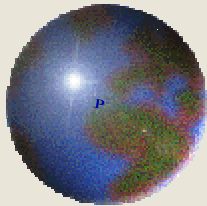




Nationwide Mediation Academy



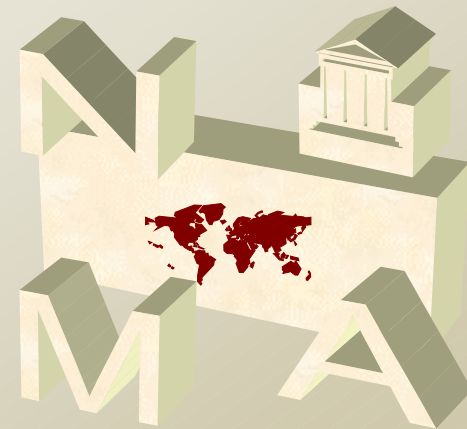
SEMINAR 1

Introduction to Civil and Commercial Mediation

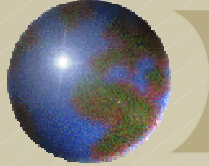
Program Leader

Corbett Haselgrove-Spurin

An NMA program on behalf of NADR UK Ltd.



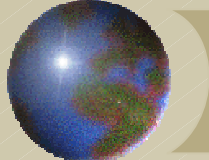
**NATIONWIDE MEDIATION
ACADEMY**



Session One

Mediation - State of play in UK Today

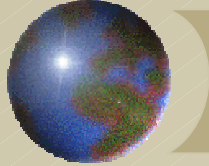
- ❖ **The current role of mediation in the UK**
- ❖ **Background to reforms under the Civil Procedure Rules 1998**
- ❖ **CPR Provisions Sections 1, 26, 44**
- ❖ **CPR Updates – London Court Scheme**
- ❖ **Mediation Case Review – application of the CPR 1998**



Session One

US Mediation – 75 years progress

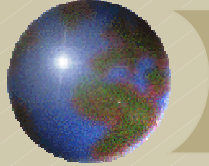
- ❖ **1930 First major specification**
- ❖ **1960 Early progress – pace picks up 1970 onward**
- ❖ **1980 Major movement in Texas underway – adopted by Fortune 500 – Jams/Endispute etc**
- ❖ **1990 20% private uptake of mediation – ABA & AAA provision – Law School ADR programs**
- ❖ **1996 Texas Mediation Act – court ordered mediation - 43% uptake**
- ❖ **1998 Federal Mediation Act**
- ❖ **2000 E-resolution – Square Trade**



Session One

UK Mediation – 14 years progress

- ❖ **ACAS Arbitration Conciliation Advisory Service**
- ❖ **1990 CEDR founded - pump-primed the London Central Court mediation experiment – logged by Dr H.Genn London University**
- ❖ **1998 – CPR + Protocols : Court Mediation Services rolled out to the principalities**
- ❖ **2000 – Adoption of ADR for public law disputes**
- ❖ **2003 – South Wales Court Mediation Service**
- ❖ **2004 – Court Ordered Mediation - London**



Session One

The Government's attitude to ADR

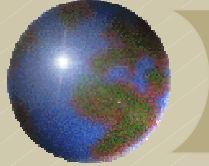
Practice Statements

- ❖ **Public Statement on government policy and commitment to use of ADR for public law issues by Lord Irvine, March 2001.**

"the Government is now formally pledged to resolve legal disputes by ADR whenever possible"

This turns out to embrace for more than just mediation – including adjudicators, regulators and ombudsmen.

Inter-relationship to auditors is uncertain.



Session One

The Courts and Mediation

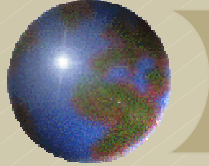
Practice Statements

- ❖ Practice Statement on ADR [1998] (Commercial Court) 10th December

per Mr Justice Cresswell

Judges would not get involved in ADR but where litigation costs were disproportionate would **recommend** mediation. Courts would maintain lists of mediation provider organisations.

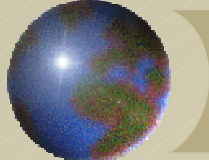
Reinforces Court Mediation Schemes



Session One

Enforcement of ADR Agreements

- ❖ **Section 9 Arbitration Act 1996**
- ❖ **Section 108 Housing Grants Construction and Regeneration Act 1996**
- ❖ **Civil Procedure Rules 1998**
- ❖ **Common Law – stay of action pending pursuit of private alternatives agreed between the parties.**



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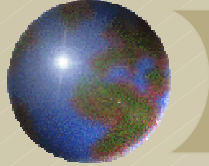
Civil Procedure Rules 1998

OVERRIDING OBJECTIVE

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

Similarly see Sections 1 and 33
Arbitration Act 1996

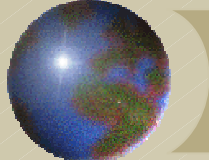
Fairness, **reasonable opportunity**



Session One

CIVIL PROCEDURE RULES cont'

- 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**.

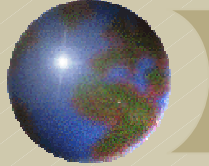


Session One

CIVIL PROCEDURE RULES Cont'

- 1.4(2) Active case management includes
- (e) **encouraging** the parties to use an alternative dispute resolution procedure if the court considers that appropriate and **facilitating** the use of such procedure.

Note the broad definition of ADR embraces far more than just mediation



Session One

Court Ordered Mediation Scheme CPR

Pilot Scheme for Mediation in Central London County Court

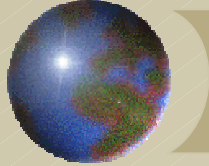
Practice Direction Supplement to CPR PART 26

1.1 This practice direction provides for a pilot scheme to operate from 1st April 2004 to 31st March 2005 in relation to claims in the Central London County Court.

1.2 This practice direction enables the Central London County Court to-

- (1) require** the parties to certain types of claims either **to attend** a mediation appointment **or to give reasons for objecting** to doing so; and
- (2) stay the claim** until such an appointment takes place.

NOTE PRESSURES CLAIMANT NOT DEFENDANT



Session One

Court Ordered Mediation Scheme CPR

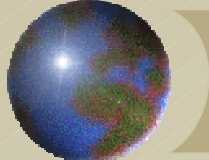
Pilot Scheme cont'

1.3 Cases in which a notice of referral to mediation has been served under paragraph 3.1 prior to 31st March 2005 shall remain subject to this practice direction **until either-**

(1) a **mediation appointment has taken place; or**

(2) any **stay of execution imposed under paragraph 5 **has expired** or been lifted by the court,**

whichever shall be the sooner.



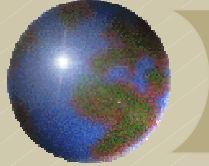
Session One

Court Ordered Mediation Scheme CPR

Pilot Scheme Cont'

- **Types of claims to which this practice direction applies**
- 2. This practice direction applies to a claim if it meets all the following conditions-**
 - (1) the small claims track is not the normal track for the claim;**
 - (2) no party to the claim is-**
 - (a) a child or patient; or**
 - (b) exempt from payment of court fees; and**
 - (3) the court has not granted an interim injunction in the proceedings.**

APPLIES TO EVERYTHING BUT THE ABOVE



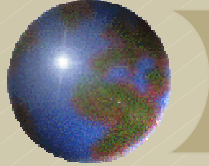
Session One

Court Ordered Mediation Scheme CPR

✚ Service of mediation notice

3.1 The court may, when it serves the allocation questionnaire under rule 26.3, serve a notice of referral to mediation on each party-

- (1) notifying them that the claim is to be referred to mediation; and**
- (2) requiring them, within 14 days after service of the notice on them, to file and serve a reply to the notice in which they must-**
 - (a) state whether they agree or object to mediation;**



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Court Ordered Mediation Scheme CPR

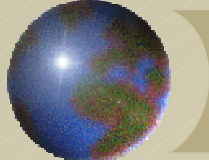
Pilot Scheme Cont'

(b) specify any dates within three months of the date of filing the response on which they would not be able to attend a mediation appointment; and

(c) if they object to mediation, set out their reasons for doing so.

3.2 The **cases** where a notice of referral to mediation is served on the parties will be **chosen at random** from those that meet the criteria set out in paragraph 2.

3.3 A party who receives a notice of referral to mediation need not complete and file an allocation questionnaire unless or until directed to do so by the court.



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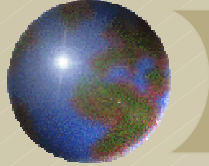
Court Ordered Mediation Scheme CPR

Pilot Scheme Cont'

⊕ Objection to mediation

4.1 If one or more of the parties states in his reply that he objects to mediation, the case will be referred to a district judge who **may** -

- (1) direct the case to be listed for a hearing of the objections to mediation;
- (2) **direct that a mediation appointment** should proceed;
- (3) order the parties to file and serve completed allocation questionnaires; or
- (4) give such directions as to the management of the case as he considers appropriate.

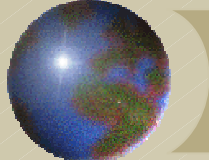


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Court Ordered Mediation Scheme CPR

Pilot Scheme Cont'

- **4.2 If a party does not file a reply within the time specified in the notice of referral to mediation, the court and all other parties may proceed as if that party has no objection to the use of mediation in the case.**



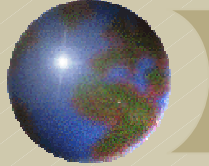
Session One

Court Ordered Mediation

Court Ordered Mediation – under CPR

- ✚ **Muman v Nagasena** [2000] WLR 299. CCRTF 199/0142/2 – Chancery Div ordered mediation
- ✚ **Shirayama Shokusan v Danovo** [2003] EWHC 3006 (Ch) ordered stay pending attempt even though opposed by other party

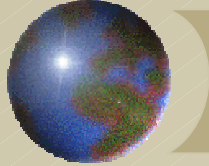
The distinction between this and the London Scheme is that the parties set up the mediation whereas in London the court sets it up and a failure by the claimant to pursue mediation could end the claim.



Session One

Stay of Action : Enforcement civil

- ✚ **Torith Ltd v Stewart Duncan Robertson [1999]**
LTL C8200316 Employment Appeals Tribunal held that an alternative procedure in the contract must be complied with before referring matter to the courts – stay of action available for ADR.
- ✚ **Cable & Wireless PLC v IBM UK LTD [2002]**
EWHC 2059 (Comm) – stay for mediation.
- ✚ **Kinstreet Ltd v Balmargo Corporation Ltd Ch 1994 G2999** – court recommendation due to high cost, low returns.



Session One

CIVIL PROCEDURE RULES - STAY

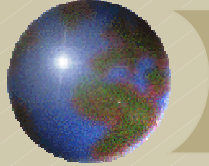
26.4(1) A party may, when filing the completed allocation questionnaire, make a **written request for the proceedings to be stayed** while the parties **try to settle** the case by alternative dispute resolution or other means.

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.**

Shirayama Shokusan v Danovo [2003]

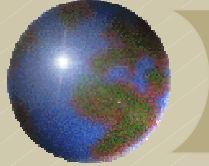
EWHC 3006 (Ch) ordered stay pending attempt



Session One

Stay of Action – Public Law

- ❖ **Anufrijeva v London Borough of Southwark et al [2003] EWCA Civ 1406**
Applications for Judicial Review in respect of compensation for breach of human rights will be rejected if there has been a failure to first exhaust available ADR procedures. If attempted but are deemed to have failed JR will be permitted.



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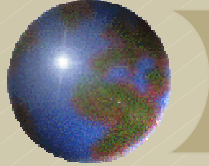
Cost penalties under CPR 1998

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(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including

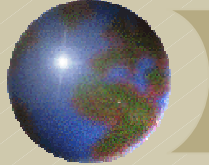
- (a) the conduct of all the parties;**



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Cost penalties under CPR 1998

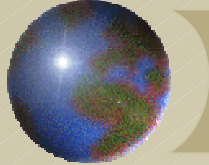
- 44.3(5) The conduct of the parties includes**
- (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol;**



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Cost penalties for failing to mediate : Public

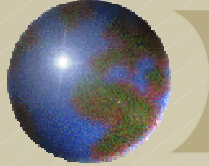
- ❖ **Cowl v Plymouth City Council 2001/2067 [2001] EWCA Civ 1935 (Criticism of failure)**
- ❖ **Royal Bank of Canada Trust Corporation Ltd v S.S. for Defence [2003] EWHC 1479 (Penalty)**
- ❖ **The CPR provisions on costs apply equally to the parties to public law actions where applicable even if the law supports the public authority.**
- ❖ **So, public authorities have power / duty to make settlement agreements if possible.**



Session One

Cost penalties for failing to mediate : Civil

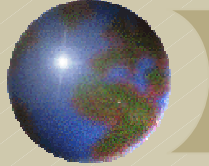
- **Dyson & Field v Leeds C.C. 22.11.1999 . Trial judge died
Retrial ordered – but mediation advised with a warning
on potential cost penalty for failure to mediate.**
- **Dunnett v Railtrack [2002] 2 All ER 850
D won but no costs – mediation refused.**
- **Leicester Circuits v Coates [2003] EWCA Civ 290 – costs
denied post mediation offer.**
- **Malkins Nominees v Societe Finance [2002] EWHC 1221
Chancery – 15% penalty for failure**
- **Neal v Jones Motors [2002] EWCA Civ 1730
£5,000 costs deducted for failure to mediate**



Session One

Cost penalties not awarded : Civil

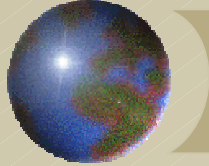
- ❖ **Hurst v Leeming** [2002] EWHC 1051. (CH) 9.5.2002 – reasonable to refuse mediation
- ❖ **Valentine v Allen, Nash & Nash** [2003] EWCA Civ 1274 – C won 75/25 – refused mediation but because D had thrown costs away costs awarded as usual.
- ❖ **SITA v Watson & Wyatt: Maxwell Batley** [2002] EWHC 2401 / 2025 (Ch) No penalty
Mediation would not have worked



Session One

Cost penalties : Civil

- ❖ **Halsey v Milton Keynes General NHS Trust : Steel v Joy & Halliday [2004] EWCA Civ 576** CA sets out role of court in advising mediation : and the grounds upon which costs may be ordered by a party who fails to mediate
- ❖ **Couwenberg v Valkova [2004] EWCA Civ 676** Clarifying incorrect interpretations of Halsey by commentators, CA made it clear that even cases involving allegations of fraud are suitable for mediation.



Session One

Enforcement of settlement agreements

❖ **Thakrar v Ciro Citterio Menswear [2002] EWHC 1975**

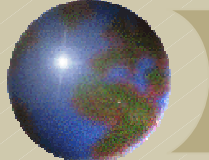
The mediated settlement agreement preceded insolvency – and was enforced – keeping the cash out of the hands of the trustees in bankruptcy and creditors.



Session One

Non-enforcement of settlement agreements

- ❖ **Oil & Mineral v Mahdi Sajjad (1999)**
Oral settlement agreement not enforceable – it must be reduced to writing.
- ❖ **Hurst Stores & Interiors v M.L.Europe [2003] EWHC 1650 : [2004] EWCA**
Settlement agreement requires authority and awareness of implications of changes to documentation -
must be an intention to settle.



Session One

CONCLUSIONS

Court mediation schemes are rolling out across the UK - By close 2004 there will be more than 40 schemes

If the London Scheme is successful it will be extended to the principalities.

Mediation cannot be avoided – it is too late to learn to participate effectively in the process after the event – i.e. when ordered to go to mediation.

In the short run there won't be enough UK based mediators in appropriate fields.