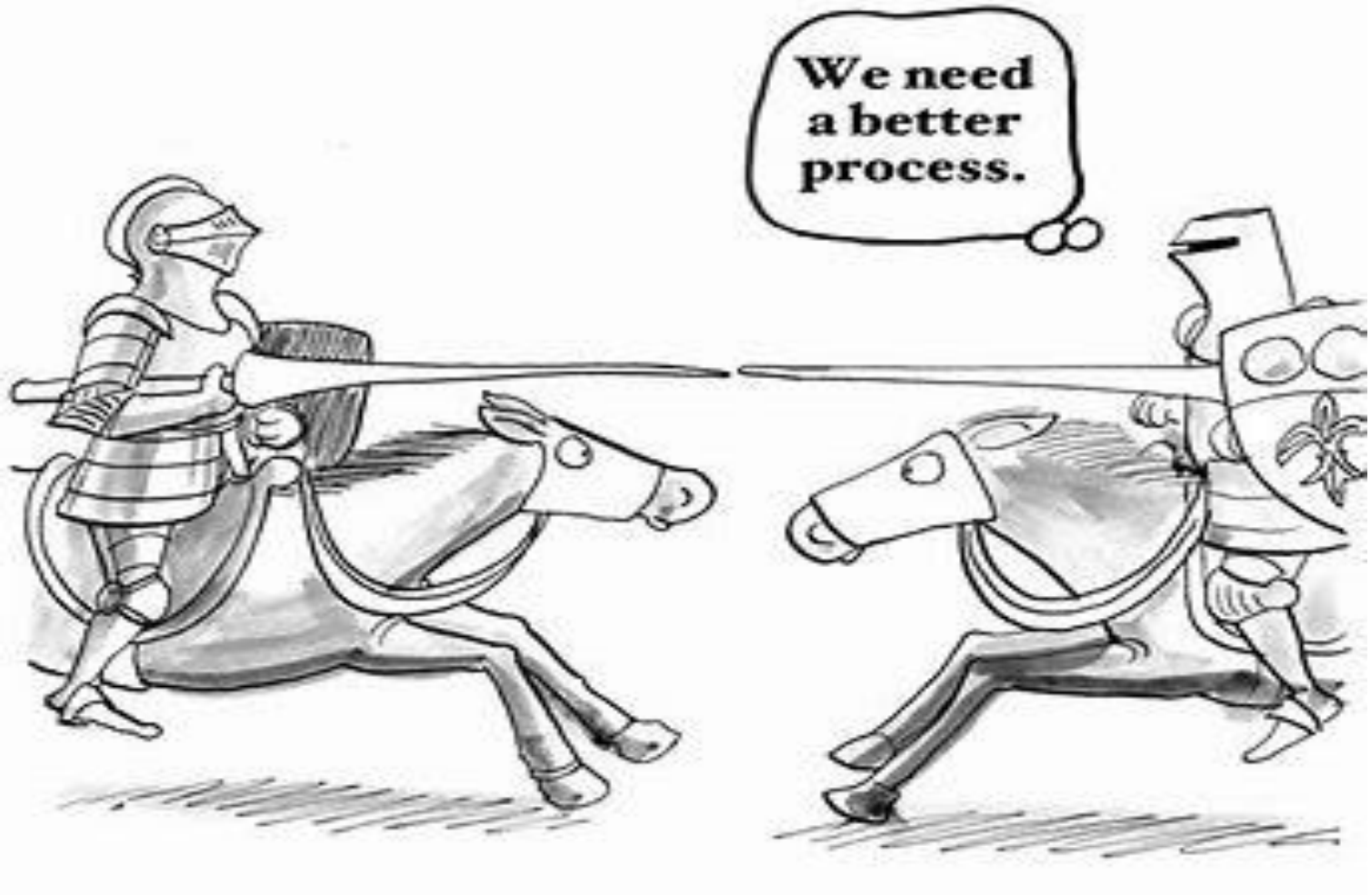

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- **Remember** – ADR should have been considered before proceedings are issued.

- The Practice Direction on Pre-Action Conduct at paragraph 8 provides that:

  - Proceedings should be the last resort.
  - ADR is not compulsory but parties should consider whether it might help them to settle matters without litigation.
  - The court may want to know if the parties have considered ADR.

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SANCTIONS

- The courts have made clear their willingness to impose costs sanctions whenever a party has acted unreasonably in failing to take part in ADR.
- The court may consider:
  - An order that the party at fault pays the costs of the proceedings, or part of the costs of the other party or parties;
  - An order that the party at fault pay those costs on an indemnity basis;
  - Sanctions involving the interest on an award.
- Unreasonably refusing or ignoring an offer to mediate is possibly non-compliant behaviour.

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Halsey v Milton Keynes General NHS Trust [2004] 1 WLR 3002

- Considered whether costs sanctions should be applied against a successful litigant on the grounds that they refused to take party in ADR.

- In the case the party declining escaped sanction but the court reviewed the circumstances in which they might do so.

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- The fundamental principle is that departure from the general rule (that the loser pays the costs of the successful party) was not justified unless it was shown that the successful party acted unreasonably in refusing to agree to ADR.

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- The Court of Appeal said that certain factors should be considered:
  - Nature of the dispute.
  - Merits.
  - Failure of other settlement attempts.
  - Cost of mediation being disproportionate.
  - Delay.
  - The prospect that ADR will succeed.

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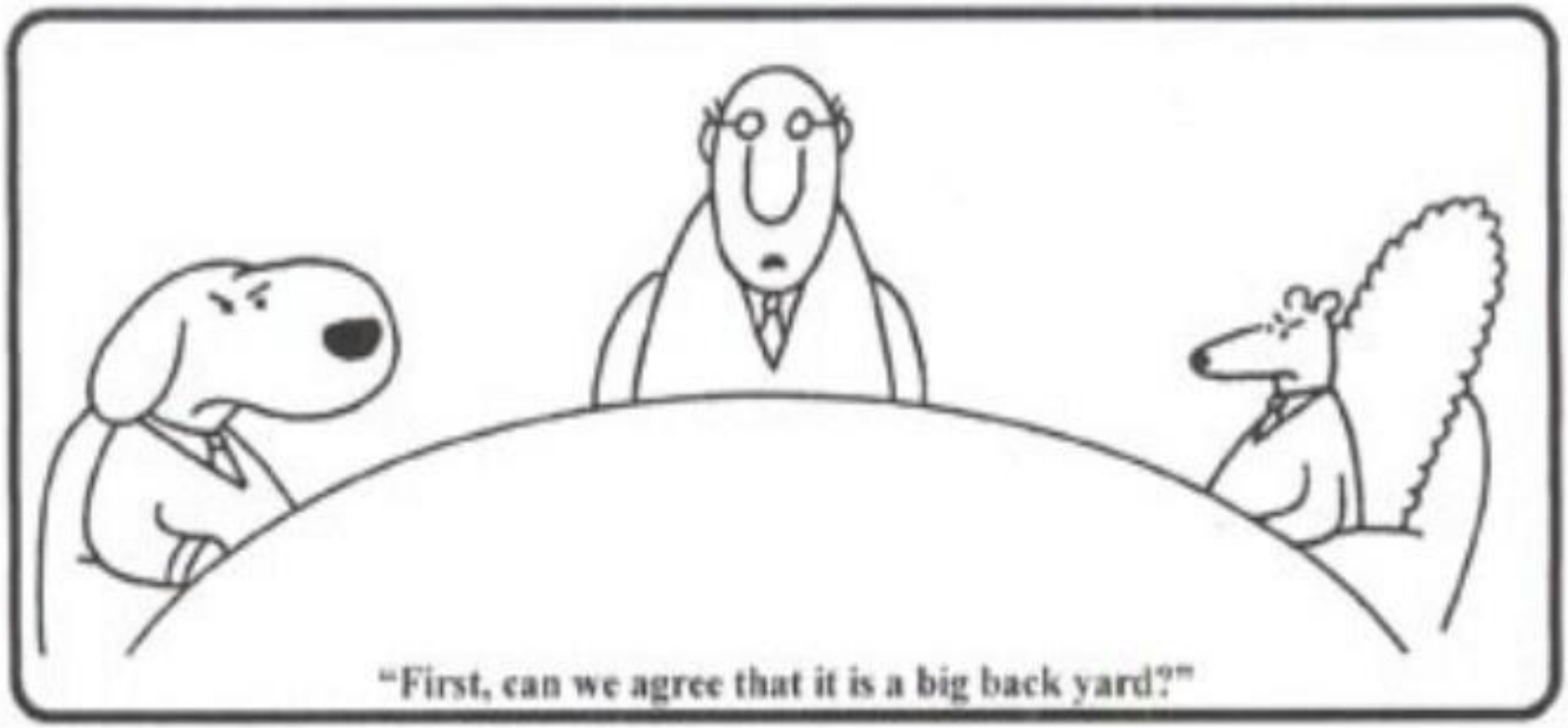

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PGF II SA v OMFS Co Ltd [2014] 1 WLR 1386

- The Court of Appeal upheld a decision, to disallow a successful defendant the costs he would have been entitled to when the claimant accepted the defendant's Part 36 Offer dated 11 April 2011 in January 2012 (the day before the trial). The court held at paragraph 34:

" *That silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable regardless of whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified, by the identification of reasonable grounds*".

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- The court (at paragraph 30) expressly approved the advice in the Jackson ADR Handbook at 11.56, which sets out how a party who believes he has reasonable grounds for refusing to participate in ADR at a given stage, and wishes to avoid costs, should behave in following a request to engage in ADR.

  - Do not ignore the request.
  - Respond promptly (in writing) giving clear and full reasons why ADR is not appropriate at this stage (based on the Halsey guidelines if possible).
  - Raise any shortage of information / evidence with proposals as to how this can be resolved.
  - Do not close off ADR of any kind and for all time.

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Garritt-Critchley v Ronan & another [2014] EWHC 1774

- The Claimant sought £208,000 in his letter of claim but suggested ADR, potentially mediation.

- The Defendant failed to engage in ADR after robust correspondence

" Both we and our clients are well aware of the penalties the court might seek to impose if we are unreasonably found to refuse mediation, but we are confident that in a matter in which our clients are extremely confident of their position and do not consider there is any realistic prospect that your client will succeed, the rejection is entirely reasonable."

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- The case went to trial after the Claimant offered to settle for £10,000.
- After trial, but before judgment, the Defendant accepted the offer for £10,000 plus standard basis costs.
- The Claimant sought costs of the whole case on the indemnity basis.

- The Defendants sought to justify their refusal to mediate on the grounds that:
  - The parties were too far apart and there was no 'middle ground'.
  - That the parties disliked each other too much to engage in meaningful dialogue.
  - They also raised proportionality.

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- The Judge rejected all the Defendant's arguments:
  "***the parties don't know whether in truth they are too far apart unless they sit down and explore settlement. If they are too irreconcilably too far apart, then the mediator will say as much within the first hour of mediation. That happens very rarely in my experience***."

  - Even if liability issues are binary there would be a range of outcomes on quantum.
  - Judges are required to asses the credibility of both sides' witnesses – which should alone encourage the parties to carry out a risk assessment.
  - The Defendants were ordered to pay costs on the indemnity basis.

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Laporte v The Commissioner of Police of the Metropolis [2015] EWHC 371 (QB)

- The Defendant was successful on every substantive issue but was awarded only 2/3 of his costs.

- This was due to the court finding that the defendant had failed, without adequate justification, to fully and adequately engage in the ADR process, notwithstanding that the outcome of such a process was not certain.

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OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195

Sir Geoffrey Vos, stated at paragraph 29 that:

- "parties are obliged to conduct litigation collaboratively and to engage constructively in a settlement process"
- A "blank refusal to engage in any negotiating or mediation process…to seek to frustrate a claimant's attempt to reach a compromise solution should be marked by the use of the court's powers to discourage such conduct"

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Thakkar v Patel [2017] EWCA Civ 117

- The Defendants did not ignore or refuse an offer to mitigate "but they dragged their feet and delayed until eventually the Claimants lost confidence in the whole ADR process"

- Jackson LJ stated "if one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction"

- The Defendants were ordered to pay 75% of the Claimants' costs of the claim with the Claimants paying the Defendants' costs of the counterclaim.

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Christopher Burgess v Jennifer Penny & anr [2019] EWHC 2034 (Ch)

- Two sisters alleged that their mother did not have knowledge and approval of the contents of a Will executed by her. The Will split her estate equally between her three children equally, namely the two sisters and their brother.
- The court found the Will to be valid and consequently the estate was split equally between the 3 siblings.
- The Judge highlighted the sisters complete refusal to mediate.

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- The sisters wanted an admission from their brother that what he had done was wrong and did not consider that objective would be achieved by mediation.
- Mrs Catherine Newman QC emphasised:

"mediation is not just about one side getting what they want. That is a misconception of the purpose of mediation. Mediation should be about attempting to reach a solution which both parties can live with as a better alternative to litigation."

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Simon Kelly v Raymond Kelly [2020]

- The parties were father and son.
- There had been 2 attempts to resolve their dispute by way of mediation.
- Each time the Claimant had refused to honour the mediation agreement.
- As such the Defendant refused a third proposed mediation.
- The court found that the Defendant's refusal was reasonable and understandable due to the risk of further broken promises and costs.
- The Defendant was awarded costs on the indemnity basis.

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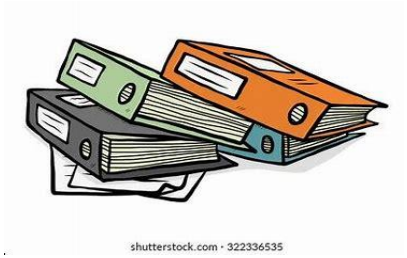
Preparation



- Bundles to be prepared in good time – limited to essential documents only.
- Position statements should be concise limited to essential facts and arguments relied upon. Include the outcome sought by each party.
- Give your mediator time to ensure they are prepared.
- Make sure you are ready with your costs to date and estimated costs to the conclusion of trial.

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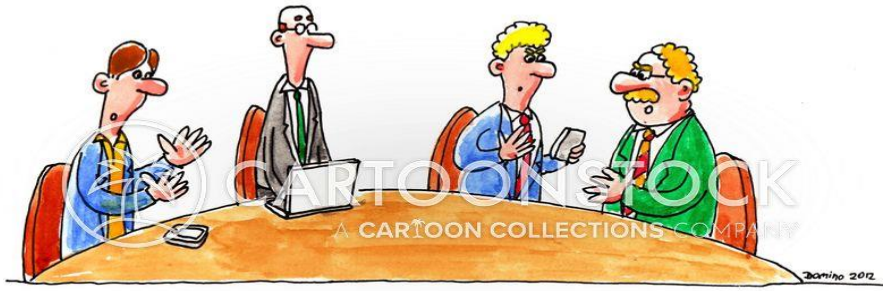
Logistics

- If parties cannot physically attend consider virtual appearances.
- Joint opening session – take a view.
- Make sure your clients know that whilst this is not litigation, in order to succeed everyone has to be willing to compromise.



After two hours of negotiations, a consensus is near on an official hashtag for the meeting.

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During the mediation

- Ask for information if you need it.
- Try to answer reasonable questions from the other side.
- Offers should be realistic and with the aim to settle.
- You have more options to shape the settlement.

- Don’t underestimate the importance of breaks / snacks / chargers.

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The Agreement

- Do not underestimate the time this takes.
- The detail can make or break the agreement.
- Try not to leave or let the mediator go before all the parties have signed.
- Try to avoid “reporting back”.
- It is not always possible to have a finalised agreement.

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Costs

- Who pays the costs of mediation?
  - Each party pays their own costs (unless otherwise negotiated).
  - The parties equally meet the joint costs for example the mediator / venue.
  - Investing in the process is important.