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Competing (and complimentary) modes of ADR

Mark Dubbery

Practice Direction on Pre-Action Conduct and Protocols – Settlement and ADR

8. Litigation should be a last resort. As part of a relevant pre-action protocol or this Practice Direction, the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings.

9. Parties should continue to consider the possibility of reaching a settlement at all times, including after proceedings have been started. Part 36 offers may be made before proceedings have been issued.

10. Parties may negotiate to settle a dispute or may use a form of ADR including—

(a) mediation, a third party facilitating a resolution;

(b) arbitration, a third party deciding the dispute;

(c) early neutral evaluation, a third party giving an informed opinion on the dispute; and

(d) Ombudsmen schemes.

Those forms of ADR might be thought of as alternatives but will often be sequential.

Don’t underestimate the cumulative power of a repeated message.

11. If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. A party's silence in response to an invitation to participate or a refusal to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs.

The now standard "Ungley" direction is a powerful tool and should seldom be omitted.

16. 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.

The overriding objective

1.1(2)(f) [Dealing with a case justly and at proportionate cost includes so far as is practical] … promoting or using alternative dispute resolution.

1.4(2)(e) [Active case management includes] …ordering or encouraging the parties to use, and facilitating the use of, alternative dispute resolution.

See also CPR 28.14 and 29.2(1A) which deal with giving directions and CPR 44.2(5) dealing with costs.

CPR 3.1(2)(o) and (p)

(o) order the parties to engage in alternative dispute resolution; and

(p) 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.

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Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576.

Nature of the Dispute – well established that mediation is well suited to disputes of this nature.

Merits of the Case – something of a catch 22 in reality.

Prior settlement attempts – as indeed is this, indeed as we shall see the courts have now ordered parties to mediate *for a second time*.

Costs of ADR – sometimes referred to as 'proportionality' but NB ***Garritt-Critchley v Ronan & another [2014] EWHC 1774***.

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Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576.

Delay – seldom a critical consideration in practice but perhaps indicative of the genesis of the criteria in the court of appeal.

Prospects of Success – something of a hostage to fortune as it is often pure conjecture, see e.g. ***Laporte v The Commissioner of Police of the Metropolis [2015] EWHC 371 (QB)***

Unreasonable refusal – now of course incorporated into the PD.

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Churchill v. Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416

Establishes the critical point that a court can compel parties to engage in ADR (by staying proceedings for that purpose) an assertion to the contrary in **Halsey** found to be obiter.

NB the form of ADR in that case was the council's own complaints procedure (in a nuisance claim pertaining to an encroachment by Japanese knotweed) and the court did not order the stay the council were seeking.

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Churchill v. Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416

Relevant considerations include:

-the form of ADR under consideration (might “in house” schemes meet with a greater degree of skepticism? There is some reason to believe they might).

-whether parties are represented (and see below).

-whether clear that the process was not a bar to later litigation.

-urgency, delay and limitation.

costs both in absolute and relative terms and in proportion to both the parties' resources and the value of the claim (in probate or similar claims this is sometimes addressed by the estate taking on the burden of the costs of ADR).

Prospects of success both in absolute terms and in the light of the parties' representation or lack thereof.

Inequality of arms whether resources, bargaining power or sophistication.

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Churchill v. Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416

Reasons for refusal – including previous failed attempts.

Reasonableness and proportionality of sanction.

Whether ADR refused in the face of an order of the court.

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Churchill v. Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416

Post **Churchill** cases include:

Northamber v Genee World [2024] EWCA Civ 428 – 25% reduction in the recoverable costs of a successful party for an unreasonable refusal to mediate.

DKH Retail Ltd v City Football Group Ltd [2024] EWHC 3231 – compulsory pre-trial mediation was ordered in the run up to trial in the face of one party's objection on grounds including the alleged weakness of the claim and lack of likely prospects of success – it succeeded.

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PGF II SA v OMFS Co. 1 Ltd [2013] EWCA Civ 1288

The Court of Appeal (at para.30) commended the advice in the *ADR Handbook* as to how a party **who believes he has reasonable grounds for refusing to participate at a given stage** and wishes to avoid a costs sanction should behave in response to a request to engage in ADR.

a) do not ignore the request;

b) respond promptly in writing giving clear and full reasons why ADR is not appropriate at the stage based if possible on the *Halsey* guidelines;

c) raise any shortage of information/evidence with proposals as to how that shortage might be overcome;

d) do not close off ADR of any kind and for all time.

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

Ramsey J decided that although a refusal to mediate was prima facie unreasonable, it should not result in a costs sanction because of other relevant conduct by the refusing party who made a without prejudice save as to costs proposal.

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Gore v Naheed [2017] EWCA Civ 369

A dispute between neighbours about a claimant's right of way to a shared driveway for access and the defendant's right to obstruct the driveway to unload lorries for their wine business. The trial judge found in the claimant's favour and ordered that the Defendants pay the claimants costs. The defendant appealed arguing that the claimants failed to engage with their invitations to mediate and therefore the judge was wrong not to have made some deduction or allowance in the claimant's costs.

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Gore v Naheed [2017] EWCA Civ 369

- Court of Appeal upheld the lower court's decision and Patten LJ stated as follows:

  "Speaking for myself, I have some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated…. A failure to engage, even if unreasonable, does not automatically result in a costs penalty. It is simply a factor to be taken into account by the judge when exercising his costs discretion."

NB appellate courts considering costs decisions afford first instance judges very considerable latitude.

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Negotiation

- Absolutely a form of ADR and the rules make that explicit.
- Usually best conducted within the Part 36 regime even at the earliest stages.
- Sometimes challenging tactical decisions need to be made when it comes to the overlap between negotiation and mediation. Constant review is essential.

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Mediation

- Main advantages are that it is well established, well understood, has an excellent record of success (c.80%).

- It is also extremely flexible.

- As observed above it should not necessarily be seen as an alternative to other forms of ADR and may in a challenging case be one of several steps.

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Arbitration

- A relative newcomer and probably best suited to 1975 Act and TLATA claims under the IFLA scheme.
- Greatest advantage is the flexibility afforded by private ADR together with finality.
- Some potential challenges in probate claims and other matters that require the court's approval of settlements but the IFLA scheme has navigated these difficulties in matrimonial finance.

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ENE/FDR

- Less flexible than mediation because it requires (in all but exceptional cases) the attendance of the parties at court.

- Affords a more authoritative voice which may encourage the parties in a way that the more subtle arts of the mediator may not.

- Private ENE/FDR by an experienced specialist practitioner is a powerful tool .

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Seals, Seals v. Williams [2015] EWHC 1829 (Ch)

Norris J, VC, at para 3:

- ***"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".***

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If at first you don't succeed…

Heyes v Holt [2024] EWHC 779 (Ch).

An interesting PE case on several points not least the requirement to pay-in or charge £331,230 in order to avoid the matter being struck out. But most relevant here as the case was stayed for a second mediation.

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Heyes v Holt [2024] EWHC 779 (Ch).

Per HHJ Matthews:

> *I am aware that mediation has already been attempted between the parties (in November 2022), and on that occasion it failed. I commend them nevertheless for trying. But that was before the claim had even been issued. Now that the parties have full pleadings and disclosure, as well as (for what it may be worth) this judgment, the parties should try again. I will order a stay for that purpose.*

On second mediation see also **Francis v Pearson [2024] EWHC 605 (KB).**

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Thank you.