CHAPTER THREE

MEDIATION – THE PROCEDURAL FRAMEWORK

INTRODUCTION.

This chapter examines negotiation and the mediation process from the perspective of practice and procedure before the civil courts of England and Wales.

Civil Litigation

The courts provide the primary mechanism for the resolution of civil disputes and the protection of private rights. It is an essential service provided by the state to ensure that private disputes are dealt with in a civilised manner that does not threaten the order and well being of society. The objective is to ensure that citizens have no legitimate reason for taking the law into their own hands. Civil justice is a central feature of the rule of law which seeks to place everyone in society on a level playing field. However, civil justice does not seek to intervene where citizens are both able and willing to settle their differences in a consensual manner on terms that comply with legal norms. Civil justice places a heavy financial burden on the state and accordingly the legal system has not been slow to encourage parties to settle their differences without the court's assistance, though undoubtedly the existence of the facility to have recourse to judicial determination of reciprocal rights and duties acts as an incentive towards settlement and has a major influence on the negotiated settlement process. It is a remarkable statistic that ninety-seven percent of all claims lodged before the courts eventually settle, with only a small minority proceeding to trial and judicial determination.

The work load of the civil courts has increased remorselessly in recent times and towards the end of the last century the perception arose that the courts had become inefficient and unable to cope with the increasing levels of work. Lord Woolf, who subsequently became the Lord Chancellor, was charged with reforming the civil justice system. The reforms that he introduced streamlined civil procedure. Lord Woolf concluded that litigants had become too reliant on the civil justice system and he introduced measures to encourage litigants to settle disputes privately where the services of the court were not really considered to be necessary. The Woolf Reforms encourage all forms of alternative dispute resolution (ADR) with a specific encouragement to negotiate and settle disputes, thereby avoiding disproportionate costs for both the parties and the state. The judges, tasked with implementing the reforms have targeted mediation as a way of achieving these objectives.

The Woolf Reforms and the Civil Procedure Rules 1998.

The duty of the parties to embrace ADR and the duty of courts to encourage parties to use ADR is central to the ***overriding objectives*** set out in **Part 1 of the Civil Procedure Rules.**[1] Whilst the sections highlighted in bold below are directly concerned with ADR, it is clear that ADR has much to offer in respect of many of the other issues covered by the section, in particular in respect of speed and expenditure, especially where the sums of money at stake are relatively low. Where the financial resources of one party far exceed those of the other ADR has much to commend it in terms of fairness by providing an affordable mechanism for dispute resolution for the financially disadvantaged party. Furthermore, co-operation between the parties lies at the heart of ADR and mediation in particular. Even where the provisions do not lead directly to the use of ADR one should note that once the courts have taken the directions contained within the overriding objective on board and put them into practice, many of the pre-existing financial benefits to lawyers of litigation will disappear. In future litigation will be *"leaner and meaner"*. The lawyer who can maximise the benefits of the new system by providing ADR services to clients will further enhance his or her reputation as a provider of legal services which lead to the efficient, fair and cost effective resolution of clients' disputes.

[1] See s1 CPR 1998.

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RULE 1 CIVIL PROCEDURE RULES 1998

1.1(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

1.1(2) Dealing with a case justly includes, so far as practicable
- (a) ensuring that the parties are on an equal footing
- (b) saving expense
- (c) dealing with the case in ways which are proportionate
  - (i) to the amount of money involved
  - (ii) to the importance of the case
  - (iii) to the complexities of the issues and
  - (iv) to the financial position of each party
- (d) ensuring that it is dealt with expeditiously and fairly and
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

1.2 the court must seek to give effect to the overriding objective when it
- (a) exercises any power given to it by the Rules or
- (b) interprets any rule.

1.3 The parties are required to help the court to further the overriding objectives.

1.4(1) The court must further the overriding objective by actively managing cases.

1.4(2) Active case management includes
- (a) encouraging the parties to co-operate with each other in the conduct of the proceedings.
- (b) identifying the issues at an early stage.
- (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others.
- (d) deciding the order in which issues are to be resolved.
- **(e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure.**
- (f) Helping the parties to settle the whole or part of the case.
- (g) Fixing timetables or otherwise controlling the progress of the case.
- (h) Considering whether the likely benefits of taking a particular step justify the cost of taking it.
- (i) Dealing with as many aspect of the case as it can on the same occasion.
- (j) Dealing with the case without the parties needing to attend at court.
- (k) Making use of technology; and
- (l) Giving directions to ensure that the trial of a case proceeds quickly and efficiently.

Commercial Court Practice Statements on ADR 1993 and 1998. [2]

The 1st Practice Direction sought to ensure that where disproportionate costs were involved the parties to litigation should consider the value of ADR. The 2nd Practice Direction sought further to encourage parties to consider to consider the use of ADR, including mediation and conciliation, as a possible additional means of resolving issues or disputes. Whilst judges would be involved in ADR processes or act as mediators they should in appropriate cases (eg disproportionate costs involved) invite parties to consider whether their case or certain issues in their cases could be resolved by ADR. The Clerk to the Commercial Court would keep a list of individuals and bodies that offered ADR services including arbitration but would not recommend any individual or organisation. The practice statement would be drawn to the attention of all persons commencing proceedings in the commercial list. Appendix IV (*information for the summons of directions*) and appendix VI (*pre-trial check list*) to the **Guide to Commercial Court Practice** (*Appendix A to Order72 RSC*) would be amended to include additional questions to ensure that in all cases legal advisers considered with their clients the

[2] *Practice Note (Commercial Court: Alternative Dispute Resolution)* Cresswell J [1994] 1All ER 34; *Practice Statement: Alternative Dispute Resolution,* 7 June 1996 Waller J; ***Practice Statement on ADR*** [1998] (Commercial Court) 10th December, per Mr Justice Cresswell.

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possibility of attempting to resolve the particular dispute or particular issues by mediation, conciliation or otherwise. While the Commercial Court would remain the appropriate forum for deciding most disputes in its list, legal advisers should ensure that parties were fully informed as to the most cost effective means of resolving the particular dispute. Following on from the practice statement, the Court Service issued revised notes of guidance for court users, for all the courts in England and Wales, an example of which is set out below.

Queen's Bench Division Guidance Notes. 6.6. Alternative Dispute Resolution ('ADR')

6.6.1 Parties are encouraged to use ADR (such as, but not confined to, mediation and conciliation) to try to resolve their disputes or particular issues. Legal representatives should consider with their clients and the other parties the possibility of attempting to resolve the dispute or particular issues by ADR and they should ensure that their clients are fully informed as to the most cost effective means of resolving their dispute.

6.6.2 The settlement of disputes by ADR can;
(1) significantly reduce parties' costs,
(2) save parties the delay of litigation in resolving their disputes,
(3) assist parties to preserve their existing commercial relationships while resolving their disputes, &
(4) provide a wider range of remedies than those available through litigation.

The Master will in an appropriate case invite the parties to consider whether their dispute, or particular issues in it, could be resolved by ADR. The Master may also either adjourn proceedings for a specified period of time or extend the time for compliance with an order, a Rule or Practice Direction to encourage and enable the parties to use ADR. Parties may apply for directions seeking a stay for ADR at any time.

6.6.3 Information concerning ADR may be obtained from the Admiralty and Commercial Court Registry.

The basic rules on applying for a stay to mediation and the powers of the court are set out in R26 CPR.

RULE 26 CIVIL PROCEDURE RULES 1998

26.3(1) When a defendant files a defence the court will serve an allocation questionnaire on each party ….

26.4(1) A party may, when filing the completed allocation questionnaire, make a written request for the proceedings to be stayed while the parties try to settle the case by alternative dispute resolution or other means.

26.4(2) Where
(a) All parties request a stay under paragraph (1) or
(b) the court, of its own initiative, considers that such a stay would be appropriate, the court will direct that the proceedings be stayed for one month.

26.4(3) The court may extend the stay until such a date or for such a specified period as it considers appropriate.

26.4(4) Where the court stays the proceedings under this rule, the claimant must tell the court if a settlement is reached.

26.4(5) If the claimant does not tell the court by the end of the period of stay that a settlement has been reached, the court will give such directions as to the management of the case as it considers appropriate.

Lawyers may have a duty to direct clients to ADR. Lord Carnwath stated obiter in ***Ali v Lane*** that "*It is sadly a commonplace that boundary disputes can be fought with a passion which seems out of all proportion to the importance of what is involved in practical terms. In such cases, professional advisors should regard themselves as under a duty to ensure that their clients are aware of the potentially catastrophic consequences of litigation of this kind and of the possibilities of alternative dispute procedures*" though he did not give any indication of what, if any, the consequences might be for a failure to do so.[3] The duty of the parties to direct themselves towards the value of ADR is set out in the Practice Directions.

[3] ***Ali v Lane*** [2006] EWCA Civ 1532

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GENERAL PRACTICE DIRECTION – PRE-ACTION PROTOCOLS

1.4. The objectives of pre-action protocols are:
(2) to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings,

3.3 The court is likely to treat this practice direction as indicating the normal, reasonable way of dealing with disputes. If proceedings are issued and parties have not complied with this practice direction or a specific protocol, it will be for the court to decide whether sanctions should be applied.

3.4 The court is not likely to be concerned with minor infringements of the practice direction or protocols. The court is likely to look at the effect of non-compliance on the other party when deciding whether to impose sanctions.

4.1. In cases not covered by any approved protocol, the court will expect the parties, in accordance with the overriding objective and the matters referred to in CPR 1.1(2)(a), (b) and (c), to act reasonably in exchanging information and documents relevant to the claim **and generally in trying to avoid the necessity for the start of proceedings.**

4.3 The claimant's letter should –
(f) state (if this is so) that the claimant wishes to enter into mediation or another alternative method of dispute resolution; and
(g) draw attention to the court's powers to impose sanctions for failure to comply with this practice direction and, if the recipient is likely to be unrepresented, enclose a copy of this practice direction.

4.7 The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the Claimant and Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if this paragraph is not followed then the court must have regard to such conduct when determining costs;

It is not practicable in this Practice Direction to address in detail how the parties might decide which method to adopt to resolve their particular dispute. However, summarised below are some of the options for resolving disputes without litigation:

- Discussion and negotiation
- Early neutral evaluation by an independent third party (for example, a lawyer experienced in that field or an individual experienced in the subject matter of the claim).
- Mediation – a form of facilitated negotiation assisted by an independent neutral party.*

It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR.**

4.6 If the defendant does not accept the claim or part of it, the response should –
(e) state whether the defendant is prepared to enter into mediation or another alternative method of dispute resolution.

4.8 Documents disclosed by either party in accordance with this practice direction may not be used for any purpose other than resolving the dispute, unless the other party agrees.

* The Legal Services Commission booklet 'Alternatives to Court', CLS Direct Information Leaflet 23 lists a number of organisations that provide alternative dispute resolution services. (www.clsdirect.org.uk/legalhelp/leaflet23.jsp),

** see also ***Nokia Corporation v Interdigital Technology Corporation [2005] EWHC 2134.*** Pumfrey J. Court ordered mediation not available in the UK. ***Halsey*** applied. Chancery Division, Patents Court.

Given that s.5.4 of the recently issued ***Pre-Action Protocol for Construction and Engineering Disputes*** goes far further than the general pre-action protocol and now provides that *"In respect of each agreed issue or the dispute as a whole, the parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt"* the government has taken yet one more step to

encourage even those already engaged in litigation to step back and re-evaluate the contribution that ADR might make to the timely settlement of the dispute in lieu of continuing with the action. This represents a real opportunity for the ADR industry, since unlike small claims where court advised mediation may be of questionable benefit to the parties, mediation has much to offer in the resolution of large and complex disputes, both in terms of cost and time issues.

Court advised Mediation

The Civil Procedure Rules 1998 have concretised a sea change in the attitude of the judiciary towards alternative dispute resolution. From the middle of the 20th century onwards the courts were over zealous of their superior role as guardians of justice and went to great lengths to override private dispute resolution arrangements. The English courts were not slow to accept the invitation of a party to a dispute to exercise jurisdiction over civil matters or to otherwise intervene in the process. Judicial support for ADR processes ranged from minimal to non-existent. Gradually however, increasing judicial workloads and tighter financial constraints on the civil justice system forced a re-evaluation. The judiciary has gone from being generally ADR adverse fifty years ago to being very supportive of private dispute resolution mechanisms.

Case law demonstrates that this is the case. Whilst the Civil Procedure Rules now provide the courts with the power to encourage ADR processes, nonetheless, application of the rules involves judicial discretion. The judiciary has exercised that discretion firmly in favour of ADR.[4] Examples of the courts advising and encouraging the parties to mediate are now legion. Such encouragement is frequently accompanied by a stay of the action pending mediation. The courts have not been slow to use this facility. Thus 1998 saw the Court of Appeal commending the services of CEDR in ***Crowther v Brownsword*** [1998].[5] The value of mediation was acknowledge by the Court of Appeal as early as 1996, in the case of ***Automotive Patterns v Plume*** [1996],[6] pre-empting the revision of civil procedure. The court observed that the case would have been appropriate for court ordered mediation if such a facility existed in the UK. The court expressed concern that small claims may be might be priced out of court, depriving deserving parties of access to justice.

The Court of Appeal has firmly embraced the concept of mediation and in appropriate circumstances has taken the opportunity during hearings of applications to appeal to commend mediation,[7] especially where social relations appear to the court to be worth preserving,[8] or the costs of appeal are disproportionate to the issues at state.[9] Where an appeal on entitlement is successful a further hearing will be required to deal with quantum. Sometimes the Court of Appeal has been minded to stay the subsequent hearing to mediation to provide an opportunity for the parties to attempt to broker a settlement on quantum.[10]

Where public funds for representation are involved the courts may well advise mediation to protect the public purse.[11] Where the parties will be forced to deal with each other in the future, mediation is often seen as preferable to litigation which might make it even harder for the parties to cooperate with each other.[12] Where

[4] The Court of Appeal in particular has been very supportive of ADR, though enthusiasm for ADR in the District Courts has been more variable, despite the efforts of Her Majesties Court Service to inculcate a culture of alternative justice.

[5] ***Crowther v Brownsword [1998] EWCA Civ 1040*** before Evans LJ; Mrs Justice Hale.:

[6] ***Automotive Patterns (Precision Equipment) Ltd v. A.W. Plume Ltd [1996] EWCA Civ 825*** before Hobhouse LJ; Hutchison LJ. Staughton LJ.

[7] ***Reed Executive Plc v Reed Business Information Ltd [2004] EWCA Civ 159*** Auld LJ; Rix LJ; Jacobs LJ. ***Williams v Lindley [2005] EWCA Civ 103.*** Buxton LJ; Smith LJ; Thorpe LJ

[8] ***Stuart Baddely & Margaret Allman v I.E.Barker [2003] EWCA Civ 742*** Buxton LJ; Mance LJ. Ward LJ;

[9] ***Michaelides v Wilkinson [1999] EWCA Civ 1168***:before Peter Gibson LJ; Mr Justice Blofeld; ***Cave v Borax Europe Ltd & Ors [2001] EWCA Civ 1729*** Sir Anthony Evans; ***Mutuma v London Borough Of Barnet [2002] EWCA Civ 674*** Sedley LJ. Ward LJ. Here the court granted leave but in the light of adverse findings of fact delivered a cost warning at the same time.

[10] ***Bates v Microstar Ltd [2000] 2000/0069/A3*** **:** Aldous LJ; Sir Richard Scott ; Thorpe LJ. Successful appeal against a summary judgment. Trial ordered regarding quantum but stayed pending ADR – aggressive correspondence by solicitor criticised by the court. ***Burne v A [2006] EWCA Civ 24:*** Ward LJ; Sedley LJ; Wilson LJ. Medical Negligence Claim. Successful appeal. Court recommended parties mediate whereby they are forced to take stock of their respective strengths and weaknesses - ie reality check (self evaluative) mediation to deal with quantum

[11] ***Commissioner of Police of The Metropolis v. Nagy [2004] UKEAT 0399_04_2209*** : HHJ. McMullen. Sex discrimination action Tribunal advised ACAS conciliation or mediation. The sums involved were small: the event occurred a long time ago and had serious implications for the Legal Aid Board.

[12] ***Darke v Strout [2003] EWCA Civ 176*** Chadwick LJ; Morland. Mr Justice Thorpe LJ; - a party was legally entitled to maintenance payments but how much had to be determined. The court could do it, but agreement was considered to be preferable.

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the Court of Appeal remits a case to the lower court it has sometimes taken the opportunity to advise mediation to avoid the further dissipation of funds.[13] The mere fact that relations between the parties had to date been acrimonious has not always deterred the court from advising mediation,[14] though at other times the court has acknowledged that there would be no point in delaying an inevitable trial because the antagonisms between the parties meant that they were incapable of agreeing to anything.[15]

Mediation is not always considered to be cost effective particularly where small value claims are involved and the courts have recognised this and declined to order mediation in such circumstances, particularly when funds were already strained.[16] If a trial is imminent and scheduled the court is unlikely to accede to a request to stay proceedings, particularly if the court feels that the request is simply a delaying tactic.[17] In the alternative, if the court does accede to a request it may make an order preserving costs on behalf of the other party to cover any potential hearing costs thrown away by the ordering of a stay.[18] Likewise, where the parties require a legal precedent to establish rights and facilitate future dealings mediation is not considered to be appropriate, particularly since one party had made it clear they were not prepared to mediate.[19]

Mediation is clearly identified by the Court of Appeal as a mechanism for achieving some form of justice, particularly for the impecunious litigant. Thus in ***Chauhan v Sandhu*** [1999] the court advised a party to a family dispute to mediate and to seek assistance from the CAB and the London Circuit pro-bono scheme.[20] In ***Kinstreet v Balmargo*** [1994] neither party could really afford further litigation and hence despite high levels of distrust between the parties mediation was commended.[21]

Where the Court of Appeal has taken the view that uncertainty about the legal entitlements of the parties has prevented settlement to date, but where the court has declared the law and it has appeared to the court that mediation would be preferable to returning to court, they have advised that course of action.[22] To further encourage mediation, whilst not adjudicating on outstanding matters, the court has not been slow to express its views on the likely outcome of ongoing litigation.[23] Whilst early evalution encourages settlement, it also tips the balance firmly in favour of one party, though in the circumstances it could also simply be a reality check advising on the inevitable rather than visiting injustice on a party. In one instance the court warned both parties of the risks inherent in litigation and costs, since it was not clear who would eventually prevail.[24]

STAY TO MEDIATION

Under s26(4) CPR the court has the power to direct that a case be stayed for 1 month with a power to extend, in order for the parties to reach a settlement. [25] A party can instigate this by requesting mediation at any time up to the commencement of a trial. The court can suggest mediation even if neither party raises the matter. A challenge to the exercise of this power on the basis of a denial of right to trial was rejected by the court since a stay is not a denial of justice, merely a delay for potentially beneficial purposes, namely to afford the parties to attempt a settlement.[26]

[13] ***Laird v Laird [1998] EWCA Civ 1841*** before Mummery LJ. Stuart-Smith LJ; Thorpe LJ; ***Maskell v Maskell [2001] EWCA Civ 858*** per Mr Justice Bell & Thorpe LJ.

[14] ***Jones v Harrison [1999] EWCA Civ 772*** before Evans LJ & Mr Justice Hidden; see also ***Alan Vernon Barker v Peter Seymour & Virginia Helen Margaret Johnson [1999] ADR.L.R. 03/25*** before Ward LJ.

[15] ***Federal Bank of the Middle East Ltd v Charles Hadkinson (No1) [1999] Ch.D*** HHJ

[16] ***Punjab National Bank v Parash [2004] EWCA 589*** Jacob LJ. Mance LJ; Morritt LJ.

[17] ***Slough Borough Council v Prashar & Ors [2004] EWCA Civ 671*** Peter Gibson LJ; Peter; Rix LJ; Longmore LJ.

[18] ***Tripp Ltd v Landor & Hawa Int. Ltd [2004] Ch.D.*** HHJ Pumfrey; ***Michael v Miller [2004] EWCA Civ 282.*** Auld LJ; Scott Baker LJ; Jonathon Parker LJ.

[19] ***Kumar v Osbournes [1997] EWCA Civ 2877 per*** Morritt LJ.

[20] ***Chauhan v Sandhu [1999] EWCA Civ 1610*** :per Otton LJ; Walker LJ.

[21] ***Kinstreet Ltd v Balmargo Corporation Ltd [1994] Ch 1994 G2999*** by Mrs Justice Arden.

[22] ***Dixons Group Plc v Murray-Obodynski [1999] EWCA Civ 1775*** :before Clarke LJ, Woolf LJ, Mance LJ.; ***Cooper v Kaur*** [2001] 1 FCR 12 per Thorpe L:J : Judge LJ ; ***Hayes v Stewart [2002] EWCA Civ 513*** Simon Brown LJ; Lady Justice Hale.

[23] ***Hughes v Jones (t/a Plas-Y-Bryn Nursing Home) [2002] EWCA Civ 346 per*** Ward LJ; Keen LJ; ***Veitch v Avery Barry & Co [2002] EWCA Civ 1342*** Tuckey LJ. Ward LJ;

[24] ***Morris v Jones [2002] EWCA Civ 1790*** Sir Anthony Evans,, Clarke LJ; Ward LJ

[25] ***Rose v Cox [1999] EWCA Civ 608*** : Evans LJ; Thorpe LJ. Whilst adjournment granted, the court also urged the parties to mediate using court mediation scheme.

[26] ***Agodzo v Amegashitsie [1999] EWCA Civ 1453*** **:** Ward LJ; Chadwick LJ

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The power is pursuant to the response given by the parties to the Allocation Questionnaire (s26(3)), Question A of which asks the parties *"Do you wish there to be a one month stay to attempt to settle the case?"* Even if the parties do not agree to a stay, the court of its own initiative can order a stay if the claimant / defendant who wishes the court to deal with the matter, provides no good explanation to the court as to why a stay, in order to try and settle the issue, should not be made. At the end of the period, if the parties return to court, the court will give further directions on the management of the case as appropriate.

What will be appropriate will depend on the responses of the parties to questions posed by the court such as "***Was there a mediation agreement?***" If the response is "***No***" the court might inquire "***Why not***?" If the response is "***Yes***" the court will wish to inquire whether or not the party attended and since the mediation failed will want to know whether or not someone with the power to settle the dispute took part in the mediation. The court may even wish to inquire of the mediator whether or not the process was abused by a party who obdurately failed to co-operate.

A legal action is not always the appropriate way to deal with disagreements particularly where there is no legal redress to a problem. In ***Martin v Childs*** [2002] the Court of Appeal held that a conveyance had not given the owner a right to lay water pipes over his neighbour's land.[27] The law could not assist but the Court expressed the hope that the warring neighbours could broker a mediated settlement. Whilst mediation has a role to play in non-legal social negotiations the only incentive to settlement is a mutual desire to establish and maintain good social relationships. Without that mutual desire the chances of settlement are non-existent.

The court has problems dealing with cases where several parties have interests at stake but where only two of the parties have the right to litigate. In such circumstances provided all concerned parties can be prevailed upon to take part in mediation the court can and will stay action pending mediation.[28]

The court will automatically grant a stay or an adjournment of a hearing if the parties commit themselves to mediation.[29] The court however can stay to mediation if a party requests it but cannot mandate mediation if the other party refuses to mediate.[30] In the alternative, if the parties do not agree to mediate where a case is remitted for re-trial the trial judge can force the parties to re-evaluate their positions during case management sessions.[31]

Where the parties had contracted on terms which included mediated settlement there can be little or no room for complaint about judicial coercion,[32] since the court is simply requiring the parties to fulfil the terms of their agreement.[33] In such situations the court will not set down a date for trial until the mediation process is exhausted since to do otherwise would put additional pressure on one of the parties during the mediation process to settle before a pending court deadline.[34]

However, in other circumstances the power to order a stay to mediation may be seen as a pseudo form of mandatory mediation.[35] Whilst s4.7 of the General Pre-action Protocol states that *"It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR",* nonetheless, a stay to mediation is a powerful incentive. Even more of an incentive occurs where the court determines not to list a case for trial or

[27] ***John & Anne Martin v Peter Francis & Jean Childs [2002] EWCA Civ 283.*** Hale. L.J Pill LJ; Mummery LJ;

[28] ***Rickards v Jones [2002] EWCA Civ 260*** *:* Mance LJ; Mrs Justice Smith. A house purchaser solicitor failed to ensure NHBC cover for a property. The court ordered three party ADR involving HHBC & Solicitor.

[29] ***Cable & Wireless v IBM [2002] EWHC 2059*** per Colman J ; ***OEM Plc v Schneider [2005] EWHC 1072 (Ch)*** *:* Mr Justice Peter Smith

[30] ***Shirayama Shokusan Co Ltd v Danovo Ltd [2003] EWHC 3006 (Ch)*** **:** Mr Justice Blackburne. Dispute over lease and trespass to land during the course of advertising. The action also involved allegations of dishonesty, but despite this when the respondent applied for court ordered mediation the application was granted by the court.

[31] ***Nakhjavani v Theophilou Pelagias [2005] EWCA Civ 908*** : Arden LJ, Keene LJ, Mr Justice Wilson..

[32] ***Bottin Investments Ltd v Venson Group Plc [2004] EWHC 135*** : HHJ Peter Smith. A share contract contained a mediation clause, allowing for a 90 day procedure, failure giving rise to a right to litigate. The court held that there was no right to litigate until mediation had been attempted.

[33] as in ***Torith Ltd v Stewart Duncan Robertson [1999] LTL C8200316*** per Lord Johnston; ***Asghar v Legal Services Commission [2004] EWHC 1803.*** Lightman J. Both cases involved Employment Appeals Tribunals.

[34] ***Cheltenham & Gloucester v Ashford [2001] EWCA 396*** Pill LJ ; ***Maggs (t/a BM Builders) v Marsh [2006] EWCA Civ 1058*** Smith LJ; Moses LJ; Hallett LJ.

[35] ***H (A Minor) [1998] EWCA Civ 98*** **per** Roche LJ; Wall LJ expressed the view that compulsory mediation is a contradiction in terms.

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set down a trial date until the parties have engaged in settlement procedures.[36] It should be noted further that the incentive is directed mostly towards the applicant who wishes to make progress rather than towards a respondent who may be quire happy for any delay since cash flow remains intact in the interim period.

The evolving implications of the Woolf Reforms for the mediation process.

Clearly there is a duty imposed on solicitors to advise their clients of the availability of ADR. Provided a client in response to a court's question as to whether or not they have been so advised answers in the affirmative the firm will be seen to have complied with the new requirements in respect of ADR. Does this mean that firms can, by adopting the practice of advising their clients in a cursory manner of the "availability" but not the "advantages" of ADR fulfil their duties and then continue as if ADR does not exist? Only time will tell whether or not this is the case, but there is good reason to believe that this will not be an effective nor safe strategy. Clients today are becoming more discerning and many will sue their legal advisor without compunction if the need arises. The blanket immunity of legal advisors from liability for the provision of poor quality legal services is a thing of the past. The time may well come when a client who has not been advised of the "advantages of mediation" and who consequently instructs his legal advisors to take a dispute to trial, incurring inordinate costs in the process, will seek to recover those costs from the legal advisor through a tort action for negligent advice.

This view has been reinforced by the Court of Appeal, by no less than Lord Woolf, MR, Brooke LJ and Robert Walker LJ in ***Biguzzi v Rank Leisure plc***. 1999.[37] Whilst the case is concerned with the way the court deals with a failure to comply with time limits it is clear that the courts will make full use of their new powers of case management under the Civil Procedure Rules. Judges now have wide powers and discretion to deal with a failure by either party to comply with orders of the court aimed at moving a case forward to fulfil the overriding objectives of Part I. The implications for Alternative Dispute Resolution are clear.

Dismissing Rank's appeal and reinstating Ricardo Biguzzi's claim for negligence and / or breach of contract which had been struck out by a deputy district judge for failure to comply with time limits by Judge Kennedy, QC, at Brighton County Court, the Court of appeal stated that *"The court had broad powers to deal with non-compliance with time limits under the Civil Procedure Rules (SI 1998 No 3132) and it could make orders which would, in many cases, deal with a claimant's default more appropriately and justly than by taking the draconian step of striking his claim out."*

The Master of the Rolls noted that the judge had held that authorities on the question of delay decided subsequent to ***Birkett v James*** [1978], but prior to the introduction of the 1998 Rules should no longer be taken as binding following the introduction of those Rules.[38] The defendant had said that that approach was wrong, at least in relation to cases, such as the present, which were covered by the transitional arrangements dealing with the introduction of the new rules.

His Lordship commended the judge's approach. The judge had had to make a decision applying the principles in the new rules. He could not ignore the fact that, previously, the parties had been acting under a different regime; but that did not mean that he was constrained to make the same sort of decision as would have been made under that regime. The courts had learnt, in consequence of the periods of delay which had taken place prior to April 1999 that the ability of the courts to control delay had been unduly constrained by such decisions as ***Birkett v James***. Under the new rules the position was fundamentally different, as Rule 1.1 made clear. Prior to their introduction, courts had often had to take draconian steps, such as striking out a case, in order to terminate an action where there had been a total failure to prosecute proceedings expeditiously which was pointlessly wasting judicial resources.

[36] ***Muman v Nagasena [1999] EWCA Civ 764*** Evans LJ; Mr Justice Hidden. Court asked to determine who had the right to occupation of a Buddhist Temple owned by a charitable trust. The Court of Appeal mandated mediation as a pre-requisite to further hearings. See later ***Muman v Nagasena [1999] EWCA 1742*** Nourse LJ; Swinton Thomas LJ; Mummery LJ. See also ***Keshwara v Keshwara [2002] EWCA Civ 1416*** Wall LJ where the court refused to set down a date for trial until either mediation has taken place or at the least that the parties had had a chance to explore the possibility of so doing.

[37] ***Biguzzi v Rank Leisure plc*** CA July 26th 1999 : Times 5th October 1999.

[38] ***Birkett v James*** [1978] AC 297

Under the new rules the keeping of time limits gained in importance and significance. The clearest reflection of that was to be found in the overriding objective to be found in Part 1 and in the unqualified power the court now had to strike out a statement of case under rule 3 .4(2)(c) where there had been a failure to comply with a rule, practice direction or court order. However, the court's powers were now much broader than previously and in many cases there would be alternatives which allowed the case to be dealt with justly without taking the draconian step of striking it out.

Under the court's case management powers delays should in future no longer occur. But if the court was to exercise those management powers it was essential that parties did not disregard timetables which were laid down. If they did so, the court must ensure that default did not go unmarked, otherwise there would be a return to the previous culture of disregarding time limits. There were, however, alternative powers to striking out which would make clear that the court would not tolerate delays. In a great many cases those powers would be the appropriate ones to adopt because they would produce a more just result.

The alternatives were listed in paragraph 2.3 of Practice Direction Protocols (see Civil Procedure Rules 1998 paragraph BO-OO1) and they included orders for costs, including on an indemnity basis, and orders depriving a claimant of part of the interest on any damages recovered or making a defendant pay interest on damages at a higher rate. The ability of the court to make indemnity orders for costs and to order that they be paid forthwith was a valuable sanction.

For a solicitor to have to justify to his client why he had to be put in funds to meet such an order was particularly valuable for bringing home to the solicitor and the party the consequences of default; particularly if the costs were assessed summarily. The great advantage of the alternatives was that they were much less likely to result in an appeal, which generated huge and disproportionate expense. In the present case, the judge had come to the conclusion that both parties had failed to comply with the rules and that the case should be brought on as soon as practicable. He was not countenancing the sort of behaviour that had occurred but he was recognising the realities of what had been happening under the old regime and seeking to apply the new approach.

Under the new approach judges had to be trusted to exercise their wide discretion fairly and justly while recognising their responsibility to litigants to not allow the same disregard of time limits to occur as in the past. When they did so, it was very important indeed that the Court of Appeal should not interfere unless it could be shown that their decisions contravened relevant principles.[39]

The application of the "***over-riding objectives***" rule in relation to ADR processes was evident in ***Torith Ltd v Stewart Duncan Roberton*** [1999] LTL C8200316,[40] where the Employment Appeals Tribunal considered the inter-relationship between applications to the Employment Tribunal for hearings and ADR agreements. Lord Johnstone held that where a collective agreement provided for a conciliation and dispute resolution procedure, an employer was entitled, as a matter of contract, to hold its employees to that procedure for determination of their complaint until such times as the route was exhausted, thus excluding the jurisdiction of the employment tribunal to that extent.

Torith v Stewart Duncan Robertson involved an appeal by an employer against a decision of an employment tribunal regarding a collective agreement. Torith Ltd had entered into a Working Rule Agreement with the trade union in 1997. A dispute developed regarding whether skill rate 1 or 3 applied to workers with LGV C licences. The Working Rule Agreement provided a comprehensive conciliation and dispute resolution procedure under the auspices of the Construction Industry Joint Council (CIJC). The Union complained using the procedure but the process stalled because the Union could not agree on who would represent the parties on the Council. At a subsequent Tribunal Hearing it was held that rate 1 applied. The question on appeal was whether or not the Tribunal had jurisdiction or not to settle the matter. The Appeal Tribunal declared, that the original agreement was unsatisfactory if not ambiguous but that since there was a detailed disputes resolution procedure it was appropriate to compare that with an arbitration clause in a contract where it was settled law

[39] A thorough review of the overriding objective of the Civil Procedure Rules is set out at Annex 21 I, Civil Justice Reforms Practice Information pages 409 – 416 followed by Chapter 22 on Alternative Dispute Resolution at pages 417 – 438 of **The Guide to the Professional Conduct of Solicitors,** 8th Ed The Law Society 1999. ISBN 1853286451.

[40] ***Torith Ltd v Stewart Duncan Roberton*** [1999] LTL C8200316

that the jurisdiction of the general courts was excluded by such an agreement, at least to the extent of the merits of the dispute until such time as it was resolved. The matter was therefore properly looked at as one of jurisdiction rather than waiver. The tribunal should not have embarked on the task of settling the matter in the circumstances. The decision of the tribunal was therefore sisted, without prejudice to either party to move for a recall of the sist if there was a material change of circumstances, not least if the CIJC process became frustrated by an inability to agree on composition.

COST PENALTIES FOR FAILURE TO MEDIATE & RULE 44 CIVIL PROCEDURE RULES 1998

44.3(1) The court has discretion as to
- (a) whether costs are payable by one party to another;
- (b) the amount of those costs; and
- (c) when they are to be paid.

44.3(2) If the court decides to make an order about costs
- (a) the general rules is that the unsuccessful party will be ordered to pay the costs of the successful party; but;
- (b) the court may make a different order.

44.3(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including
- (a) the conduct of all the parties;
- (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
- (c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36)

44.3(5) The conduct of the parties includes
- (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol;
- (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
- (c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and
- (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

44.3(6) The orders which the court may make under this rule include an order that a party must pay
- (a) a proportion of another party's costs;
- (b) a stated amount in respect of another party's costs;
- (c) costs from or until a certain date only;
- (d) costs incurred before proceedings have begun;
- (e) costs relating only to a distinct part of the proceedings; and
- (f) interest on costs from or until a certain date, including a date before judgement.

The central concept regarding costs in England and Wales is that a successful party to litigation should not be penalised by having to foot the financial costs of that success, since otherwise success would have been achieved at a price. Accordingly the starting point in respect of costs is that ***"Costs follow the event."***[41]

[41] s43(2)(a) CPR 1998. Only taxable costs are recoverable. The court's taxation officer is tasked with determining recoverable costs unless costs are agreed between the parties. Costs may be awarded on the standard basis or in special circumstances on an indemnity basis. The difference is that with regard to the standard basis, where doubt is cast over the recoverability of costs, the benefit of doubt is given to the paying party, whereas with regard to indemnity costs, the benefit is given to the receiving party. See ***Michael Humpheryes v Nedcon UK Ltd [2004] EWHC 2558 (QB) :*** HHJ Roderick Evans. Co-defendants : One prepared to settle - other not - Part 36 offer to settle by claimant rejected but subsequently beaten. Liability apportioned 66.6/33.3. 2nd defendant went into liquidation. 1st defendant liable for entire sum. Enhanced interest on costs and costs on an indemnity basis.

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This perspective is not universal however. In the US access to justice is seen as a social good. Each party is expected to meet their own legal costs. Any provision to pay the costs of the other party is seen as a barrier to access to justice. The English answer to this would be that whilst true, the US dilutes the value of justice.

The Civil Procedure Rules now provide a mechanism for the courts to be more discerning than previously about the entitlement of a successful party to be reimbursed their legal costs, by taking into account the reasonableness of the behaviour of the litigant during the course of the process. It should be noted that the position in the US is not as stark as might at first sight appear, in that there is a facility for the US courts to award punitive damages, which will more than cover the costs of litigation.

If costs are to follow the event, the question that arises is ***"What amounts to success?"*** Should costs be awarded on the basis of "***Who writes the cheque pays the costs?***" as suggested in ***Day v Day*** [2006].[42] Where a number of different issues are disputed and success in respect of different aspects of the trial is shared between the parties such a rule may be artificial, particularly where the amount of effort expended on each of the issues is not spread evenly across the board. Thus Judge Thornton declined to award any costs, ruling that there was effectively a draw despite the fact that a cheque was drawn by one party in favour of the other, in ***Management Solutions v Bennett*** [2006].[43]

At least since the famous case of ***Calderbank v Calderbank***,[44] the courts have judged success by whether or not a party has recovered more from the litigation than was otherwise available. Thus in assessing success the courts take into account any offers to settle that have been made by one party to another. This gave rise to the practice of formal and informal offers by parties to settle and further of the practice of paying money into court as a form of security to establish that the offer was not a straw gesture that could not be followed through in the event that the offer was accepted. If accepted the settlement could be recorded as a settlement judgement and the action compromised. This is important to ensure that the entire dispute is brought to an end and that a party does not subsequently assert that only one aspect of a claim was settled but that other issues remained outstanding and thus the litigation had not come to an end. In order to win, a party must be awarded more than the amount paid into court. Note that whilst the trial judge may be aware that a payment in has been made, the offer is sealed from the judge, so that the judge will not be influenced during the assessment of damages by that figure and cannot consciously or unconsciously adjust the final figure to ensure that one party is the overall winner. Of course, where there has been an open offer of settlement that has been disclosed to the court, the judge will inevitably be aware of that figure.

The process of settlement offers and payments in is now formalised by the Civil Procedure Rules.

PART 36 CIVIL PROCEDURE RULES : OFFERS TO SETTLE AND PAYMENTS INTO COURT

36.1(1) This Part contains rules about -

- (a) offers to settle and payments into court; and
- (b) the consequences where an offer to settle or payment into court is made in accordance with this Part.

36.1(2) Nothing in this Part prevents a party making an offer to settle in whatever way he chooses, but if that offer is not made in accordance with this Part, it will only have the consequences specified in this Part if the court so orders.

(Part 36 applies to Part 20 claims by virtue of rule 20.3)

Note that these rules are not mutually exclusive, s36.1(2). The court still has discretion to consider informal offers as epitomised by ***Calderbank v Calderbank***. At first the courts tended to try and strictly enforce observation of these rules when dealing with settlement offers, but more recently there has been a trend towards rewarding settlement offers that are outside the rules, rather than discouraging them.[45]

42 ***Day v Day*** [2006] *EWCA Civ 415.* See also ***Johnsey Estates v Secretary of State for the Environment*** *[2001] EWCA Civ 535*

43 ***Management Solutions & Professional Consultants Ltd v Bennett (Electrical) Services Ltd [2006] EWHC 1720 (TCC); Management Solutions & Professional Consultants Ltd v Bennett (Electrical) Services Ltd [2006] EWHC 1720_2 (TCC)***

44 ***Calderbank (Jacqueline Anne) v Calderbank (John Thomas) [1975] ADR.L.R. 06/05***

45 ***Charles v NTL Group Ltd. [2002] EWCA Civ 2004***

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CHAPTER THREE

Part 36 offers and Part 36 payments - general provisions

36.2(1) An offer made in accordance with the requirements of this Part is called -
(a) if made by way of a payment into court, "a Part 36 payment";
(b) otherwise "a Part 36 offer".
(Rule 36.3 sets out when an offer has to be made by way of a payment into court)

36.2(2) The party who makes an offer is the "offeror".

36.2(3) The party to whom an offer is made is the "offeree".

36.2(4) A Part 36 offer or a Part 36 payment -
(a) may be made at any time after proceedings have started; and
(b) may be made in appeal proceedings.

36.2(5) A Part 36 offer or a Part 36 payment shall not have the consequences set out in this Part while the claim is being dealt with on the small claims track unless the court orders otherwise.
(Part 26 deals with allocation to the small claims track)
(Rule 27.2 provides that Part 36 does not apply to small claims)

A defendant's offer to settle a money claim requires a Part 36 payment

36.3(1) Subject to rules 36.5(5) and 36.23, an offer by a defendant to settle a money claim will not have the consequences set out in this Part unless it is made by way of a Part 36 payment.

36.3(2) A Part 36 payment may only be made after proceedings have started.
(Rule 36.5(5) permits a Part 36 offer to be made by reference to an interim payment)
(Rule 36.10 makes provision for an offer to settle a money claim before the commencement of proceedings)
(Rule 36.23 makes provision for where benefit is recoverable under the Social Security (Recovery of Benefit) Act 1997[44])

Defendant's offer to settle the whole of a claim which includes both a money claim and a non-money claim

36.4(1) This rule applies where a defendant to a claim which includes both a money claim and a non-money claim wishes -
(a) to make an offer to settle the whole claim which will have the consequences set out in this Part; and
(b) to make an offer in respect of both the money claim and the non-money claim.

36.4(2) The defendant must -
(a) make a Part 36 payment in relation to the money claim; and
(b) make a Part 36 offer in relation to the non-money claim.

36.4(3) The Part 36 payment notice must -
(a) identify the document which sets out the terms of the Part 36 offer; and
(b) state that if the claimant gives notice of acceptance of the Part 36 payment he will be treated as also accepting the Part 36 offer.
(Rule 36.6 makes provision for a Part 36 payment notice)

36.4(4) If the claimant gives notice of acceptance of the Part 36 payment, he shall also be taken as giving notice of acceptance of the Part 36 offer in relation to the non-money claim.

In ***Codent Ltd v Lyson Ltd.***[46] a claimant failed to beat a payment offer, which had not been followed up with a payment in and was made less than 21 days before trial. At 1st instance the court made no allowance for the payment in, but the Court of Appeal held costs should be split 70:30.

[46] ***Codent Ltd v Lyson Ltd (2005) Lawtel AC9400558*** before May LJ, Arden LJ, Sir Peter Gibson.

Form and content of a Part 36 offer

36.5(1) A Part 36 offer must be in writing.

36.5 (2) A Part 36 offer may relate to the whole claim or to part of it or to any issue that arises in it.

36.5(3) A Part 36 offer must -

(a) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue;

(b) state whether it takes into account any counterclaim; and

(c) if it is expressed not to be inclusive of interest, give the details relating to interest set out in rule 36.22(2).

36.5(4) A defendant may make a Part 36 offer limited to accepting liability up to a specified proportion.

36.5(5) A Part 36 offer may be made by reference to an interim payment.
(Part 25 contains provisions relating to interim payments)

36.5(6) A Part 36 offer made not less than 21 days before the start of the trial must -

(a) be expressed to remain open for acceptance for 21 days from the date it is made; and

(b) provide that after 21 days the offeree may only accept it if -

(i) the parties agree the liability for costs; or

(ii) the court gives permission.

36.5(7) A Part 36 offer made less than 21 days before the start of the trial must state that the offeree may only accept it if -

(a) the parties agree the liability for costs; or

(b) the court gives permission.

(Rule 36.8 makes provision for when a Part 36 offer is treated as being made)

36.5(8) If a Part 36 offer is withdrawn it will not have the consequences set out in this Part.

Notice of a Part 36 payment

36.6(1) A Part 36 payment may relate to the whole claim or part of it or to an issue that arises in it.

36.6(2) A defendant who makes a Part 36 payment must file with the court a notice ("Part 36 payment notice") which -

(a) states the amount of the payment;

(b) states whether the payment relates to the whole claim or to part of it or to any issue that arises in it and if so to which part or issue;

(c) states whether it takes into account any counterclaim;

(d) if an interim payment has been made, states that the defendant has taken into account the interim payment; and

(e) if it is expressed not to be inclusive of interest, gives the details relating to interest set out in rule 36.22(2).

(Rule 25.6 makes provision for an interim payment)

(Rule 36.4 provides for further information to be included where a defendant wishes to settle the whole of a claim which includes a money claim and a non-money claim)

(Rule 36.23 makes provision for extra information to be included in the payment notice in a case where benefit is recoverable under the Social Security (Recovery of Benefit) Act 1997)

36.6(3) The court will serve the Part 36 payment notice on the offeree unless the offeror informs the court, when the money is paid into court, that the offeror has served the notice.

36.6(4) Where the offeror serves the Part 36 payment notice he must file a certificate of service.

(Rule 6.10 specifies what must be contained in a certificate of service)

36.6(5) A Part 36 payment may be withdrawn only with the permission of the court.

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CHAPTER THREE

Offer to settle a claim for provisional damages

36.7(1) A defendant may make a Part 36 payment in respect of a claim which includes a claim for provisional damages.

36.7(2) Where he does so, the Part 36 payment notice must specify whether or not the defendant is offering to agree to the making of an award of provisional damages.

36.7(3) Where the defendant is offering to agree to the making of an award of provisional damages the payment notice must also state -

(a) that the sum paid into court is in satisfaction of the claim for damages on the assumption that the injured person will not develop the disease or suffer the type of deterioration specified in the notice;

(b) that the offer is subject to the condition that the claimant must make any claim for further damages within a limited period; and

(c) what that period is.

36.7(4) Where a Part 36 payment is -

(a) made in accordance with paragraph (3); and

(b) accepted within the relevant period in rule 36.11,

the Part 36 payment will have the consequences set out in rule 36.13, unless the court orders otherwise.

36.7(5) If the claimant accepts the Part 36 payment he must, within 7 days of doing so, apply to the court for an order for an award of provisional damages under rule 41.2.

(Rule 41.2 provides for an order for an award of provisional damages)

36.7(6) The money in court may not be paid out until the court has disposed of the application made in accordance with paragraph (5).

Time when a Part 36 offer or a Part 36 payment is made and accepted

36.8(1) A Part 36 offer is made when received by the offeree.

36.8(2) A Part 36 payment is made when written notice of the payment into court is served on the offeree.

36.8(3) An improvement to a Part 36 offer will be effective when its details are received by the offeree.

36.8(4) An increase in a Part 36 payment will be effective when notice of the increase is served on the offeree.

36.8(5) A Part 36 offer or Part 36 payment is accepted when notice of its acceptance is received by the offeror.

Clarification of a Part 36 offer or a Part 36 payment notice

36.9(1) The offeree may, within 7 days of a Part 36 offer or payment being made, request the offeror to clarify the offer or payment notice.

36.9(2) If the offeror does not give the clarification requested under para (1) within 7 days of receiving the request, the offeree may, unless the trial has started, apply for an order that he does so.

36.9(3) If the court makes an order under paragraph (2), it must specify the date when the Part 36 offer or Part 36 payment is to be treated as having been made.

Lightman J held in ***Hertsmere Trust v Rabindr-Anandh*** that the purpose of Part 36 payment in is to encourage settlement and keep unnecessary cases out of the courts.[47] The mere fact that an offer did not include an expiry date will not necessarily prevent it being treated as a payment in for costs purposes, provided it is clear and in other ways satisfies the standard of clarity and contained equivalent rights to a Part 36 payment in.

[47] ***Hertsmere Primary Care Trust v B & K Rabindra-Anandh [2005] EWHC 320 (Ch) Lawtel AC0108513***

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Court to take into account offer to settle made before commencement of proceedings

36.10(1) If a person makes an offer to settle before proceedings are begun which complies with the provisions of this rule, the court will take that offer into account when making any order as to costs.

36.10(2) The offer must -
- (a) be expressed to be open for at least 21 days after the date it was made;
- (b) if made by a person who would be a defendant were proceedings commenced, include an offer to pay the costs of the offeree incurred up to the date 21 days after the date it was made; &
- (c) otherwise comply with this Part.

36.10(3) If the offeror is a defendant to a money claim -
- (a) he must make a Part 36 payment within 14 days of service of the claim form; and
- (b) the amount of the payment must be not less than the sum offered before proceedings began.

36.10(4) An offeree may not, after proceedings have begun, accept -
- (a) an offer made under paragraph (2); or
- (b) a Part 36 payment made under paragraph (3),

without the permission of the court.

36.10(5) An offer under this rule is made when it is received by the offeree.

Time for acceptance of a defendant's Part 36 offer or Part 36 payment

36.11(1) A claimant may accept a Part 36 offer or a Part 36 payment made not less than 21 days before the start of the trial without needing the court's permission if he gives the defendant written notice of acceptance not later than 21 days after the offer or payment was made.

(Rule 36.13 sets out the costs consequences of accepting a defendant's offer or payment without needing the permission of the court)

36.11 (2)If -
- (a) a defendant's Part 36 offer or Part 36 payment is made less than 21 days before the start of the trial; or
- (b) the claimant does not accept it within the period specified in paragraph (1) -
  - (i) if the parties agree the liability for costs, the claimant may accept the offer or payment without needing the permission of the court;
  - (ii) if the parties do not agree the liability for costs the claimant may only accept the offer or payment with the permission of the court.

36.11(3) Where the permission of the court is needed under paragraph (2) the court will, if it gives permission, make an order as to costs.

Time for acceptance of a claimant's Part 36 offer

36.12(1) A defendant may accept a Part 36 offer made not less than 21 days before the start of the trial without needing the court's permission if he gives the claimant written notice of acceptance not later than 21 days after the offer was made.

(Rule 36.14 sets out the costs consequences of accepting a claimant's offer without needing the permission of the court)

36.12 (2)If -
- (a) a claimant's Part 36 offer is made less than 21 days before the start of the trial; or
- (b) the defendant does not accept it within the period specified in paragraph (1) -
  - (i) if the parties agree the liability for costs, the defendant may accept the offer without needing the permission of the court;

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(ii) if the parties do not agree the liability for costs the defendant may only accept the offer with the permission of the court.

36.12 (3) Where the permission of the court is needed under paragraph (2) the court will, if it gives permission, make an order as to costs.

Costs consequences of acceptance of a defendant's Part 36 offer or Part 36 payment

36.13(1) Where a Part 36 offer or a Part 36 payment is accepted without needing the permission of the court the claimant will be entitled to his costs of the proceedings up to the date of serving notice of acceptance.

36.13(2) Where -

(a) a Part 36 offer or a Part 36 payment relates to part only of the claim; and

(b) at the time of serving notice of acceptance the claimant abandons the balance of the claim,

the claimant will be entitled to his costs of the proceedings up to the date of serving notice of acceptance, unless the court orders otherwise.

36.13(3) The claimant's costs include any costs attributable to the defendant's counterclaim if the Part 36 offer or the Part 36 payment notice states that it takes into account the counterclaim.

36.13(4) Costs under this rule will be payable on the standard basis if not agreed.

Costs consequences of acceptance of a claimant's Part 36 offer

36.14 Where a claimant's Part 36 offer is accepted without needing the permission of the court the claimant will be entitled to his costs of the proceedings up to the date upon which the defendant serves notice of acceptance.

The effect of acceptance of a Part 36 offer or a Part 36 payment

36.15(1) If a Part 36 offer or Part 36 payment relates to the whole claim and is accepted, the claim will be stayed.

36.15(2) In the case of acceptance of a Part 36 offer which relates to the whole claim -

(a) the stay(GL) will be upon the terms of the offer; and

(b) either party may apply to enforce those terms without the need for a new claim.

36.15(3) If a Part 36 offer or a Part 36 payment which relates to part only of the claim is accepted -

(a) the claim will be stayed(GL) as to that part; and

(b) unless the parties have agreed costs, the liability for costs shall be decided by the court.

36.15(4) If the approval of the court is required before a settlement can be binding, any stay(GL) which would otherwise arise on the acceptance of a Part 36 offer or a Part 36 payment will take effect only when that approval has been given.

36.15(5) Any stay(GL) arising under this rule will not affect the power of the court -

(a) to enforce the terms of a Part 36 offer;

(b) to deal with any question of costs (including interest on costs) relating to the proceedings;

(c) to order payment out of court of any sum paid into court.

36.15(6) Where -

(a) a Part 36 offer has been accepted; and

(b) a party alleges that -

(i) the other party has not honoured the terms of the offer; and

(ii) he is therefore entitled to a remedy for breach of contract,

the party may claim the remedy by applying to the court without the need to start a new claim unless the court orders otherwise.

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Payment out of a sum in court on the acceptance of a Part 36 payment

36.16 Where a Part 36 payment is accepted the claimant obtains payment out of the sum in court by making a request for payment in the practice form.

Acceptance of a Part 36 offer or a Part 36 payment made by one or more, but not all, defendants

36.17(1) This rule applies where the claimant wishes to accept a Part 36 offer or a Part 36 payment made by one or more, but not all, of a number of defendants.

36.17(2) If the defendants are sued jointly or in the alternative, the claimant may accept the offer or payment without needing the permission of the court in accordance with rule 36.11(1) if -

(a) he discontinues his claim against those defendants who have not made the offer or payment; and

(b) those defendants give written consent to the acceptance of the offer or payment.

36.17(3) If the claimant alleges that the defendants have a several liability(GL) to him the claimant may -

(a) accept the offer or payment in accordance with rule 36.11(1); and

(b) continue with his claims against the other defendants.

36.17(4) In all other cases the claimant must apply to the court for -

(a) an order permitting a payment out to him of any sum in court; and

(b) such order as to costs as the court considers appropriate.

Other cases where a court order is required to enable acceptance of a Part 36 offer or a Part 36 payment

36.18(1) Where a Part 36 offer or a Part 36 payment is made in proceedings to which rule 21.10 applies -

(a) the offer or payment may be accepted only with the permission of the court; and

(b) no payment out of any sum in court shall be made without a court order.

(Rule 21.10 deals with compromise etc. by or on behalf of a child or patient)

36.18 (2)Where the court gives a claimant permission to accept a Part 36 offer or payment after the trial has started -

(a) any money in court may be paid out only with a court order; and

(b) the court must, in the order, deal with the whole costs of the proceedings.

36.18(3) Where a claimant accepts a Part 36 payment after a defence of tender before claim(GL) has been put forward by the defendant, the money in court may be paid out only after an order of the court. *(Rule 37.3 requires a defendant who wishes to rely on a defence of tender before claim(GL) to make a payment into court)*

Restriction on disclosure of a Part 36 offer or a Part 36 payment

36.19(1) A Part 36 offer will be treated as "without prejudice(GL) except as to costs".

36.19(2) The fact that a Part 36 payment has been made shall not be communicated to the trial judge until all questions of liability and the amount of money to be awarded have been decided.

36.19(3) Paragraph (2) does not apply -

(a) where the defence of tender before claim(GL) has been raised;

(b) where the proceedings have been stayed(GL) under rule 36.15 following acceptance of a Part 36 offer or Part 36 payment; or

(c) where -

(i) the issue of liability has been determined before any assessment of the money claimed; and

(ii) the fact that there has or has not been a Part 36 payment may be relevant to the question of the costs of the issue of liability.

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CHAPTER THREE

Costs consequences where claimant fails to do better than a Part 36 offer or a Part 36 payment

36.20(1) This rule applies where at trial a claimant -

(a) fails to better a Part 36 payment; or

(b) fails to obtain a judgment which is more advantageous than a Part 36 offer.

36.20(2) Unless it considers it unjust to do so, the court will order the claimant to pay any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted without needing the permission of the court.

(Rule 36.11 sets out the time for acceptance of a defendant's Part 36 offer or Part 36 payment)

Costs and other consequences where claimant does better than he proposed in his Part 36 offer

36.21(1) This rule applies where at trial -

(a) a defendant is held liable for more; or

(b) the judgment against a defendant is more advantageous to the claimant,

than the proposals contained in a claimant's Part 36 offer.

36.21(2) The court may order interest on the whole or part of any sum of money (excluding interest) awarded to the claimant at a rate not exceeding 10% above base rate (GL) for some or all of the period starting with the latest date on which the defendant could have accepted the offer without needing the permission of the court.

36.21(3) The court may also order that the claimant is entitled to -

(a) his costs on the indemnity basis from the latest date when the defendant could have accepted the offer without needing the permission of the court; and

(b) interest on those costs at a rate not exceeding 10% above base rate(GL).

36.21(4) Where this rule applies, the court will make the orders referred to in paragraphs (2) and (3) unless it considers it unjust to do so.

(Rule 36.12 sets out the latest date when the defendant could have accepted the offer)

36.21(5) In considering whether it would be unjust to make the orders referred to in paragraphs (2) and (3) above, the court will take into account all the circumstances of the case including -

(a) the terms of any Part 36 offer;

(b) the stage in the proceedings when any Part 36 offer or Part 36 payment was made;

(c) the information available to the parties at the time when the Part 36 offer or Part 36 payment was made; and

(d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer or payment into court to be made or evaluated.

36.21(6) The power of the court under this rule is in addition to any other power it may have to award interest.

Interest

36.22(1) Unless -

(a) a claimant's Part 36 offer which offers to accept a sum of money; or

(b) a Part 36 payment notice,

indicates to the contrary, any such offer or payment will be treated as inclusive of all interest until the last date on which it could be accepted without needing the permission of the court.

36.22(2) Where a claimant's Part 36 offer or Part 36 payment notice is expressed not to be inclusive of interest, the offer or notice must state -

(a) whether interest is offered; and

(b) if so, the amount offered, the rate or rates offered and the period or periods for which it is offered.

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Deduction of benefits

36.23(1) This rule applies where a payment to a claimant following acceptance of a Part 36 offer or Part 36 payment into court would be a compensation payment as defined in section 1 of the Social Security (Recovery of Benefits) Act 1997[45].

36.23(2) A defendant to a money claim may make an offer to settle the claim which will have the consequences set out in this Part, without making a Part 36 payment if -

(a) at the time he makes the offer he has applied for, but not received, a certificate of recoverable benefit; and

(b) he makes a Part 36 payment not more than 7 days after he receives the certificate.

(Section 1 of the 1997 Act defines "recoverable benefit")

36.23(3) A Part 36 payment notice must state -

(a) the amount of gross compensation;

(b) the name and amount of any benefit by which that gross amount is reduced in accordance with section 8 and Schedule 2 to the 1997 Act; and

(c) that the sum paid in is the net amount after deduction of the amount of benefit.

36.23(4) For the purposes of rule 36.20, a claimant fails to better a Part 36 payment if he fails to obtain judgment for more than the gross sum specified in the Part 36 payment notice.

36.23(5) Where -

(a) a Part 36 payment has been made; and

(b) application is made for the money remaining in court to be paid out,

the court may treat the money in court as being reduced by a sum equivalent to any further recoverable benefits paid to the claimant since the date of payment into court and may direct payment out accordingly.

It can be seen that the CPR regime on costs is both detailed and most certainly not targeted simply at mediation, but nonetheless, the role of mediation as a mechanism for achieving settlement means that cooperation in the mediation process is one way of demonstrating reasonable conduct that will not attract an adverse costs judgement. At a very early stage District Judge Monty Trent, a member of the Civil Justice Committee, suggested that whilst the courts could not compel the parties to participate in ADR processes the court could none the less take any failure to engage in the process into account when awarding costs under s44.3. C.P.R. 1998. [48]

The private nature of mediation is such that the parties to a mediation will not in the general course of things be penalised by a subsequent order as to costs simply because the parties failed to reach an agreement through mediation. As will be seen later, a common standard clause in mediation agreements states that information revealed during a mediation and any offers or counter offers may not be relied on by either party subsequently in court in respect of the matter at hand. The mediator is committed to maintaining confidentiality in all matters arising out of the mediation. Without such protection parties could not afford to engage in the mediation process. Nonetheless, the court can now take note of the fact that a party has unreasonably failed to participate in the mediation process. The fact that costs will not in future invariably follow the event provides a powerful incentive for parties to reach a mediated settlement and to *"water down"* or compromise exaggerated claims at the mediation stage.

The first clear indication of the cost implications of the potential costs risks of a failure to actively engage in mediation where recommended by the court was delivered in 1999 by the Court of Appeal in ***Dyson v Leeds City Council.*** The court had been forced to order a retrial rather than send the case back to the first instance judge for reconsideration in the light of the Court of Appeal's findings, because in the interim period the judge had passed away. The court recommended ADR in lieu of a retrial and warned of the cost implications of a retrial.[49]

[48] at NLJ 149 No6880 page 411

[49] ***Dyson v Leeds City Council [1999] CCRTF 1998/1490/B2*** per Laws LJ. Ward LJ; Woolf LJ

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One of the earliest examples of the court apportioning costs rather than making an outright award is ***Foster v Somerset Council*** where the Employment Appeals tribunal penalised a claimant who only succeeded in achieving a 10% recovery having refused to accept her role in the poor relations between herself and her employer and thus caused the failure of two mediations. The court found she was a 90% contributor to the problem and that her dismissal was only marginally unfair, with corresponding consequence for damages and the recovery of costs.[50]

In ***Contractreal v Davies*** [2001] the Court of Appeal held that because the case predated the CPR rules, the court should not penalise a refusal to mediate, but sent out a warning that this would not be the case in future where such behaviour resulted in disproportionate costs.[51] Nonetheless, in ***Asiansky v Bayer-Rosin*** [2001] the Court of Appeal drew a distinction between genuine lost opportunities to mediate and situations where there was only a vague suggestion that a party might be amenable to it. Thus were a minimal payment in offer had been made it was not unreasonable to insist on going to trial.[52]

Dunnett v Railtrack [2002] was the first of a series of significant cases about mediation and costs.[53] Three of the claimant's horses escaped from her field onto an adjoining railway line through a railway gate left open by unknown third parties. The claimant had repeatedly asked Railtrack to ensure that the gate would self-lock or alternatively for them to padlock it. Railtrack representatives had asserted that they had a legal duty to provide access to its workers, which would be denied if the gate was padlocked, though they subsequently replaced the gate with a fence. The claim failed in the High Court on the basis that the claimant should not have relied upon Railtrack's legal assertions.

The claimant appealed, but pending the hearing requested mediation. The appeal failed because the grounds relied upon, namely that Railtrack owed a duty of care to guard against a known danger of trespassers leaving the gate open, whilst arguable had not been pursued at first instance. The court stated that the claimant had been let down by her original legal advisors. In the event the appeal failed but the Court of Appeal refused to order costs against the claimant because Railtrack had unreasonably refused to mediate.

The ***Dunnett*** judgment sent shockwaves through the legal profession and led to solicitors routinely advising clients to offer to mediate whether or not they really wanted to do so or expected the other party to agree, as a fall back mechanism to minimise exposure to a costs judgement in the event of failure. It was clear to the profession that even a 10% reduction in costs could be quite significant in a large trial, justifying adoption of the strategy.[54] Following this, the courts have gradually refined the rules in an attempt to ensure that the rules are not manipulated for the benefit of undeserving litigants, with a greater recognition being accorded to cases where mediation would not have been appropriate and thus a refusal to mediate was perfectly reasonable. This realignment however took time to settle down.

Dunnett was followed by ***Hurst v Leeming*** also in 2002. Mr. Justice Lightman in the High Court heard an application for damages for negligence against a Barrister, pursuant to ***Arthur J.S. Hall & Co. v Simons***[55], related to the conduct of an action by Hurst against his former partners in a solicitors firm. The action failed but Hurst attempted to resist an order of costs on the basis that Mr Leeming had refused to mediate. Leeming had refused to mediate on the grounds of previously incurred legal costs, the seriousness of the allegations of professional negligence; the total lack of substance of the claims made; the lack of any real prospect of a successful outcome to the mediation proceedings, given Mr Hurst's objective to obtain a financial payment from Mr Leeming when there was no merit in his claim; and the character of Mr Hurst as revealed by his actions – that he would not be able or willing to adopt the attitude required if a mediation was to have any prospect of success.

50 ***Foster v Somerset Council [2003] UKEAT 0355_03_3107***

51 ***Contractreal Ltd v Davies [2001] EWCA Civ 928*** Arden LJ, Mr Justice Wright

52 ***Asiansky Television Plc v Bayer-Rosin [2001] EWCA Civ 1792*** Clarke LJ, Dyson LJ. Mance LJ,

53 ***Dunnett v Railtrack Plc [2002] EWHC 9020 (Costs)*** Brooke LJ;, Sedley LJ.

54 In ***Gil v Baygreen Properties Ltd.& Ors [2004] EWHC 2029*** Deputy Judge Mr Nicholas Davidson QC. The court deviated from the costs follow event rule and deducted £20,000 from recoverable costs.

55 [2000] 3 WLR 543

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In the circumstances Lightman J. concluded that Mr Leeming was justified in refusing to proceed to mediation since objectively mediation had no realistic prospect of success as indicated by Mr Hurst previous unrealistic actions against his solicitor representatives. Leeming has a professional need to protect his reputation which justified a trial. Also, as a bankrupt Hurst had nothing to lose in the proceedings. Mr Leeming was therefore awarded his costs. Neither the belief in a water-tight case, heavy prior costs nor the seriousness of the allegations however, would not have been grounds for refusing to mediate. Whilst it may be a risky business to refuse to mediate under the current CPR regime, there are nonetheless occasions when a refusal to do so will be justified.[56] Mr Justice Lightman however subsequently demonstrated his support for mediation in ***RBG v Rastogi*** in 2005, where he held that mediation and subsequent settlement negotiations failed because of an insistence on an apology, which in the circumstances the liquidators could not professionally provide. This conduct deprived him of any costs allowance that might otherwise have been available to him for good conduct in the litigation.[57] Similarly, where the conditions imposed on a mediation were unreasonable a party the party imposing those conditions may suffer a cost penalty.[58]

The concept of slicing the costs cake was placed firmly on the table by Mr Justice Etherton in ***Malkins Nominees v Society Finance*** in 2002, where a 15% deduction in recoverable costs was imposed for a failure by the winning claimant to take part in mediation. The judge had been inclined to impose a 25% deduction but reduced it to 15% because the offer was made at a very late stage.[59] This example was followed by the Court of Appeal in ***Neal v Jones*** where a failure to mediate resulted in what the court deemed to be an unnecessary two day hearing.[60] By contrast in ***Gould v Armstrong*** whilst faced with a mere recovery of £700 as the balance between claim and counterclaim in a case that incurred £14,000 of taxable costs the court expressed regret at a failure to mediate but felt that mediation had little to offer a small value claim and declined to impose a costs sanction.[61] Similarly in ***Valentine v Allen*** the court considered that a failure to mediate was attributed to all the parties and thus no cost sanction ordered.[62] In ***SITA v Watson*** the court held that there had been a reasonable and justifiable refusal to mediate,[63] and in ***McCook v Lobo*** the court held that it had been reasonable to ignore a letter suggesting mediation because there was no likelihood of success.[64] In ***Leicester Circuits v Coates*** the claimant eventually failed to establish either a breach of contract and / or causation, which explained to a very large extent why the defendant had pulled out of a mediation. In all three cases no cost penalties were imposed. [65]

Mr Justice Lewison sent out a somewhat stark warning however in ***Royal Bank of Canada v MOD*** in 2003[66] where despite a failure to establish a right to recovery a cost penalty was imposed on the successful MOD for a refusal to mediate despite the fact that legal issues were at stake and the MOD wanted to establish a precedent. It was however only a marginal discount on costs. This example was followed in ***Partridge v Lawrence*** were a 15% reduction in costs was awarded for a refusal to accept a late invitation to mediate. The claimant had failed to beat a payment in. [67]

In ***Re K (a child)*** Ward LJ stated that if either party requests *"that this matter be referred to mediation using this court's Alternative Dispute Resolution Service, then I direct that it shall be referred to mediation; and, if the other party*

56 The continuation of this 11 year litigation saga is reported at ***Hurst v Leeming [2003] EWCH 499 (Ch*** where the court held that the continuation of the action amounted to an abuse of process. Mr Justice Lawrence Collins. 14th March 2003.

57 ***RBG Resources Plc (In Liquidation) v Rastogi [2005] EWHC 994 (Ch).***

58 ***Longstaff International Ltd v Evans [****2005] EWHC 4 (Ch)* Nicholas Warren QC. In the event costs were allocated on a 50/50 basis because their was fault on both sides

59 ***Malkins Nominees v Societe Finance [2002] EWHC 1221 Ch :***

60 ***Neal v Jones Motors [2002] EWCA Civ 1730/1731/1759*** Brooke LJ; Keene LJ. Rix LJ;

61 ***Gould v Armstrong [2002] EWCA Civ 1159*** Keene LJ. Lord Phillips MR.

62 ***Valentine v Allen, Nash and Nash [2002] EWCA Civ 1819*** Arden LJ Laws LJ. In ***Willis Management (Isle Of Man) Ltd v Cable and Wireless Plc [2005] EWCA Civ 806 :*** Rix LJ Tuckey LJ, Wilson. J the Court of Appeal subsequently held that no binding agreement had been concluded between parties. An agreement to subsequently agree an essential term cannot create a binding contract. It is not for the courts to determine the terms in the absence of agreement between negotiators. According the appeal was allowed. .

63 ***SITA v Watson and Wyatt: Maxwell Batley [2002] EWHC 2401 / 2025 (Ch).*** Mr Justice Park

64 ***McCook v Lobo [2002] EWCA 1760*** Hale LJ. Pill LJ; Judge LJ;

65 ***Leicester Circuits Ltd v Coates Brothers PLC [2003] EWCA Civ 290*** Judge LJ; Longmore LJ; Sir Swinton Thomas

66 ***Royal Bank of Canada Trust Corporation Ltd v Secretary of State for Defence [2003] EWHC 1479 (Ch)***

67 ***Partridge v Lawrence [2003] EWCA Civ 1122*** *:* Clarke LJ; Dyson LJ Gibson LJ; Peter

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fails to participate without a good reason, that may be a reason why this court will exact a penalty of costs against the recalcitrant party for failing to co-operate and by wasting this court's time."[68] Failure to co-operate in the process is a two way requirement. Thus when in ***Corsenso v Burden*** the court determined that the defendant had made strenuous efforts to settle a dispute, the court penalised the successful claimant for not cooperating. The problem here however is that the court will rarely be aware of the behaviour of either party during the mediation process because it is covered by the privilege rule. [69]

The suspect tactic of proposing mediation at the last minute received a knock back in ***Joyce v Boyd*** where Depute Master James held that the case was clearly heading for a full trial in any case and thus refused to impose a costs penalty for refusing to accept the offer. In order for a cost penalty to be imposed responsibility for refusing to mediate has to be attributed to a particular party.[70] Where both parties equally spurned the court's advice to mediate the appropriate costs award was not to make any costs award at all, the Court of Appeal held in ***McMillan Williams v Range***.[71]

Following these cases, in a major judgment the Court of Appeal set out to rationalise the criteria for costs judgements involving mediation, in ***Halsey v Milton Keynes General NHS Trust***.[72] The Court of Appeal refused to award costs against successful defendants who had refused mediation. The court first considered whether or not the court has the power to order mediation as opposed to strongly recommend it, and concluded it does not, and then reviewed the factors which may be relevant to the question whether a party has unreasonably refused ADR, stating that they will include (but are not limited to) the following:

(a) the nature of the dispute;
(b) the merits of the case;
(c) the extent to which other settlement methods have been attempted;
(d) whether the costs of the ADR would be disproportionately high;
(e) whether any delay in setting up and attending the ADR would have been prejudicial; and
(f) whether the ADR had a reasonable prospect of success.

The court made it clear that in many cases no single factor will be decisive, and that these factors should not be regarded as an exhaustive check-list. Regarding the requirement to mediate, Dyson J stated

*"We heard argument on the question whether the court has power to order parties to submit their disputes to mediation against their will. It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court. The court in Strasbourg has said in relation to article 6 of the European Convention on Human Rights that the right of access to a court may be waived, for example by means of an arbitration agreement, but such waiver should be subjected to particularly careful review to ensure that the claimant is not subject to constraint: see **Deweer v Belgium** (1980) 2 EHRR 439, para 49. If that is the approach of the ECtHR to an agreement to arbitrate, it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6. Even if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it. We would adopt what the editors of Volume 1 of the White Book (2003) say at para 1.4.11:*

The hallmark of ADR procedures, and perhaps the key to their effectiveness in individual cases, is that they are processes voluntarily entered into by the parties in dispute with outcomes, if the parties so wish, which are non-binding. Consequently the court cannot direct that such methods be used but may merely encourage and facilitate.

If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage

[68] ***K (a child), Re [2003] EWCA Civ 1410***

[69] Corsenso (UK) Ltd v Burden Group Plc [2003] EWHC 1805 (QB) per Judge Reid.

[70] ***Joyce Boyd v MOD [2003] HQ02X00875***

[71] ***McMillan Williams v Range [2004] EWCA (Civ) 294*** Mantell LJ; Ward LJ; Jonathan Parker LJ.

[72] ***Halsey v Milton Keynes General NHS Trust : Steel v Joy & Halliday*** *[2004] EWCA Civ 576.* Ward LJ; Laws LJ; Dyson LJ; See also ***Burchell v Bullard [2005] EWCA Civ 358 :*** Rix LJ. Ward LJ;. The case predated ***Halsey*** so it was not applied. In this construction litigation an offer of mediation was declined. Ultimately both the claim and counterclaim were partly successful, but disproportionate costs were incurred all round. The claimant recovered £5,000 but costs of £150,000 were incurred.

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the perceived effectiveness of the ADR process. If a judge takes the view that the case is suitable for ADR, then he or she is not, of course, obliged to take at face value the expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR. But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it."

The court also considered the causation issue and liability in respect of successive accidents contributing to a claimant's injury/losses and reaffirmed that ***Performance Cars*** is still good law.

The case of ***Allen v Jones*** followed close on the heels of ***Halsey***. [73] The court held that on the facts this had been an all or nothing dispute. Mediation would not have been suitable and thus costs followed the event. By contrast, where the defendants had conceded the central issue during case management, the winning claimant was penalised for costs from the time that he declined to pursue court advised mediation in ***Marchands v Thompson***. [74]

The courts have continued to advise mediation since Halsey as seen by **Lewis v Barnett** where an application for disclosure to facilitate continued litigation was granted, even thought the court felt that the parties would be well advised to mediate. Again a strong cost warning was delivered to the parties.[75]

Whether or not to award costs on a claim by claim basis or globally is a matter that the court is frequently called to address. In ***Yorkshire Bank v RDM*** the claimant prevailed on only one of four points of claim. The defendant had refused to mediate. Initially the court had considered ordering an equal allocation of costs but because there was a reasonable chance of success in the litigation shifted the allocation upwards to 65:35.[76]

Even where a mediation fails it can provide a party with a very good indicator of where to pitch a part 36 offer or counter settlement offer. This is what occurred in ***Montlake v Lambert Smith Hampton***. The claimant beat the payment in. The court considered that the claimant had done all that was required of him in terms of reasonable behaviour and attempts to settle and hence was entitled to both costs and interest.[77]

By contrast to the ***Royal Bank of Canada v MOD*** in ***Reed v Reed*** the court declined a costs order against a successful defendant who twice rejected overtures to mediation. Applying Halsey the court held that there had been a large distance between the positions of the parties and there were novel issues that required a judicial determination, rendering the prospects of mediation poor.[78]

In ***Chaudry v Yap*** the claimant ignored tentative but not very serious hints by the defendant to mediate. Eventually the defendant made an uplifted payment in which the claimant accepted. This still left the matter of costs outstanding and at a costs hearing the court held that the claimant was the clear winner and declined to make any discount for the claimant's failure to mediate.[79] It is important that the court does not discourage a party from making a nuisance settlement by leaving the door open for costs. Thus a claimant who had been fortunate to benefit from such a payment where the claim was largely undeserving was refused costs prior to the settlement.[80]

In order for a party to meaningfully engage in mediation, the parameters of a dispute need to be set out clearly. If they are not a party will not be subjected to cost penalties for failing to mediate or failing to settle. Thus in ***Askey v Wood*** the court held that mediation was likely to be a sterile exercise if the parties do not know, at lese in broad terms, what quantum figure they were attempting to apportion. Here the dispute was whether or not liability should be apportioned 50:50, 75:25 or 74:26, the latter figure being the apportionment offered in a Part 36 letter. That being the case there were no cost penalties suffered for a failure to mediate.[81] Similarly, in ***Wills v Mills*** a party had declined to mediate because the claimant had not set out the basis of the claim, making it

[73] ***Allen v Jones*** *[2004] EWHC 1189* Bernard Livesey QC

[74] ***Marchands Associates LLP v Thompson Partnership LLP [2004] EWCA Civ 878*** Peter Gibson LJ;Waller LJ; May LJ.

[75] ***Lewis v Barnett (t/a Windmill Racing Stables) [2004] EWCA Civ 807.*** *Sedley* LJ; Neuberger LJ.

[76] ***Yorkshire Bank v RDM [2004] QBD*** . HHJ Langan QC.

[77] ***Montlake, Yarrinton & Wills v Lambert Smith Hampton Group Ltd (2004) [2004] EWHC 1503 (Comm).*** Mr Justice Lngley.

[78] ***Reed Executive Plc v Reed Business Information Ltd [2004] EWCA CIV 887.*** JacobsLJ; Rix LJ; Similarly where a precedent was required no costs were awarded for a refusal to mediate in ***Daniels v The Commissioner of Police for the Metropolis [2005] EWCA Civ 1312*** Ward LJ; Dyson LJ. The objective had been to stem the flow of petty work place accident claims.

[79] ***Chaudry v Yap : Re Midland Linen Services Ltd (2004)*** Deputy Judge Mr Leslie Kosmin QC

[80] ***Wright v HSBC Bank Plc No2 [2006] ADR.L.R. 06/23*** Mr Justice Jack

[81] **Askey v Wood [2005] EWCA Civ 574:** Chadwick LJ

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impossible for the defendant to meaningfully engage in negotiations. Accordingly no cost penalty was imposed for a refusal to mediate.[82]

Where a mediation fails because of the unreasonable conduct of a party, that conduct can attract a cost penalty., as demonstrated by ***Merelie v Newcastle Primary Health Care Trust***.[83] A party agreed to mediation but demanded an apology at the outset. The mediation failed. The court examined the role of the apology in mediation and observed that whilst an apology can be a useful aspect of mediation it is not appropriate to demand an apology as a prerequisite to mediation. Mr Justice Underhill remarked that *"It is of course important to bring grievances out into the open; but if there is a genuine intention to resolve them constructively the way in which they are aired is equally important. Ms. Nelson described the Claimant's remarks as a "tirade"; and on the evidence of the Claimant's own script and notes that does not appear to be an exaggeration. To demand a public apology as the precondition for mediation was not constructive."*

Halsey has reached out beyond the courts and has been taken notice of by a range of tribunals. Thus in ***Secretary of State for Defence v Farrow*** Mr Peter Back, Divisional Director for Comptroller at a Patent Office adjudication where there is a mediation facility a request for a mediation order was denied because the extra-ordinary circumstances required to make such an order, as per Halsey, were absent.[84] Similarly in ***Gibson v Commission for Social Care Inspection*** unreasonable behaviour resulted in a cost sanction.[85]

It is not difficult to see why the courts are on times disconcerted by the behaviour of litigants. This is evident in **Devon County Council v Clarke.** The claimant sought damages for the failure of a school to identify dyslexia in a pupil and provide appropriate education. The claim only partially succeeded and the decision was appealed. The Court of Appeal reduced the claimant's cost award by 70%. One if left to wonder whether the claimant actually recovered anything at all, or even suffered a loss in view of the fact that this litigation involved costs in excess of £150,000. It is small wonder that the court concluded that in reality there had been no winners.[86]

It is not unusual for a party to grasp at straws and fight till the bitter end, not just about the main issue, but about satellite issues and particularly about costs. In ***Nicholas Drukker v Priddie Brewster***, Drukker sought to recover a liquidation management fee. The action was stayed to mediation which was eventually abandoned and the case returned to court for costing. The court threw out further allegations of negligence against Drukker as an abuse of process.[87]

Mr Justice Jack pulled many of the strands together in ***Hickman v Lapthorn***.[88] Here, the claimant was advised by his solicitors and counsel to settle a road accident claim. Subsequently the claimant sued the solicitors (1st defendants) and counsel (2nd defendants) for negligent advice. The claim succeeded and was apportioned 1/3 & 2/3 between the defendants. Costs however was also a very significant issue. The court found that after the claimant had offered to settle for £150,000 it was highly likely that a mediation would have led to a settlement very close to the subsequent judgment figure of £130,000. The problem was that whilst the 1st defendants were prepared to mediate the 2nd defendant (guided by underwriters) refused to do so. The court was asked to award all costs of the claimant in the litigation against the 2nd defendant for a refusal to mediate and the 1st defendant likewise sought to recover its costs after that event.

The court held that whilst the 2nd defendants position had been optimistic it was not unrealistic. Accordingly it was not liable for all the costs of the claimant and the 1st defendant. The court concluded that the general principles in ***Halsey*** are :-

(a) A party cannot be ordered to submit to mediation as that would be contrary to Article 6 of the European Convention on Human Rights – paragraph 9.

82 ***Wills (Alexandra) v Mills Solicitors [2005] EWCA Civ 591.*** Behrens LJ Mance LJ

83 ***Merelie v Newcastle Primary Health Care Trust (No.3) [2006] EWHC 1433 (Admin)***

84 ***Secretary of State for Defence v Farrow System Ltd [2005] BL O/008/05***

85 ***Gibson v Commission for Social Care Inspection [2004] EWCST 266(EA_Costs)*** per Mr S. Hunter Chairman**.** Pursuant to Care Homes Regulations 2001.

86 ***Devon County Council v Clarke [2005] EWCA Civ 266*** *:* Dyson LJ.. Mummery LJ; Keene LJ

87 ***Nicholas Drukker & Co v Pridie Brewster & Co [2005] EWHC 2788 (QB)***: Openshaw J, Master Campbell, John Bucklow

88 ***Hickman v Lapthorn [2006] EWHC 12 (QB). Halsey, Cowl, Dunnett*** *and* ***Hurst v Lemming*** considered.

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(b) The burden is on the unsuccessful party to show why the general rule of costs following the event should not apply, and it must be shown that the successful party acted unreasonably in refusing to agree to mediation – paragraph 13. It follows that, where that is shown, the court may make an order as to costs which reflects that refusal.

(c) A party's reasonable belief that he has a strong case is relevant to the reasonableness of his refusal, for otherwise the fear of cost sanctions may be used to extract unmerited settlements – paragraph 18.

(d) Where a case is evenly balanced – which is how I understand the judgment's reference to border-line cases, a party's belief that he would win should be given little or no weight in considering whether a refusal was reasonable: but his belief must be unreasonable – paragraph 19.

(e) The cost of mediation is a relevant factor in considering the reasonableness of a refusal – paragraph 21.

(f) Whether the mediation had a reasonable prospect of success is relevant to the reasonableness of a refusal to agree to mediation, but not determinative – paragraph 25.

(g) In considering whether the refusal to agree to mediation was unreasonable it is for the unsuccessful party to show that there was a reasonable prospect that the mediation would have been successful – paragraph 28.

(h) Where a party refuses to take part in mediation despite encouragement from the court to do so, that is a factor to be taken into account in deciding whether the refusal was unreasonable – paragraph 29.

(i) Public bodies are not in a special position – paragraph 34.

The court noted that the 1st defendant could have protected its position by making a payment in but had failed to do so.

There is no requirement to engage in settlement negotiations or to mediate in respect of payment of an accrued debt. In ***Gray v Essential Box Co.***[89] the claimant sought to enforce an adjudication decision. The respondent had no valid defence to the enforcement, but attempted to avoid enforcement costs by alleging that the claimant had declined to engage in negotiations over payment. Since there was a right to the outstanding sum, there was nothing to negotiate about. The court awarded costs on an indemnity basis.

Conclusions regarding ADR practice and procedure in civil disputes.

The courts are not particularly fixed on mediation as the only available for achieving the overriding objectives of the Civil Procedure Rules. Their objective is to minimise cost, expense and energy for both the court and its clients.

This is clear from the judgment in ***Anglo Group v Winter Brown.***[90] Toulmin J. outlines the various ADR mechanisms now available to assist the courts and the parties to settle outside the court room, seeing no conflict of interest between these processes and the objectives of the court.

"The Woolf reforms, building largely on the approach which was developed in this Court and the Commercial Court (with the support and encouragement of the users of these Courts) sees no inherent conflict between dispute resolution by parties in the course of the procedure and dispute resolution by the court at a full hearing at the end of the procedure. Dispute resolution in the course of the procedure may be achieved with assistance outside the court procedure by way of independent ***mediation****; but it may also be achieved by techniques of case management pioneered in this court, e.g. by "without prejudice" meetings of experts, joint statements of experts setting out the matters on which they agree or disagree, early neutral evaluation or by the appointment of a single jointly appointed expert who may effectively resolve the technical issue or issues which are preventing the parties from settling their disputes; or by a combination of constructive case management and* ***mediation****. Many of these innovations underline the importance of experts retained by the parties acting at all stages as independent experts in order to assist the parties in reaching a resolution of their disputes or in narrowing the issues in dispute thus saving time and costs at trial."*

[89] ***Gray & Sons Builders (Bedford) Ltd. v Essential Box Company Ltd. [2006] EWHC 2520 (TCC)***

[90] ***Anglo Group plc v. Winter Brown & Co Ltd [2000] EWHC TCC 127.***

CHAPTER THREE

PUBLIC SECTOR MEDIATION

ADR and Public Policy

ADR procedures, since the implementation of the proposed Woolf reforms,[91] have increased in importance in the settlement of disputes both in the private and the public sector. The Woolf reforms, with recourse to both mediation and the fast track approach, have increased the pressure on clients, solicitors and counsel for settling disputes in a fast efficient manner. Witness first the practice statement from the Commercial Court and secondly the new provisions within the Civil Procedure Rules 1998 introduced on the 26th April 1999. Whilst Lord Woolf stepped back from introducing compulsory ADR in the UK he none the less signalled its growing importance and set out the objective of facilitating its use, in the following terms :-

"In recent years there has been, both in this country and overseas, a growth in ADR and an increasing recognition of its contribution to the fair, appropriate and effective resolution of civil disputes. The fact that litigation is not the only means of achieving this aim, and may not in all cases be the best, is my main reason for including ADR in an Inquiry whose central focus is on improving access to justice though the courts. My second reason is to increase awareness still further, among the legal profession and the general public, of what ADR has to offer. Finally, it is also desirable to consider whether the various forms of ADR have any lessons to offer the courts in terms of practices and procedures.

I do not propose that ADR should be compulsory either as an alternative or as a preliminary to litigation. The prevalence of compulsory ADR in some United States jurisdictions is largely due to the lack of court resources for civil trials. Fortunately the problems in the civil justice system in this country, serious as they are, are not so great as to require a wholesale compulsory reference of civil proceedings to outside resolution. In any event, I do not think it would be right in principle to erode the citizen's existing entitlement to seek a remedy from the civil courts, in relation either to private rights or to the breach by a public body of its duties to the public as a whole."

Public Statement by Lord Irvine, March 2001.

The government planed as early as 2001 to significantly increase its use of alternative dispute resolution in contracts and only pursue litigation as a last resort to settle legal disputes involving government entities. Lord Irvine said in a public policy statement in 2001 in this regard that in future the government's disputes would be "*settled by mediation or arbitration whenever possible."* He added that *"[a]rbitration, mediation and independent assessments will bring simpler, cheaper, quicker ways of resolving Government legal cases."* According to Lord Irvine, *"[s]tandard Government procurement contracts will in the future include clauses on using ADR to resolve disputes instead of litigation and whenever possible claims for financial compensation will be settled by independent assessment instead of going to court."* Given that the Lord Chancellor was responsible for management of the courts, the appointment of judges, magistrate and other judicial officers, the oversight of civil litigation, and reforms in family and property law there was little reason to doubt his ability to implement such measures.

As Karol K. Denniston,[92] said the announcement was "*an indication of the development*" of ADR in England and showed that *"the whole litigation environment has changed in tone since the Woolf reforms"* were put into place. According to Denniston, the announcement also "*shows the government is coming in line with the courts*" with a greater reliance on ADR to resolve disputes. The only problem that he foresaw that might arise from the government's new commitment to using ADR was a perceived lack of enough experienced mediators in the commercial sector to handle the expected increase in mediation.

Dan Wood,[93] , responded to the announcement saying that CEDR was *"delighted to hear the announcement."* He said, however, that the announcement is "*great at the symbolic level but they [the government] must practice what they preach beyond just encouraging ADR use."* According to Wood, the government's commitment to use ADR was *"good for UK taxpayers because of the cost savings to the government," and "good for business because they know that disputes with the government will first be directed into ADR" rather than litigation and that the "impact on the field is enormous because of the size of the government's purchasing power."*

[91] see in particular Chapter 18, p136 Access to Justice – Interim Report.

[92] an attorney with Paul Hastings Janofsky & Walker in London,

[93] Communications director for the Centre for Dispute Resolution (CEDR) in London

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Lord Irvine said that the government was dedicated to leading the way in the use of ADR by showing that disputes do not need to end up in court, and that *"[v]ery often, there will be alternative ways of settling the issues at stake which are simpler, cheaper, quicker and less stressful to all concerned than an adversarial court case."* Provided the other party to the dispute agrees, "*the Government is now formally pledged to resolve legal disputes by ADR whenever possible"* and that the government would monitor the effectiveness of ADR in resolving disputes. However, areas where ADR would not be used by the government included intentional wrongdoing, abuse of power, public law and where there was a need for legal precedent.

The statement said government departments would *"improve flexibility in reaching agreement on financial compensation, including using an independent assessment of a possible settlement figure,"* and the central government would *"produce procurement guidance on the different options available for ADR in Government disputes and how they might be best deployed in different circumstances."* These undertakings would *"spread best practice and ensure consistency across Government,"* according to the statement.

No clearer evidence of the commitment of both the Lord Chancellor and the Lord Chief Justice of the intention to shift the focus from the courts to ADR for the settlement of public law disputes could be asked for, than the decision of the Court of Appeal in ***Cowl v Plymouth City Council*** [2001]. [94] The court expressed the view that when considering applications for Judicial Review under Order 53 and Rule 35 the courts are likely in future to take a robust view of the inapplicability of Judicial Review hearings where alternative methods of settling the dispute, without the assistance of the courts, have not yet been fully explored. The requirement is now set out in the Part 54 Pre-Action Protocol.

ADMINISTRATIVE LAW PRE-ACTION PROTOCOL Rule 54

3 Where alternative procedures have not been used the judge may refuse to hear the judicial review case. However, his or her decision will depend upon the circumstances of the case and the nature of the alternative remedy. Where an alternative remedy does exist a claimant should give careful consideration as to whether it is appropriate to his or her problem before making a claim for judicial review.

The constitutional issue of the power of authorities to reach settlements which may be questioned by Public Auditors is less clear. If the Government is committed to such settlements it may not be a major barrier to negotiated settlement. However, officials may be unwilling to make payments out of public funds without being ordered to do so by the courts, particularly where they firmly believe they are not required to do so, or where a judicial decision is needed to clarify what is or is not within their powers and duties.

Another unanswered question is what happens to the three month time limit from decision of an authority for applications for judicial review in situations where the parties voluntarily enter into ADR processes. Possibly, it is wiser to apply for Judicial Review and then submit to a court recommended ADR process, since the application will have been made on time, but will merely have been temporarily suspended pending the outcome of the ADR process. If the Lord Chancellor's Office could set up a filing process for submissions to Judicial Review, which resulted in the time limit being suspended this could resolve the problem. Applicants for Judicial Review may be well advised to have considered appropriate ADR bodies before applying, so that if a judge advises ADR, the parties will be able to chose the organisation rather than be pressured to adopt a particular organisation by the court, which might not be appropriate to their needs.

What amounts to exhaustion of the ADR process poses problems. One party may seek further outside assistance and guidance, simply to buy time, or perhaps in order to get a favourable outside opinion. If the other party has an urgent need to settle the dispute or needs an interlocutory order / injunction to stop something occurring further ADR participation may be seen as disadvantageous and undesirable.

[94] ***Cowl v Plymouth City Council*** 2001/2067 [2001] EWCA Civ 1935, 14th December 2002.. be fore The Lord Chief Justice, Lord Woolf CJ; Lord Justice Mummery and Lord Justice Buxton.

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CHAPTER THREE

We now have the benefit of three significant cases on the role of ADR in Public Law matters in the UK., namely ***Cowl v Plymouth City Council*** [2001], ***Royal Bank of Canada v S.S. for Defence*** [2003],,[95] and ***Anufrijeva v London Borough of Southwark*** *[*2003],[96] heard together by the CA in a combined hearing. Public Law litigation is now big business and a significant aspect of legal practice. The advent first of the European Union and secondly of human rights legislation has introduced for the first time the concept of damages for breach of public law duties, though it remains the case that no damages are available outside these limited areas. It is now possible to draw some tentative conclusions about this area of ADR practice, firstly as to what amounts to ADR for the purposes of Public Law and secondly, when damages are permitted, as to how they will be assessed by the court.

Cowl makes it clear that there is scope in certain situations for the representatives of public bodies to lawfully enter into settlement negotiations without compromising their statutory duties. Cowl however throws little light on the extent to which that is the case. Consequently, it can be anticipated that district auditors may again in the future seek to hold representatives of public bodies personally to account for funds thrown away by a compromise agreement in breach of statutory duty to manage public funds in the public interest. Alternatively, it may be anticipated that a compromise agreement may in some situations be unenforceable due to a lack of authority, which might correspondingly give rise to arguments as to the scope estoppel in public law.

Royal Bank of Canada touches on a question common to ADR in respect of civil litigation, namely when is it appropriate to reject ADR overtures? and implications on costs of so doing. It would appear that a mere confidence in the strength of one's claim in law is insufficient reason to refuse to mediate. Whilst the MOD were penalised in costs for failing to mediate, the question is still unanswered however, as to what would have happened if they had engaged in mediation and forfeited the right to repossession or paid compensation for early repossession when, as became clear from the judgement, they had a legal right to repossess and no legal liability for terminating the lease and an auditor had subsequently investigated the circumstances of that compromise settlement. Are public bodies caught in a Catch 22 situation whereby officers may be made to account for bad deals, but the public body will suffer cost penalties for failing to enter into negotiations? What point is there in engaging in negotiations knowing there is nothing you can lawfully put on the table for consideration? Further clarification is needed here.

Anufrijeva et al reveals the scope of ADR in Public Law matters, the hurdles to be surmounted in applying for Judicial Review and touches on matters of quantum in damages. In **Cowl**, the CA had already intimated that all forms of negotiation satisfy the overriding requirements of s1 CPR 1998, not simply mediation and further stated that the courts should be satisfied that an applicant had discharged his duties in this respect by pursuing all other practicable methods of resolution before acceding to an application for J.R. In ***Anufrijeva*** *t*he court made it clear that the good offices of the Parliamentary Commissioner for England and Wales and other ombudsmen are included within the umbrella of ADR for the purposes of Public Law, and that whilst it is not necessary to have "***exhausted***" all other avenues of settlement, the applicant must at least explain why the ombudsman option was not appropriate in the circumstances. A short answer, whilst not canvassed by the court, must surely be that since the application sought to recover damages, these would not have been available from the Ombudsman in this series of applications. Traditionally, the remit of the Ombudsman was to provide a form of redress in respect of mal-administration, where the aggrieved citizen lacked the locus standii, in the absence of breach of a legal interest, to sue either at law, or to apply for judicial review. In normal circumstances therefore it is difficult to see what contribution the ombudsman can make to a public law application which involves a recovery of damages, since all that the ombudsman can do is advise or recommend, with a view to improving administrative services. However, if the Ombudsman is prepared to recommend compensation in deserving situations and local authorities are prepared to follow that advice or recommendation, the ombudsman could perform a useful ADR role. An intriguing question is what the response to the courts would be where mal-administration is established and the advice of the Ombudsman has been disregarded. Would this impact on costs alone or also on the level of damages?

[95] ***Royal Bank of Canada Trust Corporation Ltd v S.S. for Defence*** [2003] EWHC 1479

[96] ***Anufrijeva v London Borough of Southwark; R v S of S for Home Department ex parte N & ; R v S of S for Home Department ex parte N M*** [2003] EWCA Civ 1406,

The next question that arises is "How does the court assess damages at public law?" The answer provided by the court, I regret to say is, like the inscrutable sphinz, not too revealing or helpful. The court stated "*The awarding of compensation under the HRA is not to be compared with the approach adopted under a claim for breach of civil law. However, rough guidance as to the level of damages to be awarded may be obtained from the guidelines issued by the Judicial Studies Board, the Criminal Injuries Compensation Board, the Parliamentary Ombudsman and the Local Government Ombudsman. The difficulty, however, is in finding a suitable comparator within these guidelines. In cases of maladministration, where damages are appropriate, awards should be moderate, but not minimal, as this would undermine the respect for Convention rights*. " What exactly amounts to "***moderate but not minimal***" is anyone's guess. Any award however small may however be sufficient to ensure that a case cannot proceed to Strasbourg, and thus enables the UK to remain in control and safeguard the public interest free from outside interference.

The European Union Law element also has an impact upon the assessment of damages, which is not canvassed by these cases, since the matter did not arise. The assessment of damages for breach of European Union law is un-problematical where civil action is involved. However, where a public law breach of European Union law occurs, Factortame and related cases have made it clear that a real and substantial remedy must be available and that no rule of English Law that bars damages can override this requirement. Hence the Spanish fishermen were entitled to and indeed received compensation. The level of compensation reflected their commercial losses and was neither "***moderate nor minimal***."

Anufrijeva throws some light on the availability of damages at Public Law. The court stated in respect of Human Rights issues that "*There are a number of features that distinguish damages under the HRA from damages in contract or tort law.* ***Damages under the HRA are not recoverable as of right****. When choosing whether or not to award damages, the court must have due regard to ECtHR principles and must balance the need of the individual against that of the State.* ***The approach adopted to awarding damages should be no less liberal than that applied by the ECtHR.*** *"The critical message is that damages should only be awarded when it is 'just and appropriate' and 'necessary' to achieve 'just satisfaction'" (paragraph 63). They should be awarded on an equitable basis having due regard to the seriousness of the violation, the conduct of the parties and the "degree of loss" suffered*."

The only problem with this dicta is that if a claimant can demonstrate a likelihood that if the case were to go to Strasbourg, the court there would award damages, presumably this would give rise to a "***right***" to recover damages from a UK court.

The cross over between public law and private law causes problems which are highlighted in ***Lloyd, R v*** [2001].[97] The appellant, a disabled person living in sheltered accommodation wanted to be able to have communal meals with other residents. The residential home was at one stage operated by the Local Authority, but when it became evident that the premises needed upgrading it was put out to a Housing Association which was able to tap into central government assistance to improve the premises. The accommodation was converted into separate units. The council was concerned that permitting communal dining would jeopardise the status of the premises, rendering it subject to the requirements of the Registered Homes Act. In the event of this happening, the Association, which was not a registered care home provider would be forced to operate a get out clause in the contract and terminate the arrangement.

The appellant had unsuccessfully taken her application to court and to mediation. This appeal also failed. However, the court was aware that this did not solve the problem. Clearly the council was not in principal opposed to communal dining but had a vested interest in preventing the termination of an arrangement which was mutually beneficial to the council, the association and to residents.

Whilst the court was unable to produce a legal solution, the court worrying identified failures in the mediation process. Schiemann LJ observes : " …. *the undertaking to consult has been rendered largely nugatory, since consultation axiomatically requires the candid disclosure of the reasons for what is proposed. The consequent resort to* ***mediation****, under pressure from the Court, was no substitute:* ***mediation*** *here began from just those entrenched positions which consultation is designed to avoid. As a result, it is only in this Court that the real issue has been isolated and the argument narrowed to something quite manageable. Nobody wants to jeopardise the arrangements with Warden Housing*

[97] ***Lloyd, R v [2001] EWCA Civ 533*** Schiemann LJ, Sedley LJ, Lady Justice Arden.

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Association; everyone agrees that individual lettings with private cooking facilities are appropriate, so long as they do not stand in the way of those, like Ms Lloyd, who want to sit together to eat their meals.

We are now concerned, in these circumstances, to achieve a resolution of what everyone agrees is a wholly unsatisfactory situation. Ms Lloyd and her companions are living in unsatisfactory circumstances; the Council proposes something which on any basis seems manifestly more satisfactory but is inhibited from doing so by the threat of legal action. It is a classic case where the genuine desire on the part of Ms Lloyd's advisers to achieve what they deem to be the best for her is the enemy of the achievement of the good. So far events have proved not to be in her best interests or those of her companions."

The question that arises, is why it was that mediation was unable to separate the legal from the wider interests and to broker a satisfactory result in this case? It may well be that the council negotiators were solely focused on legal issues and lacked the authority to do otherwise. Such situations call for senior management and policy makers to attend the mediation if an impasse is to be broken, but frequently this does not happen. It is one thing for the court to recommend mediation, it is another for the parties to be made aware of the context in which the mediation needs to be conducted, if it is to have any valuable result.

Costs and Public Law

(A&B – X&Y) R v East Sussex County Council [2005] sheds some further light on when ***Cowl*** does and does not apply.[98] This concerned a paper only challenge before Mr Justice Munby (QBD Admin Div) to a prior ruling on costs in respect of judicial review hearing of care orders made by ESCC. These hearing related to *"user independent trust issues"*, *"manual handling"* and *"best interest proceedings."* Following negotiations and mediation the best interest proceedings were vacated and dealt with by consent orders, leaving only the question of costs to be determined by the court.

The claimants' costs exceeded £750,000 and combined with the respondent's costs, the final bill exceeded £1M. The claimants were successful in respect of legal aspects of the trust and manual handling claims but vast sums were spent on aspects of handling that were never adjudicated. Both parties produced large quantities or argumentation, evidence and expert reports on matters which could not and should not have been dealt with by the court. All of this occurred despite the fact that the parties had been requested to limit submissions to matters over which the court had jurisdiction. The court refused to adjudicate on the public law exercise of discretion placed by statute upon the County Council, though it should be noted that because of the litigation the council substantially revised its manual handling policy, something that but for the litigation might not have occurred.

The respondents asserted that the claimants should be denied costs because of a refusal to mediate. The court disagreed because it was not unreasonable in the circumstances for the applicants to take the view that the terms of reference proposed by the local authority were inappropriate and to conclude that mediation was likely to be futile. The court noted that aspects of the case were stoutly litigated with enthusiasm by both parties, further indicating that mediation could not have succeeded. ***Cowl v Plymouth County Council (Practice Note)*** distinguished on the facts.[99] Munby J however speculated that perhaps he should have taken a more robust attitude towards mediation at an earlier stage and by applying **Cowl,** have mandated mediation.

The court also rejected attempts to apply the rules on costs adopted by the Family Court to public law care order cases. The court ultimately took a broad brush stroke to costs, rather than dealing with them on an issue by issue and success basis – since neither party prevailed on many aspects of the litigation. A fair outcome was that ESCC were ordered to pay 50% of the claimant's costs.

[98] **(A&B – X&Y) R v East Sussex County Council** [2005] EWHC 585 (Admin). Mr Justice Munby. Cases referred to **:** ***R (Boxall) v Mayor & Burgesses of Waltham Forest LBC*** *(2000) 4 CCLR 258.* ***R v Mayor & Burgesses of L.B. of Hackney ex p S*** *13 October 2000).* ***Bolton M.D.C v S.S. for the Environment (Practice Note)*** *[1995] 1 WLR 1176.* ***R (Smeaton) v SS for Health (No 2)*** *[2002] EWHC 886 (Admin), [2002] 2 FLR 146.* ***R v Liverpool CC ex p Newman*** *(1993) 5 Admin LR 669.* ***CF v SS for the Home Department*** *[2004] EWHC 111 (Fam).* ***A v A Health Authority****, In* ***re J (A Child), R (S) v SS for the Home Department*** *[2002] EWHC 18 (Fam/Admin).* ***Lockley v National Blood Transfusion Service*** *[1992] 1 WLR 492.* ***R (Burkett) v London Borough of Hammersmith & Fulham*** *[2004] EWCA Civ 1342.*

[99] *[2001] EWCA Civ 1935, [2002] 1 WLR 803.*

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The question of costs again arose in the case of ***Gibson v Commission for Social Care Inspection***.[100] The Gibsons were removed from the register of care homes providers. They unsuccessfully appealed the decision. This hearing considered the costs of the appeal, finding the appellants responsible for costs under Reg 24 - Care Homes Regulations 2001 which empowers the tribunal to order an appellant to pay the costs of an appeal which is conducted unreasonably. The respondents asserted amongst other things that the appellants had unreasonably failed to respond to offers or to mediate.

The Tribunal noted that *" … there is no **mediation** built into this appeal process nor is there any requirement that either party has to attend the meeting. Indeed in some cases there may be good reasons why a meeting might be inappropriate. However, in this particular case, in circumstances where the Applicants challenge to the Respondents case was still unclear and where proposals to settle were on the table, it does appear to have been unreasonable on the part of the Applicants simply to refuse to attend the meeting. Even if the meeting had not resulted in a settlement, at the very least it could have served to narrow the issues, thereby reducing the length of the hearing and saving substantial time and costs".*

Conclusions

A difficult area of Public Law practice also not touched upon in this series of cases, where there may be a role to play for ADR, relates to the inter-relationships between Public Bodies. Where one public body receives public funding from another and an allegation that the money has been used for ultra-vires purposes or has not been used at all, a dispute is likely to arise where the funding body may seek to recover funds. Clearly, where a high level of wrong-doing is involved, individuals may be surcharged by the district auditor. However, where public funds are simply used for the wrong public purpose, so that something the funding body did not wish to fund has reaped a benefit, is restitution available, or alternatively set-off against future funding? Traditionally, these are civil law remedies, though the latter involves a degree of self help. Now that Public Law has embraced the concept of damages, could an award of damages be made? It may be that in order to protect itself from liability, in respect of set off from subsequent funding, taking into account the previous over-payment, a public body might seek a declaration from the High Court that there has been an over-payment or ultra vires use of funds. Whichever course of action is followed, it is submitted that recourse to ADR would be a useful way of ensuring that public funds are not dissipated on unnecessary litigation. The one problem that might arise is, that until a court has made a declaration there may be a lack of incentive to settle.

A perennial problem that continues to crop up, despite many judicial attempts to establish tests to govern the distinction is the borderline between public and private law, which again exacerbates the problem of applying public or private law criterion with regard to mediation practice. This is evident in ***Rye v Sheffield City Council***.[101] The respondent had applied for a grant for renovation to private property. The council had refused the grant asserting that the application did not fall within the parameters of the Act. This was successfully challenged before HHJ Mance and the Council appealed, asserting that the matter should have been submitted to Judicial Review as a Public Law not a private law matter.

Pill LJ stated that the most appropriate way of dealing with questions as to whether or not a grant is available for renovation work are to refer the dispute to mediation or alternatively to appoint a single joint expert to advise the court. He observed that judicial review was inappropriate since it is a question of fact as to whether or not the requirements of the Act are fulfilled and not a matter of ***Wednesbury*** reasonableness or discretion. Furthermore, judicial review would not provide a remedy for the applicant. It is easy to agree with this latter proposition but less so the former, since it is available to the court to make a declaration in public law. Rather, the question remains, was it a public law or a private law issue. The latter proposition does not address that question. As to whether or not there should be financial remedies available at public law is yet another matter, but it alone is not a distinction, rather it simply provides a jolly good pragmatic reason for going elsewhere.

It is clear that the explosion in Judicial Review cases in the public sector is a cause of concern for the Lord Chancellor, the Department of Constitutional Affairs and the Lord Chief Justice. The Government has made concerted efforts to introduce and encourage the use of alternative dispute settlement processes such as central and local ombudsmen and ADR. However, the guiding principles however are not yet finalised. Thus recently

[100] ***Gibson v Commission for Social Care Inspection [2005] EWCST 266(EA_Costs)*** Mr Stewart Hunter (Chairman), Mrs Linda Elliot, Mr Jeff Cohen

[101] ***Rye v Sheffield City Council [1997] EWCA Civ 2257.*** Lord Woolf MR, Morrit LJ, Pill LJ on unsuccessful appeal from HHJ Mance.

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in ***Robinson v Hammersmith & Fulham*** **[2006]** the CA held that mediation, whilst useful should not detract from an authority's duty to house an under aged homeless person. The council initiated mediation in respect of a child applicant for housing, whereby the child might come of age in the intervening period, taking the applicant outside priority housing status. The CA held that the mediation process should not be allowed to detract from the duty to house the applicant.[102]

Self Assessment Exercise No 3

1. Examine the circumstances in which a court will issue a stay to mediation in England & Wales in respect of a civil action.
2. Examine the potential impact on costs orders that may flow from a failure to mediate.
3. Examine the circumstances in which a court may refuse an application for judicial review in the absence of active participation in ADR by the applicant.
4. Examine the cost implications of a failure to engage in ADR in public law actions.

ADDITIONAL READING

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WEB-LINKS

Civil Procedure Rules : http://www.dca.gov.uk/civil/procrules_fin/index.htm

[102] ***Robinson v Hammersmith and Fulham [2006] EWCA Civ 1122***

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