PUMP COURT
CHAMBERS

Inheritance, ADR & Mediation

1. There had in recent years been a growing emphasis on the role of ADR, with the court being increasingly forceful in adhering to the practice direction on pre-action conduct's injunction that litigation be a 'last resort'. There was an ever growing body of jurisprudence dealing with parties who failed to heed the call (albeit inevitably a smaller competing body to afford some crumbs of comfort to the mediation hesitant).
2. The events of the last 18 months however have provided a powerful new incentive for parties to engage in mediation and other forms of ADR and have provided incentives for us to do so in a more flexible manner.

ADR NOW

3. The *Jackson ADR Handbook* was distributed to all members of the judiciary in April 2013 and is now a well-established element of the judicial library of first resort and a sensible first point of reference for any litigant making a substantial application for costs based on a failure to mediate. It should also, however, be a first point of reference for a party considering refusing an offer of ADR, or a particular type of ADR. It affords far less comfort than a brief perusal of ***Halsey v Milton Keynes General NHS Trust*** **[2004] 1 WLR 3002** might lead one to expect.
4. The Court of Appeal in **Halsey** (and it is worth remembering that the Court of Appeal had been an important convert in the early days of the mediation gospel so far as England and Wales were concerned) suggested that the following factors should be considered: -

    - *nature of the dispute*
    - *merits*

3 Pump Court
Temple, London EC4Y 7AJ
T. 0207 353 0711
F. 0845 259 3241
DX 362 London

5 Temple Chambers
Temple St., Swindon SN1 1SQ
T. 01793 539899
F. 0845 259 3242
DX 38639 Swindon 2

31 Southgate Street
Winchester SO23 9EB
T. 01962 868161
F. 0845 259 3242
DX 22514 Winchester

E. clerks@pumpcourtchambers.com
W. www.pumpcourtchambers.com

- *failure of other settlement attempts*
- *costs of mediation disproportionate*
- *delay*
- *whether any prospect of ADR succeeding*

5. Matters, of course, have progressed quickly since then. Now it is usual to see the following direction (once known as an Ungley order in the QBD and initially applied to clinical negligence claims but brought to a wider audience by Mostyn J in **Mann v Mann [2014] EWHC 537 (Fam)**):

> "*At all stages the parties must consider settling this litigation by any means of Alternative Dispute Resolution (including Mediation); any party not engaging in any such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal [and not less than 28 days before trial]; such witness statement must not be shown to the trial judge until questions of costs arise*."

6. The standard order gives the proposer of ADR (NB not just mediation) a powerful tool with which to lay the ground for a costs order adverse to a party that unreasonably refuses ADR but such a course should have commenced prior even to issue:

> Para. 8 of the Practice Direction on Pre-Action Conduct provides: "*Starting proceedings should usually be a step of last resort... Although ADR is not compulsory, the parties should consider whether some form of ADR procedure might enable them to settle the matter without starting proceedings. The court may require evidence that the parties considered some form of ADR*."

7. While for some years I have been comfortable discussing ADR in a mediation context almost as if it were synonymous with mediation that is no longer a wise course. Para 8.2 of the practice direction sets out the alternative forms available:

    - Discussion and Negotiation
    - **Mediation** (a form of negotiation with the help of an independent person);
    - **Early Neutral Evaluation** (where an independent person**,** for example a lawyer or an expert on the subject, gives an opinion on the merits of the dispute and now increasingly used to refer to a quasi-FDR hearing – a fascinating piece of further cross-pollination whereby the best practice of the family court is now enshrined in the Chancery Division); or
    - Arbitration (which may well have a future in the chancery division beyond 1975 Act claims following developments in the family division in **Haley v Haley [2020] EWCA Civ 1369** where the CA held that the test for an appeal from an arbitral award under the Matrimonial Causes Act 1973 was as it is from a judge at trial and not the (considerably higher) test in the commercial court.

8. The Courts have repeatedly determined that Inheritance Act claims together with probate claims and other similar familial disputes are *suitable in nature* for resolution by *mediation* because of *inter alia*:

    - the costs of litigation – especially where multiple parties are involved,
    - the difficulty in putting together agreed offers of settlement,
    - the need to address feelings of hurt,

- the complexity and length of trials dealing with many years of family history,
- the desirability of avoiding further damage to family relationships.

THE DIFFERENT FORMS OF ADR

Mediation v Arbitration

9. **Mediation** of most inheritance disputes necessitates attendance by parties and their advisors at a mediation for which a day is allowed. Costs will still be modest compared with full-scale litigation (and see particularly guidance below). In very modest and simple cases, perhaps consider time limited mediation. The growth of remote, or partly remote or hybrid mediation has been a notable success story of the last two years (I write as a convert having previously regarded remote mediation as something of a novelty which sacrifices the 'in person' benefits). It has been possible to put together at short notice mediations in which parties on different continents who would have been unable or unwilling to attend a mediation in England and Wales have resolved their dispute quickly and at lower costs at a time when access to the courts has not always been fully available and where remote hearings would not have been as seamless. It is my experience that technical difficulties with remote mediations have been far rarer than those with remote hearings and solutions found more quickly.
10. It is likely that the remote mediation is here to stay. Some parties will doubtless prefer to revert to in person mediation, but many will not. Parties with experience of hybrid mediations will also likely be quite content to agree to flexible arrangements whereby parties' competing preferences might all be accommodated. As an advocate I have now

been involved in wholly remote mediation; mediation where I was present but my solicitor and client were together in Scotland, mediation where my solicitor and I were present and the client was overseas and mediation where we were all together but the mediator was remote.

11. An alternative to mediation is for the parties to enter a binding agreement to **arbitrate** whereby they nominate an arbitrator of their choice to finally determine the case and avoid court proceedings altogether. The parties are free to design a process that is proportionate and appropriate to their case; they can choose the arbitrator, the timetable, the venue (which can be in comfortable environment such as chambers or a hotel), the level of disclosure and the nature of the hearing and procedure (for example you could decide to dispense with oral evidence if the factual matrix is clear or conduct a joint meeting with an accountant if there are tax issues). An arbitration award is binding and like a court order and is only appealable in certain circumstances and thus it brings finality which is not guaranteed with mediation (subject to how **Haley** above develops). There may be some difficulties with arbitration in probate and trusts disputes. Like mediation the parties can decide at any time that they wish to stay court proceedings to arbitrate. Again, technology can allow the parties to conduct proceedings remotely or partly remotely if they and the arbitrator agree.
12. Pre-mediation meetings are far easier to set up remotely and can involve the parties to a greater degree which often saves time on the morning of mediation.
13. **Early Neutral Evaluation ("ENE")** is an alternative approach that is particularly well suited to multi-party family provision claims and cases where there is little or no dispute as to the facts. It is where an independent and impartial evaluator is appointed to give the parties an assessment of the merits of their case. The evaluator is commonly a retired judge or senior

counsel. The ENE is non-binding and is entirely without prejudice. ENE can be used as a standalone dispute resolution method or together with mediation. An ENE offers some of the same advantages as an arbitration. The evaluator will be chosen by the parties and will be a specialist in the area concerned thereby giving confidence to the parties. He or she will be able to dedicate significant preparation time and as much hearing time as is necessary unlike a court FDR where preparation is constrained by other court matters. An ENE will be held in an environment which is more conducive to settlement as opposed to a busy court room. Finally, the ENE can be arranged at relatively short notice thereby saving considerable costs. Like mediation ENE is non-binding. A court may compel the parties to attend ENE.

14. In **Williams v Seals & Ors. [2015] WTLR 34** the judge dealing with preliminary matters had stated that the claim was

> *"unquestionably a case which cries out for mediation and I would encourage the parties in the strongest possible terms to pursue mediation, as soon as possible after any further proceedings by the Respondents have been issued or after they have made clear that they do not intend to bring further proceedings"*.

15. Mediation was attempted but stalled due to differing perceptions of the issues in dispute and the respective strength of the respective arguments. The Respondents made an application to the court in **Seals, Seals v. Williams [2015] EWHC 1829 (Ch)**, where Norris J, VC, highlighted the positive steps which could be taken by the court in being invited to undertake an "Early Neutral Evaluation" of the case. He stated at paragraph 3 of his judgment:

> *"The advantage of such a process over mediation itself is that the judge will evaluate their respective parties' cases in a direct way and may well provide an authoritative (albeit provisional) view of the legal issues at the heart of the case and an*

experienced evaluation of the strength of the evidence available to deploy in addressing those legal issues. This process is particularly useful where the parties have very differing views of the prospect of success and perhaps an inadequate understanding of the risks of litigation itself".

16. Whilst an ENE can be voluntary the court has power to order an ENE as part of its case management. The court's power to order ENE stems from CPR r3.1(2)(m) which came into effect on 1st October 2015. It states that 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 settle the case" .

    This can be a highly effective step and an alternative to striking out or giving summary judgment of the Court's own motion where a claim is very weak or hopeless (in part).

17. There is also provision for "**Financial/ Family Dispute Resolution"** hearings as in family proceedings, the CPR did initially intend CMC's to be used in a manner very much akin to what is now a FDR. This approach is finding favour in an increasing number of County Courts around the country particularly by judges familiar with the benefits that have accrued in financial remedy proceedings but also notably in CLCC. It is a without prejudice court hearing conducted by a judge who will give an indication to the parties as to the merits of their case. The Judge who conducts the FDR will have no further involvement in the case.

18. The advantages of an FDR/ ENE over mediation are:

    (i) The parties are likely to give the view of a judge or senior barrister more weight than a mediator who is limited as to what he or she can say as to the merits of the case.

(ii) A FDR/ ENE is particularly useful on cases involving questions of law such as construction of Wills than those involving questions of fact.

(iii) FDR is particularly helpful for cases where the parties have divergent views and need to hear an indication on the merits.

19. A new and exciting development is the "private" FDR where parties can obtain many of the advantages of arbitration and choose a mutually respected expert tribunal to conduct an "FDR hearing" at a time and place of their choice (or remotely). These hearings are particularly well suited to hybrid family/civil proceedings and while not strictly within the ambit of today's hearing many present will doubtless have experiences of Schedule 1 Children Act proceedings in tandem with TLATA claims or with financial remedy claims when third parties (often the parent or parents of one spouse) are asserting a beneficial interest in the matrimonial home (or some other matrimonial asset). In the former case private FDR has been highly effective in my experience and in the latter civil mediation has on several occasions resolved not just the issue in which the intervenors were interested but the entire dispute.

SANCTIONS

20. The courts have made clear their willingness to impose costs sanctions whenever a party has acted unreasonably in failing to take part in ADR.

Sanctions are dealt with at para. 15 of the PD:

15. The court will consider the effect of any non-compliance when deciding whether to impose any sanctions which may include—

(a) *an order that the party at fault pays the costs of the proceedings, or part of the costs of the other party or parties;*

(b) *an order that the party at fault pay those costs on an indemnity basis;*

(c) *if the party at fault is a claimant who has been awarded a sum of money, an order depriving that party of interest on that sum for a specified period, and/or awarding interest at a lower rate than would otherwise have been awarded;*

(d) *if the party at fault is a defendant, and the claimant has been awarded a sum of money, an order awarding interest on that sum for a specified period at a higher rate, (not exceeding 10% above base rate), than the rate which would otherwise have been awarded.*

21. Unreasonably refusing or ignoring an offer to mediate is expressly included in the list of possibly non-compliant behaviour (see para. 14).

KEY CASES

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

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

- Ignoring offers of ADR.

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

- What is meant by "proportionality"

Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd (No.2) [2014] EWHC 3148 (TCC)

- a WPSATC letter saves a Defendant from severe sanctions.

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

- a more nuanced approach to refusal where the defendant was penalised only one-third of her costs.

Rana v Tears of Sutton Bridge [2015] EWHC 2597 (QB)

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

- sanctions imposed for refusal.

Thakkar v Patel [2017] EWCA Civ 117

- sanctions where short of a refusal a party "…*dragged their feet and delayed until eventually the claimants lost confidence in the whole ADR process*".

Gregor Fisken Ltd v Carl [2021] EWCA Civ 792

- court encouraged mediation may be a particularly unwise thing to refuse.

CASES "THE OTHER WAY"

Briggs v First Choice Holidays and Flights Ltd [2017] EWHC 2012 (QB)

- no sanction where an industry funded scheme was rejected.

Gore v Naheed [2017] EWCA Civ 369

- something of an anomalous refusal to sanction a party in a neighbour dispute.

Mark Dubbery
e. m.dubbery@pumpcourtchambers.com
October 2021