Rhetoric and civil justice: a commentary on the promotion of mediation without conviction in England and Wales

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***C.J.Q. 162** The nature of support for mediation in England and Wales vacillates among government insistence that mediation is the preferred method for resolving disputes, judicial encouragement of mediation, and an emphatic denial of compulsory mediation in this jurisdiction. Insisting on a façade of voluntariness to the process while subjecting litigants to cost sanctions for unreasonably refusing to participate in the process creates a burden on the litigant and the civil justice system. Government and judicial reluctance to align rhetoric supporting mediation with a clearly mandated programme ultimately impedes the effectiveness of achieving the government's policy goal for civil justice—that is, to deal with cases justly and at proportionate cost as noted by the overriding objective of the* CPR *. The article seeks to illuminate the schism between rhetoric and action, and the resulting lack of transparency in civil justice. It will lead to a conclusion that calls for government action to settle this debate once and for all: to put its policies into action by recognising that the power to order mediation already exists in England and Wales and to make this clear through express legislative provisions rather than through the current reliance on the application of judicial discretion.*

Introduction

There have been a number of recent articles dealing with mediation and the civil justice system of England and Wales. Genn, Nolan-Haley and others have explored the development of mediation in England and Wales with emphasis on the place of mediation within civil justice. [1] In particular, the *Civil Justice Quarterly* has examined the issue of compulsion in mediation through a series of articles by Ahmed, Shipman, Koo and Meggitt. [2] This article continues the exploration, ***C.J.Q. 163** weighing in on the issue from a public policy point of view and a corresponding call for government action. The nature of support for mediation in England and Wales vacillates among government insistence that mediation is the preferred method for resolving disputes, judicial encouragement of mediation, and an emphatic denial of compulsory mediation in this jurisdiction. Policy statements speak of the need to deal with matters privately and to lessen the use of the courts while at the same time,

evince an unwillingness to take affirmative steps to assure that this is so by implementing a directly compulsory mediation programme. [3]

Currently, it is not clear where England and Wales stand on the issue of compulsion and mediation. There is a disconnect among government actions, civil procedure rules and the reality of judicial pronouncements on mediation. [4] One could assume that the question whether England and Wales has a compulsory system for mediation in its civil justice system would be an easy one to answer. However, a canvass of the literature supports a schizophrenic answer to this problem. For example, Ahmed and Quek are of the view that mandatory mediation exists in England and Wales whereas Brunsdon-Tully and del Ceno argue that there is no mandatory mediation in this jurisdiction. [5] As Nolan-Haley says, the debate regarding compulsion continues in the UK. [6]

The government and the judiciary want mediation, according to Hazel Genn. [7] An examination of government policies and judicial statements suggest they do, however, not sufficiently enough to make it mandatory in a way that is visible and transparent. This vacillation on the part of key actors in civil justice is an intriguing issue. Having regard to other jurisdictions such as Ontario Canada where the provincial government introduced mandatory mediation in the late 1990s and where it continues as an integrated part of the civil justice system, it is difficult to understand the reticence for implementing a compulsory mediation regime in England and Wales or the continued action in side-stepping the issue through the utilisation of cost sanctions. [8] Today, it cannot be said that mediation in England and Wales is compulsory despite claims that it may be so through the various civil procedure rules and pre-action protocols. [9] Litigants continue to be able to choose mediation. They are, however, at risk of costs penalties if they choose in error.

Insisting on a façade of voluntariness to the process while subjecting litigants to costs sanctions for unreasonably refusing to participate in the process creates a burden on the litigant and the civil justice system. Government and judicial reluctance to align rhetoric supporting mediation with a clearly mandated programme ultimately impedes the effectiveness of achieving the government's ***C.J.Q. 164*** policy goal—that is, to deal with cases justly and at proportionate cost as noted by the overriding objective of the CPR . [10] At best, mediation's place in civil justice is one of an ad hoc nature and one that is not transparent.

The issue being canvassed in this article is not whether compulsory mediation is good or bad. There are arguments on both sides of the divide: it is an issue that has been considered by scholars, government policy makers, mediation practitioners and the legal profession including judges and lawyers alike. Some of the arguments against compulsion include that: (1) it breaches the concept of voluntariness of the process; (2) it does not deliver justice; (3) it prevents the development of the law; (4) it disadvantages the poor and the weak; and (5) it leads to coerced settlement. [11] On the other hand, such arguments are countered with views that: (1) compulsion to the table does not mean compulsion to stay at the table or to accept a settlement; (2) justice has many forms; (3) parties are satisfied with the process once having experienced the process; (4) it helps make efficient a civil justice system that is already about settlement. [12] This is an extremely brief overview of the arguments that can be heard in the debate. The point emphasised in this article is that the inconsistency in position regarding compulsion in civil justice in England and Wales needs to be redressed. The plea is to recognise the inconsistency and take steps to eradicate it.

This article will set out a brief description of the development of mediation's place in English civil justice, followed by an examination of the issue of compulsion with the seminal case of *Halsey v Milton Keynes General NHS Trust* where arguably the compulsion debate took root. [13] It will then explore government policy statements and actions used to promote mediation as an effective way to deal with dispute resolution. The judicial view will be examined in light of these government pronouncements both in terms of what judges have said extra-judicially and what has been said by them in their decisions about mediation and whether mediation should be made compulsory. The article will then examine current court power to direct mediation and consider the issue of the unreasonable refusal to mediate against this backdrop of *Halsey* , government pronouncements and judicial commentary.

We will see that there is recognition of mediation's integral place in civil justice implemented through a system of penal application, but a reticence for an expressly mandatory mediation system. The current court rules and corresponding decisions do not reflect annunciated government policy or clear procedural requirements for users of civil justice. As a result, litigants are faced with uncertainty regarding the extent of their obligations to mediate under the CPR . Ultimately, the article seeks ***C.J.Q. 165*** to illuminate the schism between rhetoric and action, and the resulting lack of transparency in civil justice. It will lead to a conclusion that calls for government action to settle this debate once and for all: to put its policies into action by recognising that the power to order mediation already exists in England and Wales and to make this clear through express legislative provisions. Justice demands it.

Mediation and civil justice

In the past, even before the popularity of ADR processes, most cases settled before trial. The figure is often quoted as in the 90 percentile and above. [14] Whatever the specific number, it is not controversial to suggest that the bulk of litigated disputes settle without a judicial verdict. Courts arguably were always on the periphery of action due to the settlement of most cases without trial. While judgment is often seen as the ideal in this common-law system of justice, settlement often occurs in lieu of judgment.

The implementation of the CPR in 1999 was an important development for ADR in England and Wales. The CPR requires the courts to actively manage cases and part of that obligation is to encourage parties to settle their disputes. The foundation for these provisions is the overriding objective to treat cases justly and at proportionate cost, as mentioned above. Settlement therefore is an explicit objective of the judicial system. [15] In particular, r.1.4(1) requires the court to actively manage cases. Rule 1.4(2) refers to case management as encouraging and facilitating parties' efforts to settle a dispute. Rule 26.4 provides parties with the opportunity to seek a stay of proceedings pending settlement efforts. Rule 44 gives power to the court to order costs sanctions against a party who acts unreasonably in failing to take steps to settle its dispute, including the power to invoke a 10 per cent penalty when offers to settle have not been accepted. [16] These rules, together with various Court of Appeal decisions, [17] make it clear that settlement, fueled by a desire for efficiency, has become a primary objective within the judicial system. The main motivator for this move to embrace ADR was economic and administrative efficiency: a reduced reliance on litigation means reduced costs for government and reduced cases for the courts. [18]

Genn suggests that the reduction of the legal aid budget is the impetus for private justice, suggesting the forsaking of justice for efficiency: "The outcome of mediation, therefore, is not about *just* settlement it is *just* about settlement". ***C.J.Q. 166*** [19] Equating efficiency with the promotion of ADR processes seems to support what are seen to be the hallmarks of the English justice system—efficiency and proportionality. [20] The concern arises when efficiency becomes the goal of the system as opposed to being a means to reach the goal. [21] Certainly, the push for mediation in England and Wales appears to be premised on an efficiency argument: streamlining the civil justice system and reducing the government budget. [22]

As a result of the CPR provisions, mediations are positioned within the litigation process itself. We see through various judicial decisions that the court takes seriously the obligations imposed by the CPR requiring both courts and litigants to consider settlement. Failure to do so leads to economic punishment through costs sanctions: an unreasonable refusal to mediate may lead to a successful party being denied its costs of the action. [23] Being subject to costs sanctions for unreasonable refusal to mediate does not create a mandatory system—it simply encourages one. A mandatory system is a system that automatically requires litigants to attend a mediation session prior to being able to proceed to a trial of their action. [24] As can be seen by the provisions of the CPR , mediation is not compulsory in England and Wales, yet litigants are expected to know when they must participate in mediation if they are to avoid the denial or reduction of a cost award at the end of their trial even if they are successful in the action.

The *Halsey* decision and the issue of compulsion

There has been much litigation over the reasonableness of a party's refusal to mediate and the costs sanctions imposed in that event. [25] For this paper, the focus is on compulsion, which appears to begin and end with *Halsey v Milton Keynes General NHS Trust* , a case of the English Court of Appeal which considered the application of the CPR on the actions of a party refusing to mediate a dispute. [26] The case is critical for an understanding of the impact of the CPR and also for the confusion about the status of mediation in civil justice.

The court in *Halsey* opined on several important aspects of the CPR as it relates to mediation including: (1) the circumstances under which costs sanctions are to be invoked (having regard to factors such as the nature of the disputes, the proportionality of the costs/value of claim); (2) the burden of proof for establishing ***C.J.Q. 167*** unreasonableness in the refusal to mediate (on the party who is seeking to invoke the cost sanction); (3) the nature of mediation as a confidential process; and (4) the issue of compulsion (mediation is not and should not be compulsory). It is this latter reference to the obiter dictum of Lord Dyson, which circles the debate on mandatory mediation in England and Wales.

In obiter, Lord Dyson states there is no compulsory mediation in England and Wales because it would infringe art.6 of the European Convention on Human Rights (ECHR), the right to a fair trial provision of the ECHR . [27] The cases decided prior to *Halsey* were emphatic in their support of mediation with judges willing to invoke the costs sanctions in the context of a supportive judicial culture promoting mediation. [28] Prior to *Halsey* , it may well have been a situation of implicit compulsion given the strength of those decisions. [29] Post *Halsey* , courts became reticent in their opinions and used the *Halsey* edicts to temper their views. [30] A clear indication of the impact of the decision was felt in its effect on a pilot project that had been exploring the concept of mandatory mediation at that time. After the decision, 80 per cent of cases opted out of the 2004 Central London County Court ARM scheme where cases had been automatically referred to mediation. [31]

Lord Dyson's views on the issue of compulsion also commenced a public debate about mandatory mediation, beginning with comments by judges as to the accuracy of Lord Dyson's comments in this regard. For example, Gavin Lightman J suggested that *Halsey* was wrong on the art.6 point. [32] On the other hand, Lord Phillips, former President of the Supreme Court, in a speech given in India when he was the second most senior judge in the country as Lord Chief Justice, thought that mandatory mediation is "indeed likely" to be a breach of art.6. [33] Lord Clarke, when Master of the Rolls, was of the view that there could be grounds for suggesting that *Halsey* was wrong in stating that compulsory mediation was contrary to art.6 of the ERCH. [34]

The issue has been settled for the moment: the European Court of Justice in *Alassini v Telecom* held that a mandatory provision requiring litigants in Italy to attend on a mediation before being able to proceed with litigation did not contravene art.6. [35] Furthermore, other countries in the EU have since instituted mandatory regimes without challenge. [36] This is not surprising given the mandate in the ***C.J.Q. 168*** European Directive on Mediation for Cross-Border Disputes which states expressly that nothing in the Directive precludes member states from invoking mandatory schemes. [37] Arguably, mediation is seen as a procedural step to be undertaken and therefore a housekeeping matter for civil justice systems, rather than a withdrawal of rights to trial.

Article 6 and infringement concerns have been dealt with. What remains is inconsistency and uncertainty as a result of *Halsey* and its application to a litigant's refusal to mediate.

Government policy supporting mediation

Despite the confusion over *Halsey* regarding the nature of the court's power to compel attendance at mediation, the government has continued with its support of mediation in civil justice in England and Wales. Various government statements and schemes have been articulated, illustrating a view that private justice is a fundamental tenet to public policy today, arguably, in the name of access to justice.

Beginning with the government's own disputing processes, in 2011, the Ministry of Justice reaffirmed the government's commitment to use ADR for disputes involving government departments and agencies. [38] This Commitment reinforced a prior pledge by government in 2001, despite a statement in *Halsey* that such a commitment was not relevant for purposes of the determination of costs sanctions. [39]

In 2011, the small claims court became the subject of a government consultation for its reform, during which views were solicited as to whether mediation should be mandated for small claims court matters, among other things. [40] In 2012, the government announced that small claims court matters would become subject to automatic referral to the Small Claims Court Mediation Service where parties are told about the mediation process and if they agree, they participate in telephone mediation. [41] This referral does not result in an automatic mandatory mediation session: all parties need to agree to mediate. The referral is to a mediation ***C.J.Q. 169*** *information* session with a mediator who explains the benefits of the process. In a report written for the Ministry of Justice ODR Advisory Group, Prince notes that during the period April–October 2013, there were 26,670 automatic referrals to mediation information sessions and 5,792 mediations conducted, which confirms that "automatic referral to mediation" does not mean that mediation will take place. [42]

Low value claims came in for further mediation treatment in late 2012. All actions filed in the County Court Money Claims Centre since 2012 are automatically referred to mediation and again, if all parties agree, they participate in mediation. [43] Like

the small claims court process, the automatic referral is to an information session and participation in mediation is still subject to the agreement of all parties.

Mediation referral schemes have not been relegated to low value claims only. The Court of Appeal Mediation Scheme is one that has been running for a number of years. Under the current scheme, all personal injury and contract claims up to the value of £250,000, inheritance disputes having a value of up to £500,000 and boundary disputes for which permission to appeal is sought and obtained are automatically recommended for mediation unless a judge exceptionally directs otherwise. Again, although automatically recommended for mediation, all parties need to agree to participate in mediation, and if they do agree, a mediator is nominated by the scheme. [44]

As for government statements, in 2012, then Secretary of State for Justice, Kenneth Clarke, spoke of the importance of mediation in civil justice:

"Without effective civil justice, businesses couldn't trade, individuals couldn't enforce their rights, and government couldn't fulfill its duties. But individuals and businesses tell me that the civil justice system at the moment can sometimes be intimidating and that they don't know if using the system will be worth the time, expense and hassle of going to court. I want to make the system as easy and transparent as possible. I want people to be able to resolve their disputes cheaply and simply through the courts' very successful mediation service, and I want judges freed up to make quick and effective judgments based on the facts of a case, without unnecessary legal complication. ***C.J.Q. 170*** " [45]

Subsequently in 2014, the Minister of State for Civil Justice and Legal Policy, Lord Faulks reiterated the government's support for mediation in a speech given to the Civil Mediation Council annual conference in which he emphasised the need for people to consider alternatives other than court to resolve disputes in order to develop a more efficient court system. [46] He stated:

"… the success of mediation and other dispute resolution methods in keeping unnecessary litigation out of the courts is a key cornerstone of an efficient and cost effective justice system". [47]

Support is not only evident for civil cases. For example, in 2014, Simon Hughes, Minister of State for Justice and Civil Liberties, although speaking of family mediation, referred to government support for mediation:

"I will go on working to make sure that mediation and other forms of out-of-court resolution of disputes is given maximum priority in government and in the family justice system of our country." [48]

In addition, the Department for Business, Innovation & Skills implemented a consultation on ADR for Consumers and established an advisory group in response to the EU Directive on Consumer Disputes, and an all-party parliamentary group on ADR was launched in late 2015

"to help change the culture of Alternative Dispute Resolution (ADR) in the country by providing a valuable forum within Parliament to discuss the latest development in ADR and to promote its wider use". [49]

It is clear from this brief survey that government supports mediation within civil justice and seeks to encourage its use. The court acknowledges this support in the recent decision of *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* . [50] In the case, the court took the unusual step of upholding an agreement to agree clause while pointing to the court's obligation to support government public policy on ADR:

"Concluding that the obligation was enforceable would be consistent with the public policy of encouraging parties to resolve disputes without the need for expensive arbitration or litigation. ***C.J.Q. 171*** " [51]

This is all the more astonishing when one considers the clause in issue: the parties were to hold "friendly discussions". [52]

Express support for mediation, however, goes only so far; that is, it comes in the form of requiring parties to learn about mediation, but it refrains from requiring them to attend at the mediation table. In January 2015, the Ministry of Justice reiterated its position that mediation should not be made mandatory in response to a private member's bill to implement compulsory mediation for boundary disputes despite strong words by the Court of Appeal that such disputes are needlessly litigated. [53] The

strength of the policy statements made by the government to promote mediation in the name of a more efficient justice system is at odds with the lack of necessary steps taken to implement a clear and express policy initiative.

The judicial view

Judges, like government, speak favourably about mediation both in their judicial decisions and also extra-judicially. They, like government, continue to reinforce the benefits of mediation and the concept that trial should be the last resort for litigants, but generally reject the compulsion of parties to engage in mediation. For example, Lord Woolf raised the issue of compulsion in his reports on court reform in the 1990s, but stopped short at either offering or recommending compulsion. [54] The issue of compulsion came up again in the report of Lord Jackson on Costs in 2009 in which he proposed a number of recommendations to deal with the burgeoning costs of litigation today including reference to ADR. [55]

In his report, Lord Jackson also speaks favourably of ADR. He says:

"Alternative dispute resolution ("ADR") (particularly mediation) has a vital role to play in reducing the costs of civil disputes, by fomenting the early settlement of cases. ADR is, however, under-used. Its potential benefits are not as widely known as they should be." [56]

However, Lord Jackson refuses to take the next step. He says:

"In spite of the considerable benefits which mediation brings in appropriate cases, I do not believe that parties should ever be compelled to mediate. What the court can and should do (in appropriate cases) is (a) to encourage mediation and point out its considerable benefits; (b) to direct the parties to meet and/or to discuss mediation; (c) to require an explanation from the party which declines to mediate … and (d) to penalise in costs parties which have unreasonably refused to mediate"

with such penalty to be in the discretion of the court but could include reducing costs award for the winning party or ordering indemnity costs against a losing ***C.J.Q. 172*** party. [57] For Lord Jackson, ADR is part of the procedural tools that judges could use to further the objective of the CPR . As he states: "Judges must have discretion to give such case management directions as they deem appropriate in the circumstances of the individual case." [58]

The focus for Lord Jackson is to increase awareness of the benefits of mediation as the way to encourage people to use mediation and to do this through the education of the public, judiciary and lawyers. Subsequently, while sitting on the bench and seeing the havoc of costs on litigants, Lord Jackson affirmed his support for mediation:

"… before embarking upon full blooded adversarial litigation parties should first explore the possibility of settlement. In neighbour disputes of the kind now before the court (and of which I have seen many similar examples) if negotiation fails, mediation is the obvious and constructive way forward." [59]

Judicial support for mediation is also found in the 2013 Chancery Modernisation Review which considered Chancery practice and procedure, as well as in the 2015 Interim Report on the Civil Courts Structure Review. Lord Briggs, in these reports, reiterates strong encouragement for ADR. [60] Further, six judges of the Committee of the Council of Circuit Judges have written of the importance of mediation to civil justice and the need for parties to consider settling their disputes out of court. [61] This advice is provided to litigants in a published litigation handbook for non-represented litigants in which parties who are without representation are being encouraged to seek mediation rather than going to court. [62]

Judges believe that mediation is an adjunct to the civil justice system and see it as a necessary tool for the efficient administration of justice and proportionality. For example, Lord Neuberger, the current President of the Supreme Court, is of the view that ADR is complementary to the trial process and part of the civil justice system, but is different from trial as it does not dispense substantive justice. The type of justice offered by mediation is an individualised justice offered as a service to the public and one which is supported by the justice dispensed by trial—equality, law and the protection of the rule of law. [63] Although acknowledging the benefits ***C.J.Q. 173*** of mediation, Lord Neuberger is not in favour of blanket and express compulsion, a view echoed by Lord Dyson in 2014 and Lord Briggs in 2015. [64]

Judicial support for mediation seems to be coupled with the desire to retain a façade of voluntariness in the belief the litigant should have the choice of whether or not to proceed with mediation. This leaves the litigant in a vulnerable position of determining whether the court has power to mandate mediation and whether it will be subject to penalty for having refused to undertake mediation.

Inconsistency and uncertainty

After *Halsey* , courts continued to examine the applicability of the cost sanction provision of the rules in the context of the *Halsey* framework. The difficulty with this approach is the inconsistency and uncertainty facing litigants regarding their obligations to mediate their dispute. Nolan-Haley, in her examination of mediation in England and Wales, says that one of the difficulties with the English way of dealing with mediation is the fact that the parties do not know where they stand. [65] The level of compulsion is not clearly articulated in the CPR and varying opinions add to the confusion. Masood Ahmed says that there is an implied compulsory mediation primarily due to the cost consequences provisions of the CPR . [66] Meggitt suggests that the Court of Appeal has invoked compulsory mediation "in all but name" as a result of its decision in *PGF II S A v OMFS Company 1 Ltd* . [67] Longmore J in *Ghaith v Indesit Co UK Ltd* suggests the Court of Appeal Scheme is a compulsory one and refers to procedural rules giving power to compel. [68] Yet, there are also courts which expressly state they do not have power to order mediation. [69] The confusion is compounded by governmental and judicial rhetoric about mediation, the CPR provisions, and *Halsey* which says there is to be no compulsion for mediation. Cases then vary on whether conduct is unreasonable, all adding to a state of uncertainty. ***C.J.Q. 174***

(a) Court power and mediation

The CPR provides a framework for the encouragement of mediation through the obligation to consider settlement and the application of costs sanctions where there has been an unreasonable failure to do so. For example, the Admiralty and Commercial Courts Guide, which applies to admiralty and commercial cases (such as contract, financing, import of goods, oil and gas issues) gives the court the ability to order ADR, whether that be mediation, early neutral evaluation or any other form of ADR. [70] The court has the power to direct stays, order parties to attend mediation and if necessary, make a formal order setting out a date by which the mediation needs to take place. [71] This has been in place for years and such orders are frequent.

The case of *C v RHL* , a case of the Queen's Bench (Commercial Court) is one in which the court exercised its power to order mediation. [72] The parties were involved in complex disputes arising out of a shareholder's agreement with litigation proceedings having commenced in Russia and arbitration proceedings commenced in London. Colman J said:

"I have no doubt that the overall interests of all parties […] would be best served if the whole group of disputes between C and RHL was referred to mediation before any further substantial costs are incurred either in pursuing or defending satellite litigation … In many respects this series of disputes with its particular commercial background is the paradigm of a case which is likely to be settled by mediation." [73]

With this, the court proceeded to order the preparation of an ADR Order providing for the selection of the mediator, and requiring fully authorised decision makers to attend the mediation and give the mediator such evidence as required. [74] The court also set the date for the conclusion of the mediation. [75] This is a clear example of a pro-active court, and arguably, compulsory mediation.

Later, in a 2009 decision of the High Court of Justice, Chancery Division, the court denied an application for the determination of preliminary issues in dispute, but ordered mediation, stating:

"In summary, then, I shall dismiss the application and direct that both parties use their best endeavours to ensure that a mediation is heard before the end of the Trinity term. I would like that to be recorded in the order that is to be made on this application. I would also wish the parties to report to the Court, through my clerk, in writing, on progress by 1st June 2009. Finally, 'best endeavours', as we know from best endeavours clauses in contracts, does not mean 'second best endeavours.' ***C.J.Q. 175*** " [76]

The court here too is ordering parties to mediation. Again, an instance of compulsion is evident. Interestingly, *Halsey* approves such orders. [77] In a similar vein, Ahmed suggests that the courts have the power to apply costs sanctions much more robustly than they currently do. [78]

It is difficult to see why these types of orders are permissible as compulsory orders, yet are not appropriate for wider dissemination as a general requirement of civil justice. Such orders are at odds with other judicial decisions, which hold firmly that the court does not have power to order mediation. In *Aird v Prime Meridian Ltd* , May LJ considered whether an order made under r.35.1 of the CPR requiring an expert's report to be prepared in advance of a mediation session, was a privileged document ordered in the context of a mediation or whether it was a document for use by the court in the litigation made under the auspices of a rule dealing with expert reports. [79] It was acknowledged that the expert's report was to be prepared for use in mediation; however the Court of Appeal found this to be immaterial on the basis that the court has no power to order mediation or to order how a mediation is to be conducted. [80] It says:

"Since the court cannot order the parties to participate in mediation, neither can the court make orders stipulating the details of how the parties should conduct a mediation. The most the court can do is to encourage." [81]

This decision seems harsh to the litigant who was relying on the report to be protected from court scrutiny as having been prepared for a *without prejudice* meeting of the mediation session. This is particularly acute given the trial judge's comments that the order was made in the context of the party using the report for a mediation session. The problem appears to lie in r.35.1 pursuant to which the order was made, rather than other provisions more directly related to ADR processes. Despite this, May LJ made his views about mediation quite clear in rejecting a public policy argument in favour of protecting the document prepared for the purpose of mediation as understood by all parties and the judge at first instance, and by indicating that the stay and cost sanction provisions should be applied with caution. [82]

The seemingly confusing nature of these orders continues to be seen in more recent cases. In *Mann v Mann* , for example, the court reiterated it could not compel the parties to mediation, but could "robustly encourage them by means of an Ungley Order" by which the parties were ordered to justify any decision they made regarding unsuitability for ADR and to file witness statements in support. [83] While ***C.J.Q. 176*** accepting the *Halsey* view that directive orders stop short of compulsion, Mostyn J does acknowledge that "it might be thought that the nature of the coercion amounts to much the same thing". [84] Recently, Turner J in *La Porte and Christian v Commissioner of Police of the Metropolis* also had occasion to refer to *Halsey* and its reference to the Admiralty and Commercial Courts Order as the strongest form of encouragement, but one which stops short of compelling parties. [85] Another case in which one party asked the court to specifically order mediation sees the court refusing to take a position on whether it has power to order mediation or merely encourage it, despite having considered the debate. [86]

Inconsistency does not exist only at the level of the court decisions. It also exists within the rules of the Commercial Court and the court's granting of such orders. For example, Colman J, decision-maker in the *C v RHL* case discussed earlier, is not in favour of compulsory mediation and is of the view that the Practice Direction does not provide for mandatory mediation. [87] However, he supports the power of the court to direct mediation through the Admiralty and Commercial Courts Order which he says requires parties to advise why they have failed to participate in ADR "to concentrate the mind of the parties". [88]

Similarly, Lord Phillips seems to be giving inconsistent messages: in 2008 he said that parties should be given strong encouragement to mediate and that a court can require them to mediate yet he also expressed the view that compulsory mediation may be contrary to art.6 of the ECHR. [89] Lord Clarke was of the same view regarding court power to direct mediation: "The courts may well have power under the CPR as they stand, to direct mediation." [90] Lord Ward too in *Wright v Michael Wright (Supplies) Ltd* suggests that the court has the power in r.26.4(2)(b) of the CPR to direct mediation and to rigorously apply sanctions when it is refused, and couples this with a call for a revisitation of *Halsey* on compulsion. [91]

The courts themselves do not present a unified voice in terms of the extent of their powers. It remains discretionary on the courts to determine the level of their activism, with the court rules either providing a basis for an order compelling parties to mediation or providing a basis for rejecting such an order. Of course, this is dependent on the particular judicial view of the facts and law regarding the case at bar, and also the particular judicial view regarding the place of mediation ***C.J.Q. 177*** within civil justice. Where the judicial view is supportive of mediation, an expansive approach to court power is taken and where the

judicial view is less supportive, a restrictive approach is taken. In any event, a certain amount of lip service is given to the view that the court has certain power when it comes to directing mediation, but there should not be compulsory mediation.

There seems to be a distinction between compulsion and direction. What is a directive approach and how is it different from compulsion? Is the court inviting the parties to mediation or is it ordering the parties to mediation? From a review of the cases, it would appear that direction results in a court order requiring mediation: compulsion leads to the same outcome—required attendance at mediation. The distinction seems to be in the source of the compulsion. Based on judicial commentary, to direct mediation lies in the discretion of the court whereas to compel mediation lies in public policy. A discretionary approach requires an assessment to be made on a case-by-case basis, currently the favoured approach. Certainly Neuberger LJ suggests that it is the court's prerogative in the administration of justice to determine whether mediation is appropriate for a case: in particular, it lies within the purview of the case management powers for judges to assess whether mediation should be or should have been undertaken. [92] This is based on the argument that the judiciary, as a third branch of government, has responsibility for the delivery of justice. [93] For Lord Neuberger, ADR can only take place within the framework of civil justice for the public good, rather than as a private benefit for litigants. It would appear that the senior most law lord of this jurisdiction sees ADR as a tool for judges to use for the effective case management of their caseload, and one to be used as they see fit.

The words "direct" and "order" are used interchangeably by the courts, evidencing a malleability of effect. Where there is a view that it would be useful, judges avail themselves of current CPR provisions and various pre-action protocols in such measure as reflects their support for mediation and the court's role in promulgating its use. It supports a current discretionary approach taken to the applicability of mediation in civil justice, one which is fueled by the fact that public policy currently refuses to acknowledge that compulsion exists in some form or another.

(b) The nature of unreasonableness

Another level of inconsistency and uncertainty is found in the way the courts have opined on decisions taken by parties who refuse to attend on mediation when requested by the other party. The costs sanctions provision set out in r.44 gives discretion to the courts to deprive the successful party of its costs of the action on a finding of unreasonableness in refusing to mediate. This deprivation is contrary to the general rule of costs following the event that exists in England and Wales where the unsuccessful party pays the costs of the successful party. In determining whether a party has been unreasonable, courts have regard to the factors laid down ***C.J.Q. 178*** by Lord Dyson in *Halsey* . The factors are numerous, broad and unlimited. Lord Dyson stated:

"… factors which may be relevant to the question whether a party has unreasonably refused ADR 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 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. … We wish to emphasise that in many cases no single factor will be decisive, and that these factors should not be regarded as an exhaustive check-list." [94]

The fact that these factors are not exhaustive alone makes it tricky for disputants to determine the extent of their obligations regarding ADR and the CPR . In examining cases which applied these factors, we see that the decision whether to refuse mediation can be a dangerous one for disputants. Even with the assistance of the ADR handbooks which attempt to provide guidance to litigants as to the steps that should be taken to avoid a finding of unreasonableness, it is difficult to see a pattern emerging from the cases which would provide a measure of certainty for litigants. [95]

For example, in one case, *Nigel Witham Ltd v Smith and Isaacs* , the nature of a claimant's intransigence was sufficient for a defendant to successfully argue that mediation would not have yielded any benefit because of the claimant's stubbornness, and thus the defendant did not act unreasonably in refusing mediation. [96] Yet in *Rolf v De Guerin* , the Court of Appeal, although having recognised that one of the parties was intransigent and mediation likely would not have resulted in settlement, found that to be an insufficient excuse. [97] The refusal to mediate in that case was unreasonable. The interesting aspect of this decision is Lord Rix's comment that the defendant's desire to have his day in court was not compelling despite the fact that Lord Rix recognised this as the right of every party. [98] In the end, having regard to the nature of the dispute and particularly its small value, the court found the defendant was unreasonable in refusing to attend on mediation. [99]

Compare this to *Swain Mason v Mills & Reeve*, also in 2012 and also a decision of the Court of Appeal.[100] The court disagreed with the trial judge's view that the defendant had unreasonably refused mediation. In its view, the defendant's belief ***C.J.Q. 179** in its "watertight" case was not unreasonable even though it lost on some issues but was vindicated on the major issue of breach of duty.[101]

In the recent *PGF II S A v OMFS Company 1 Ltd* case, the Court of Appeal again discussed the significance of mediation and promoted its use.[102] Briggs LJ examined the issue whether silence to an invitation to mediate constituted an unreasonable refusal to mediate. In holding that silence was unreasonable, Briggs J stated:

"… this case sends out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR, even if they have reasons which might justify a refusal, or the undertaking of some other form of ADR, or ADR at some other time in the litigation. … The court's task in encouraging the more proportionate conduct of civil litigation is so important in current economic circumstances that it is appropriate to emphasise that message by a sanction … which operates 'pour encourager les autres.'"[103]

This is a very important decision as it reinforces the need to encourage mediation uptake, in essence, issuing a "buyer beware" edict to those contemplating refusal to engage in mediation, yet providing a good example of a court at odds with itself. Briggs LJ sees the need for robust encouragement while at the same time having the view that the cost sanction applied at trial was more vigorous than he would have applied.[104] Meggitt sees this case as cementing a compulsory regime for mediation in England and Wales, but one that is hidden from view.[105]

The issue of silence was also considered in *R. (on application of Paul Crawford) v University of Newcastle Upon Tyne*.[106] In *Newcastle*, after having regard to the *Halsey* factors, the court considered whether *PGF's* finding regarding the failure to respond to a request for mediation applied to the case.[107] It found that the defendant's participation in an ombudsman process initiated by the claimant was participation in ADR and accordingly, the defendant's silence in response to additional requests to mediate was *not* unreasonable.[108] This is seemingly at odds with the facts in *PGF* as the defendant here also ignored all requests for mediation and did not specifically point to the lack of need for mediation given its participation in the ombudsman process.

In *LaPorte*, another exhaustive review of the refusal to mediate was undertaken. The court did a painstakingly detailed survey of the communication between the parties regarding the request for mediation, as is often done in these cases.[109] After ***C.J.Q. 180** assessing the *Halsey* factors, and finding that the case, although strong, could have been settled by mediation as the issue of police conduct was a question of fact that could be mediated, the court determined that the successful defendant had been unreasonable in its refusal. Despite this, it exercised its discretion to award the defendant two-thirds of its costs rather than denying all costs. Recalling that the issue of an award of costs is discretionary on the court, this is another area of uncertainty for litigants: to what extent will the costs sanction and exercise of discretion be applied for an unreasonable refusal to mediate?[110]

Many cases explore the issue of costs sanctions by canvassing each of the *Halsey* factors in depth.[111] There are others that rely on particular factors such as an unreasonable belief in the strength of a party's case and mistrust of the other party[112]; a reasonable belief in a strong case foreclosing the possibility of accepting a settlement[113]; an unreasonable lack of willingness to engage in consideration of settlement proposals[114]; contacting a mediation organisation is not an offer for participation in mediation and therefore no offer was made to which a response was necessary[115]; and, predictions as to what might be required to reach a settlement are irrelevant to the issue whether mediation had a reasonable prospect for success.[116]

The difficulty with the status quo lies in the hodge-podge line of cases where unreasonable conduct is determined on variable factors. What is good enough in one case may not be good enough in another. The *Rolf* case supports this view as does the case of *Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd*, a decision of Ramsay J which begins with a review of *Halsey*, *PGF* and the *Jackson ADR Handbook*.[117] Although the fact that the defendant had a strong case provided "some but limited justification" for refusing mediation, in view of other factors, the court found the defendant's refusal unreasonable.[118] Against this, however, the failure of the claimant to accept the defendant's offer was of such significance that no award was made to alter the usual cost award in favour of the defendant.[119] As a result, a party's

conduct towards settlement offers is now also a factor to be considered. Ultimately, the court's statement on what constitutes unreasonableness remains opaque:

"Where a party to a dispute, which there are reasonable prospects of successfully resolving by mediation, rejects mediation on grounds which are ***C.J.Q. 181*** not strong enough to justify not mediating, then that conduct will generally be unreasonable." [120]

Nolan-Haley, after a review of the decisions dealing with this question of reasonable/unreasonable refusal to mediate, says no definitive conclusion can be reached as to when costs will be used as a penalty. [121] Shipman suggests that a judge's approach as to whether a refusal is unreasonable depends on a judge's views about justice, the role of the courts in dispensing justice and the place of justice in any in mediation. [122] Ahmed suggests it is a certain type of case where refusal to mediate will be seen to be unreasonable; that is, the lower value cases which the courts believe would benefit from mediation. [123]

Is such a complex process fair to litigants who have been successful yet are now having to defend against a decision taken during the course of litigation. Litigants can be subjected to strategic moves regarding requests to mediate: parties can use the threat of costs sanctions as a bargaining tool in their litigation strategy. They may seek mediation for cost advantage: there is no cost to them to request it, but it may benefit them economically if the other disputant refuses. The responding party is placed in a quandary: should it go to mediation and what are the consequences of refusing. The consequences should be clear at the outset of the decision, not at the end when costs are being assessed and stakes are high. [124] From a disputant point of view, this is simply not a fair position to be placed in.

This ad hoc approach of the rules of court and judicial decisions makes it difficult for litigants to understand the demands they must meet during the conduct of their litigation and it leaves mediation in a no-man's land as to its place within civil justice despite statements by the judiciary and government saying it is part of the civil justice landscape. [125] It also takes an economic toll on litigants due to the need to continually correspond with the opposing party to position themselves in a favourable light on the issue. As a result, litigants need to expend time and money to record their attempts to offer mediation and likewise to evidence an unreasonable refusal, and vice-versa. *La Porte* provides a good example of the detailed examination made by the court of the communication history between the parties in its consideration of an unreasonable refusal. ***C.J.Q. 182*** [126]

Conclusion

Beginning with *Halsey* , which threw the cat among the pigeons with Lord Dyson's obiter dictum about compulsory mediation, the issue of compulsion has not been easily determined. The factors of *Halsey* in the determination of whether a refusal to mediate is unreasonable require a litigant to assess the risks of refusing mediation, with subsequent case law providing too general a guide for such an assessment. The issue of whether the courts have power to order mediation is also problematic: there appears to be power and often it is invoked, but the official party-line is that there is no power in the CPR to mandate mediation. Further, there are the judicial and extra-judicial views, which are not of like mind as to the level of encouragement to be given to parties regarding mediation. And finally, there is the government speaking to a streamlined justice system in which mediation is to play a central role (going so far as requiring automatic referral to mediation in certain situations), but leaving it for the parties to decide whether to participate in mediation in the face of onerous costs sanctions should the incorrect decision be made. [127] Lord Faulks succinctly states the current government policy:

"HMCTS continue to promote mediation on the directions questionnaire, a key stage in civil litigation, and will consider with the judiciary the introduction of a standard paragraph on all orders to encourage parties to mediate and to advise them that the court may penalise them on costs if they unreasonably refuse to attempt mediation." [128]

As suggested earlier, the difficulty with this approach is that it is the litigant who suffers and ultimately, the efficacy of the civil justice system. Litigants are entitled to know what their obligations are when it comes to civil justice; in particular, what needs to be done to ensure that they get equal treatment in access to justice. For example, to start a claim, certain steps are to be taken and costs to be paid: it is time to be clear about these steps and costs to ensure litigants are fully informed about the risks they will face if they embark on litigation. Currently, public policy through the CPR says they must consider whether mediation is appropriate for their dispute, failing which they will be subject to costs sanctions. Whether those costs sanctions will be applied in light of their decision not to pursue mediation, remains uncertain and difficult to assess in view of the current

state of the law and views about the place of mediation in civil justice. Litigants find themselves in a system that advocates mediation, which may or may not be compulsory. [129]

Government needs to redress the current schism between talk and action. This article is not seeking converts to a mandatory system of mediation. Rather, it seeks to expose the inconsistency of the rhetoric as presented to litigants and potential litigants alike. There seems to be a desire by the English courts and government ***C.J.Q. 183*** to continue under a façade which holds to the view that compulsory mediation is not appropriate for England and Wales. However, the rules and pre-action protocols of their civil justice system, the statements made by the judiciary in cases and speeches, and the actions of government all point to a regime that seeks to do indirectly what it feels it should not do directly. Furthermore, it supports a system which is ad hoc, opaque and burdensome on litigants. There is a need for clear articulation about the expectations of the civil justice system.

Sir Alan Ward suggested in *Wright v Michael Wright (Supplies) Ltd* , a decision of the Court of Appeal in 2013, that there is a need to revisit the issue of compulsion. [130] Although the appeal was allowed on a substantive point, Sir Alan took the opportunity to support mediation, stating that parties should mediate because costs are too high and there are benefits to mediation. He went further to say that it is time to rethink the compulsion issue and the decision of *Halsey* . Sir Alan points to mediation as the reason why the government has reduced the ability of people to fund litigation through legal aid—as mediation "offers a proper alternative which should be tried and exhausted before finally resorting to a trial of the issues"—a sentiment with which he agrees. [131] This was not the first time that Sir Alan indicated firm support for mediation. In *Faidhi* above, he indicates his support for mediation for neighbourhood disputes, stating "give and take is often better than all or nothing". [132]

It is not for the courts, however, to consider the issue; it is for government as the purveyor of public policy. The courts work with what they have: a procedural system of rules and protocols which we see are not consistently interpreted and the existence of precedent against compulsion in the form of *Halsey* . *Gilks v Hodgson* provides a good example of this, illustrating that courts are stymied in their frustration with cases that refuse to mediate: "If parties, or one of them, insist on litigating in this way, it is difficult for the court to cut short their wasteful endeavours, however much it may try to do so." [133] Ahmed in his recent exploration about the relationship of mediation and civil justice argues that the courts have the power to be more robust in their application of the cost sanction to the point of making payment orders against the successful party. [134] As courts are reluctant to invoke such a vigorous sanction, he proposes a rule change to reflect the power expressly. [135]

Ahmed's suggestion to clarify the extent of the court's power to impose costs sanctions is one way to deal with judicial reluctance with respect to mediation. It is submitted however that this suggestion will not address the weaknesses of the current mediation framework in civil justice. The judiciary itself is at odds with its views about the power of the court to impose mediation, and the desire to do so. Such unease has no place in civil justice. Lord Neuberger says that civil justice belongs to the third branch of government—the judiciary. As stated earlier, Lord Neuberger sees mediation as part of the complement of case management tools ***C.J.Q. 184*** for judges' use in insuring access to substantive justice for litigants. It is up to the judiciary to interpret and apply the CPR as to when a litigant should participate in mediation as it is the judiciary's responsibility to manage cases and thereby ensure substantive justice is protected. [136] Lord Jackson is of a similar view. [137] Views such as these confirm the need for government clarity regarding the administration of civil justice as it relates to mediation. This is further strengthened by Lord Neuberger's recent acknowledgment that the current system of penalising litigants for failing to mediate is not ideal and some form of compulsion in relation to mediation may be agreeable, although the forms suggested continue to be somewhat equivocal. [138]

Government supports and encourages mediation as the viable alternative to litigation. Public policy must be expressly reflected in the administration of the civil justice system. It is the government's responsibility to ensure this is done appropriately, yet the government appears reticent to do so. Currently, power resides in a vacillating judiciary to determine the role that mediation will play in any particular case. Whether the government acts through statutory instrument or introduces primary legislation, action must be taken. Arguably, the move to compulsory mediation requires the implementation of primary or secondary legislation at the behest of the executive branch of government rather than leaving its fate to the delegated powers of the Civil Procedure Rules Committee. This Committee is primarily made up of members of the judiciary and lawyers: given the reticence of the judiciary to consider compulsion in light of *Halsey* , the involvement of the legislative or executive branch of government is needed to ensure that government public policy aims are met. [139] Secondary legislation such as the type introduced by the Secretary of State recently to deal with on-line dispute resolution for consumer disputes is but one example. [140] The legislation has been introduced in fulfillment of an EU Directive dealing with consumer disputes and the introduction of an ADR process

to deal with such disputes across Europe. [141] A call is made for similar legislation to redress the problems discussed in this paper surrounding the relationship between mediation and civil justice in England and Wales.

In conclusion, it is proposed that a better way forward is for government to bite the bullet and develop legislation which better reflects its public policy position regarding ADR and civil justice rather than vacillating through procedures that **C.J.Q. 185* are not expressly definitive one way or another. An open, transparent system is needed. It is time to be definitive about policy and the manner in which to treat mediation in civil justice. Disputants should know where they stand: they should know what their obligations are when they commence litigation and the penalty for failing to fulfill them. Lord Clarke has opined that the courts already have power to direct parties to mediation. [142] The government needs to channel that power into express legislative provisions to ensure clarity of process. [143]

If such a call is too drastic, the government should introduce a pilot scheme where mediation is truly mandatory. [144] In other words, it would not provide the opportunity for litigants to easily withdraw from attending a mediation session. The ARM Pilot was vulnerable to its opt-out provision and the *Halsey* decision, and as a result, does not provide a good indicator of the value to government policy of such a scheme. [145] It is important, too, that an evaluation be conducted during the pilot to assess the areas of weakness requiring modification prior to finalisation and to enable full consultation by stakeholders in the pilot. Such a pilot scheme could lay the groundwork for a movement to an express recognition of mandatory mediation in civil justice and a movement away from a system of flux, one that is dependent on judicial discretion regarding the place of mediation in civil justice. The overriding objective of dealing with cases justly and proportionately demands it.

Debbie De Girolamo

Footnotes

1 Hazel Genn, "What is Civil Justice For? Reform, ADR, and Access to Justice" (2012) 24 Yale J.L. & Human. 397; Jacqueline M. Nolan-Haley, "Is Europe Headed Down the Primrose Path with Mandatory Mediation?" (2012) 37 N.C.J. Int'l L. & Com. Reg. 981; for others, see fn.2 below.

2 Masood Ahmed, "Implied compulsory mediation" (2012) 31 C.J.Q. 151; Shirley Shipman, "Court approaches to ADR in the civil justice system" (2006) 25 C.J.Q. 181; Shirley Shipman, "Compulsory mediation: the elephant in the room" (2011) 30 C.J.Q. 163; A.K.C. Koo, "Ten years after Halsey" (2015) 34 C.J.Q. 77; Gary Meggitt, "PGF II SA v OMFS Co and compulsory mediation" (2014) 33 C.J.Q. 335.

3 These policy statements are the subject of exploration later in this paper.

4 Civil Procedure Rules 1998 (CPR)(SI 1998/3132) as amended 3 December 2015.

5 Ahmed, "Implied compulsory mediation" (2012) 31 C.J.Q. 151; Dorcas Quek, "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program" (2010) 11 Cardozo J. Conf. R. 479; Matthew Brunsdon-Tully, "There is an A in ADR but does anyone know what it means any more?" (2009) 28 C.J.Q. 218; Julian Sidoli del Ceno & Peter Barrett, "Part 36 and mediation: an offer to settle will not suffice — PGF II SA v (1) OMFS Co and (2) Bank of Scotland Plc" (2012) 78 Arbitration 401.

6 Nolan-Haley, "Is Europe Headed Down the Primrose Path with Mandatory Mediation?" (2012) 37 N.C.J. Int'l L. & Com. Reg. 981, 1002–1003.

7 Genn, "What is Civil Justice For? Reform, ADR, and Access to Justice" (2012) 24 Yale J.L. & Human. 397, 409.

8 In Ontario, mandatory mediation has been implemented through r.24.1 of the Rules of Civil Procedure : Courts of Justice Act RRO 1990 reg.194, Rules of Civil Procedure . For information about the mandatory mediation regime in Ontario, see the Ministry of the Attorney General website, www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/ [Accessed 13 February 2016].

9 CPR and Pre-Action Protocols thereunder will be discussed in greater depth later in the paper.

10 CPR r.1.1(1) .

11 See for example, O. Fiss, "Against Settlement' (1984) 93 Yale L.J. 1073 and accompanying Symposium — Against Settlement: Twenty-five Years Later" in (2009) 78 Fordham L. Rev. 1117 and articles following and in particular, Fiss' commentary of his article, "History of an Idea" at page 1265; *R.L. Abel, "The Contradictions of Informal Justice" in R.L. Abel (ed.) The Politics of Informal Justice Volume 1: The American Experience (New York: Academic Press, 1982), pp.270–298*; *Hazel Genn, Judging Civil Justice, The Hamlyn Lectures 2008 (Cambridge: Cambridge University Press, 2010), pp.78–125*.

12 See for example, R.L. Wissler, "Court-connected Mediation in General Civil Cases: What We Know From Empirical Research" (2001–02) 17 Ohio St. J. Disp. Resol. 641; *Robert G. Hann, Carl Baar et al., Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report — The First 23 Months (Toronto: Queen's Printer, 2001)*; Julian Sidoli del Ceno, "Compulsory mediation: civil justice, human rights and proportionality" (2014) 6 I.J.L.B.E. 288.

13 *Halsey v Milton Keynes General NHS Trust [2004] EWCA (Civ) 576; [2004] 1 W.L.R. 3002* . This case will be discussed in further depth below.

14 See for example, in England Lord Clarke refers to the number as being 98%: *Lord Clarke MR, "Mediation - An Integral Part of Our Litigation Culture" Littleton Chambers, Gray's Inn, 8 June 2008, p.5*, http://webarchive.nationalarchives.gov.uk/20140423213320/http://www.judiciary.gov.uk/media/speeches/2009/speech-lord-clarke-mor-09062009 [Accessed 14 February 2016].

15 CPR rr.1.4(1) , (2) , 26.4 and 44 .

16 CPR Pt 36 gives the court power to award an additional amount to a party's cost award of up to 10% of the judgment awarded in certain circumstances where offers to settle have not been accepted, up to a maximum amount of £75,000. See www.justice.gov.uk/courts/procedure-rules/civil/rules/part36 for a full description of the award [Accessed 14 February 2016].

17 See for example, *Burchell v Bullard [2005] EWCA Civ 358; [2005] C.P. Rep. 36* ; *Dunnett v Railtrack Plc [2002] EWCA (Civ) 303; [2002] 1 W.L.R. 2434* ; *Halsey [2004] EWCA (Civ) 576; [2004] 1 W.L.R. 3002* .

18 *Lord Woolf, Access to Justice Interim Report, Department for Constitutional Affairs (June 1995)*, http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/interfr.htm [Accessed 14 February 2016]; *Lord Woolf, Access to Justice Final Report, Department for Constitutional Affairs (July 1996)*, http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/index.htm [Accessed 14 February 2016]; Simon Roberts, "'Listing Concentrates the Mind': The English Civil Court as an Arena for Structured Negotiation" (2009) Oxford J. of Legal Studies 1.

19 Genn, "What is Civil Justice For? Reform, ADR, and Access to Justice" (2012) 24 Yale J.L. & Human. 397, 411.

20 Colleen M. Hanycz, "More access to less justice: efficiency, proportionality and costs in Canadian civil justice reform" (2008) 27 C.J.Q. 98, 121; CPR r.1 and its reference to the overriding objective and proportionality; *Lord Faulks, "Mediation and Government", Keynote Speech, The Civil Mediation Conference, 22 May 2014*, https://www.gov.uk/government/speeches/mediation-and-government [Accessed 14 February 2016].

21 Colleen M. Hanycz, "Wither Community Justice? The Rise of Court-Connected Mediation in the United States" (2007) 25 Windsor Y.B Access Just. 167, 204.

22 *Lord Faulks, "Mediation and Government", Keynote Speech, The Civil Mediation Conference, 22 May 2014*; *Rt Hon Michael Gove, "What does a one nation justice policy look like", Speech to The Legatum Institute, 23 June 2015*, https://www.gov.uk/government/speeches/what-does-a-one-nation-justice-policy-look-like [Accessed 14 February 2016].

23 In England and Wales, the general rule on costs is that costs follow the event resulting in the successful party in litigation being awarded legal costs, subject to court discretion; see CPR r.44 .

24 F. Sander, H. Allen and D. Hensler, "Judicial (Mis)Use of ADR? A Debate" (1996) 27 U. Tol. L. Rev. 885 and Quek, "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program" (2010) 11 Cardozo J. Conf. R. 479 describe different mandatory mediation structures. For purposes of this exploration, a mandatory scheme is one in which legislation in the form of either primary or secondary legislation requires disputants to attend on a mediation prior to the trial of an issue: see as examples, Ontario's r.24.1 and the form introduced by the Italian Government at issue in *Alassini v Telecom Italia SpA (C-317/08) [2010] 3 C.M.L.R. 17 ECJ* .

25 The issue of unreasonableness and the impact on the issue of compulsion will be explored later in this article.

26 *Halsey [2004] EWCA (Civ) 576; [2004] 1 W.L.R. 3002* .

27 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art.6; *Halsey [2004] EWCA (Civ) 576; [2004] 1 W.L.R. 3002* at [9]–[11].

28 Judicial commentary on pre- *Halsey* period cases show a strong support for mediation, bordering on mandatory inclinations: see *Dunnett [2002] EWCA (Civ) 303; [2002] 1 W.L.R. 2434* ; *Hurst v Leeming [2002] EWHC 1051 (Ch); [2003] 1 Lloyd's Rep. 379* for example.

29 See Craig Loveless, "The dangers of privatizing civil justice through mandatory ADR" (2003) 10 U.C.L. Juris. Rev. 368, 369–370 who sees r.1.4 of the CPR as mandating mediation, a view supported by the cases pre- *Halsey* . See also, Arthur Marriott, "Mandatory ADR and access to justice" (2005) 71 Arbitration 307, 310–311.

30 See *Laporte v Commissioner of Police of the Metropolis [2015] EWHC 371 (QB); [2015] 3 Costs L.R. 471* ; *Aird v Prime Meridian Ltd [2006] EWCA Civ 1866; [2007] C.P. Rep. 18* .

31 *Genn, Judging Civil Justice, The Hamlyn Lectures 2008 (2010), pp.78–125*.

32 *Lightman, J. "Mediation: an approximation to justice", SJ Berwin, 28 June 2007*, http://webarchive.nationalarchives.gov.uk/20140423213320/http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/berwins_mediation.pdf [Accessed 14 February 2016].

33 Lord Phillips LCJ, "Alternative Dispute Resolution: an English viewpoint", India, 29 March 2008 in (2008) 74(4) Arbitration 406.

34 *Lord Clarke, "Mediation - An Integral Part of Our Litigation Culture" Littleton Chambers, Gray's Inn, 8 June 2008*.

35 *Alassini [2010] 3 C.M.L.R. 17* .

36 For a survey of the EU experience, see *Giuseppe de Palo & Mary B. Trevor (eds), EU Mediation Law and Practice (Oxford: Oxford University Press, 2012)*; *Giuseppe de Palo et al., "Rebooting' the mediation directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU", Study commissioned by the European Parliament's Committee on Legal Affairs, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, 2014*, http://www.europarl.europa.eu/studies [Accessed 14 February 2016].

37 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters art.5.2 .

38 The Dispute Resolution Commitment was announced on 23 June 2011 by the Ministry of Justice under which it was promised that government departments and agencies would use ADR whenever possible; *"Djanogly: More efficient dispute resolution needed", Press Release of MOJ and Jonathan Djanogly, 23 June 2011*, https://www.gov.uk/government/news/djanogly-more-efficient-dispute-resolution-needed [Accessed 14 February 2016]; The Dispute Resolution Commitment: Guidance for Government Departments and Agencies, MOJ, May 2011, http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/guidance/mediation/drc-guidance-may2011.pdf [Accessed 14 February 2016].

39 *Halsey [2004] EWCA (Civ) 576; [2004] 1 W.L.R. 3002* at [7], [34]–[35].

40 The consultation commenced 29 March 2011 and the Government Report was released in February 2012 in which the automatic referral scheme was announced: *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system: A consultation on reforming civil justice in England and Wales - The Government Response, Presented to Parliament by the Lord Chancellor and Secretary of State for Justice by Command of Her Majesty*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228973/8274.pdf [Accessed14 February 2016]. This scheme impacts claims of up to £10,000.

41 See fn.40 above. This approach was also taken in respect of family law matters. Pre-action rules in the Family Court require separating couples to attend mediation assessment sessions, called Mediation Information and Assessment Meeting where a mediator meets with the parties and helps to determine what process is the best for the particular dispute and whether mediation is appropriate: for example, the mediator will look at whether power imbalances, domestic violence or child protection are issues that would not make mediation appropriate. Mediation here too is not compulsory, although a judge may require parties to attend. See, Family Procedure Rules Pt 3 , as amended; Practice Direction 3A — Family Mediation Information And Assessment Meetings (MIAMS), https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_03a [Accessed 14 February 2016].

42 The language that is often used in connection with the Small Claims referral is that there is an automatic referral to mediation, which suggests that there is a mandatory scheme in the Small Claims. However,

this is not the case: there is automatic referral where all parties request it. The fact that there must be agreement by all parties to a mediation lessens the impact of the 'automatic referral' mechanism. These figures set out in the Prince Report makes clear that "automatic referral" does not mean that mediation is conducted. Sue Prince, ODR Advisory Group Small Claims and ODR (January 2015), https://www.judiciary.gov.uk/wp-content/uploads/2015/03/odr-small-claims.pdf [Accessed 14 February 2016]; For further statistics suggesting one-third of small claim cases in 2013 continued to mediation after "automatic referral", see Sue Prince, ODR Advisory Group Working Paper on Policy Issues (July 2014), https://www.judiciary.gov.uk/publications/policy-issues/ [Accessed 14 February 2016].

43 The Mediation Service Pilot Scheme, Practice Direction 51H for the County Court Money Claims Centre initially established the referral program commencing 1 October 2012 for claims of £5,000 or less. It was extended for further periods and made permanent through CPR r.26.4A .

44 HM Courts & Tribunals Service, The Court of Appeal Mediation Scheme (CAMS), http://www.cedr.com/docslib/56D_CA_Mediation_Scheme_rules_for_1_April_13_final.pdf [Accessed 14 February 2016]; See details of current Court of Appeal scheme, www.justice.gov.uk/courts/rcj-rolls-building/court-of-appeal/civil-division/mediation [Accessed 14 February 2016].

45 Kenneth Clarke, Secretary of State, 9 February 2012, http://www.theguardian.com/law/2012/feb/09/small-claims-cases-mediation-ministry-of-justice [Accessed 14 February 2016].

46 *Lord Faulks, "Mediation and Government", Keynote Speech, The Civil Mediation Conference, 22 May 2014*; See also, Ministry of Justice, Press Release, https://www.gov.uk/government/news/lord-faulks-court-should-be-the-last-resort [Accessed 14 February 2016].

47 *Lord Faulks, "Mediation and Government", Keynote Speech, The Civil Mediation Conference, 22 May 2014, para.8*.

48 The Rt Hon Simon Hughes, Minister of State for Justice & Civil Liberties, "Bold Reforms" (2014) 164 *New Law Journal*, http://www.newlawjournal.co.uk/nlj/content/bold-reforms [Accessed 14 February 2016].

49 Department for Business, Innovation & Skills, Alternative Dispute Resolution for Consumers, Government response to the consultation on implementing the Alternative Dispute Resolution Directive and the Online Dispute Resolution Regulation , November 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/377522/bis-14-1122-alternative-dispute-resolution-for-consumers.pdf [Accessed 14 February 2016]. *Ministry of Justice, "CJC sets up advisory group for online dispute resolution", Press Release*, https://www.judiciary.gov.uk/announcements/cjc-sets-up-advisory-group-for-online-dispute-resolution/ [Accessed 14 February 2016]. For the register of the all-party parliamentary group on ADR as at 23 December 2015 setting out its purpose and membership, see http://www.publications.parliament.uk/pa/cm/cmallparty/151223/alternative-dispute-resolution.htm [Accessed 14 February 2016].

50 *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd [2014] EWHC 2104 (Comm); [2015] 1 W.L.R. 1145* .

51 *Emirates Trading Agency [2014] EWHC 2104 (Comm); [2015] 1 W.L.R. 1145* at [47]; See also [48]–[64] for discussion of good faith and enforceability of contract.

52 *Emirates Trading Agency [2014] EWHC 2104 (Comm); [2015] 1 W.L.R. 1145* at [47].

53 *Ministry of Justice, Boundary Disputes, A Scoping Study, January 2015*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/395258/boundary-disputes-a-scoping-study.pdf [Accessed 14 February 2016]; *Gilks v Hodgson [2015] EWCA Civ 5; [2015] 2 P. & C.R. 4* at [2], [42], [43].

54 *Lord Woolf, Access to Justice Interim Report, Department for Constitutional Affairs (June 1995), Ch.18, paras 2–4*; *Lord Woolf, Access to Justice Final Report, Department for Constitutional Affairs (July 1996), paras 9, 18*.

55 *Lord Jackson, Review of Civil Litigation Costs: Final Report (December 2009)*, https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf [Accessed 14 February 2016].

56 *Lord Jackson, Review of Civil Litigation Costs: Final Report (December 2009), Executive Summary, section 6.3* (for full report on ADR, see Ch.36 therein).

57 *Lord Jackson, Review of Civil Litigation Costs: Final Report (December 2009), para 3.4, p.361*.

58 *Lord Justice Jackson, "The Role of Alternative Dispute Resolution in Furthering the Aims of the Civil Litigation Costs Review", Eleventh Lecture in the Implementation Programme, RICS Expert Witness Conference, 8 March 2012, para.5.4*, https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/

Speeches/lj-jackson-speech-eleventh-lecture-implementation-programme.pdf [Accessed 14 February 2016].

59 *Faidi v Elliot Corp [2012] EWCA Civ 287; [2012] H.L.R. 27* at [35]. This was a case involving a neighbour dispute over nuisance created by the installation of wooden floors. In rebuking the parties for failing to consider mediation, Lord Jackson referred to the total costs incurred by the parties of £140,134 for the conduct of the action, stating "if the parties were driven by concern for the wellbeing of lawyers, they could have given half that sum to the Solicitors Benevolent Association and then resolved their dispute for a modest fraction of the monies left over." See at [37].

60 *Lord Justice Briggs, Chancery Modernisation Review: Final Report (December 2013)*, https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CMR/cmr-final-report-dec2013.pdf [Accessed 14 February 2016]; *Lord Justice Briggs, Civil Courts Structure Review: Interim Report (December 2015), paras 2.86–2.91*, https://www.judiciary.gov.uk/wp-content/uploads/2016/01/ccsr-interim-report-dec-15-final1.pdf [Accessed 14 February 2016]. Note, however, that in the latter report, Lord Briggs makes clear that this encouragement should not result in compulsory mediation. This will be referenced later in the paper.

61 *HH Judge Edward Bailey (Editor-in-chief), HH Judge Neil Bidder QC, HH Judge Peter Bowers, HH Judge Alison Hampton, HH Judge David Hodge QC and HH Judge Peter Hughes QC, A Handbook for Litigants in Person (2013)*, www.judiciary.gov.uk/publications/handbook-litigants-person-civil-221013/ [Accessed 14 February 2016].

62 *Bailey, Bidder, Bowers, Hampton, Hodge and Hughes, A Handbook for Litigants in Person (2013)*.

63 *Lord Neuberger, "Has Mediation had its Day" Gordon S Lynn Lecture 2010, paras 17–20*, http://webarchive.nationalarchives.gov.uk/20131202164909 /http://judiciary.gov.uk/Resources/JCO/Documents/Speeches/moj-speech-mediation-lectureA.pdf [Accessed 14 February 2016]. See also, *Lord Neuberger, "Equity, Adr, Arbitration And The Law: Different Dimensions Of Justice" The Fourth Keating Lecture, Lincoln's Inn, 19 May 2010, paras 39, 41–44*, http://webarchive.nationalarchives.gov.uk/20131202164909 /http://judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-keating-lecture-19052010.pdf [Accessed 14 February 2016].

64 In his 2010 Gordon Slynn Lecture, it is suggested that Lord Neuberger was not in favour of compulsion to promote mediation; rather, public education was favoured. In a more recent speech given to the Civil Mediation Council Annual Conference, Lord Neuberger has made a shift. In referencing the MIAMS in the family court and small claims court proceedings, he ruminates that some form of compulsion may be beneficial, including the extension of MIAMS to smaller civil cases (recall however that the MIAMS referral however is to an information session only) and the encouragement of mediation through contractual provisions. See *Lord Neuberger, "A View From On High" Civil Mediation Conference 2015, 12 May 2015, paras 20–21, 23* https://www.supremecourt.uk/docs/speech-150512-civil-mediation-conference-2015.pdf [Accessed 14 February 2016]. See *Lord Dyson's keynote speech (delivered by Brian Speers) at the Belfast Mediation Conference, 9 May 2014, "Halsey 10 years on — the decision revisited", reported in (The Writ, The Journal of the Law Society of Northern Ireland, Issue 221, May/June 2014 at 12*, http://www.lawsoc-ni.org/publications/the-writ-magazine-/ [Accessed 14 February 2016]. See *Lord Briggs, Civil Courts Structure Review: Interim Report (December 2015), paras 2.86–2.87*.

65 Jacqueline Nolan-Haley, "Mediator Exceptionality" (2009–2010) 78 Fordham L. Rev. 1247.

66 Ahmed, "Implied compulsory mediation" (2012) 31 C.J.Q. 151.

67 Meggitt, "PGF II SA v OMFS Co and compulsory mediation" (2014) 33 C.J.Q. 335; *PGF II SA v OMFS Co 1 Ltd [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386* .

68 *Ghaith v Indesit Co UK Ltd [2012] EWCA Civ 642* at [26]. Procedural rules giving court power will be explored in the section following.

69 Cases in this regard will be explored below.

70 The Admiralty and Commercial Courts Guide, G.1 and G.2, http://www.justice.gov.uk/downloads/courts/admiralitycomm/admiralty-and-commercial-courts-guide.pdf [Accessed 14 February 2016].

71 The Admiralty and Commercial Courts Guide, Appendix 7.

72 *C v RHL [2005] EWHC 873 (Comm)* .

73 *RHL [2005] EWHC 873 (Comm)* at [8].

74 *RHL [2005] EWHC 873 (Comm)* at [11].

75 *RHL [2005] EWHC 873 (Comm)* at [12].

76 *Honda Giken Kogyo Kabushiki Kaisha (A Firm) v Neesam [2009] EWHC 1213 (Pat)* at [39].

77 *Halsey [2004] EWCA (Civ) 576; [2004] 1 W.L.R. 3002* at [30]. It also discussed the Ungley Order, named after a procedural court officer who created them in clinical negligence cases; [32]-[33]. The Ungley Order sets out a date by which parties are to consider whether the case is capable of being resolved by a form of ADR and if a party considers it is not, it needs to explain its reasons at the end of trial with the court determining costs sanctions as necessary. The Court of Appeal is no stranger to such orders. In *Muman v Nagasena [2000] 1 W.L.R. 299* at p.305 ordered mediation for a dispute falling within a mediation scheme established for charitable organisations.

78 Masood Ahmed, "Bridging the gap between alternative dispute resolution and robust adverse costs orders" (2015) 66(1) N.I.L.Q. 71, 83. Ahmed sees the inconsistency regarding the nature of the requirement for parties to consider or undertake mediation.

79 *Aird v Prime Meridian Ltd [2006] EWCA Civ 1866; [2007] C.P. Rep. 18* .

80 *Aird [2006] EWCA Civ 1866; [2007] C.P. Rep. 18* at [6], [8], [9], [11], [14], [20], [21]–[25].

81 *Aird [2006] EWCA Civ 1866; [2007] C.P. Rep. 18* at [6].

82 *Aird [2006] EWCA Civ 1866; [2007] C.P. Rep. 18* at [33] and [6].

83 *Mann v Mann [2014] EWHC 537 (Fam); [2014] 1 W.L.R. 2807* . Although a case of the High Court of Justice, Family Division, Mostyn J considers the *Halsey* view that the court does not have authority to compel parties, however makes note that *Halsey* approves the Admiralty and Commercial Courts and Ungley orders. See at [14] and [36].

84 *Mann v Mann [2014] EWHC 537 (Fam); [2014] 1 W.L.R. 2807* at [14].

85 *Laporte [2015] EWHC 371 (QB); [2015] 3 Costs L.R. 471* at [53]. In *Laporte* , the court accepts that the defendant unreasonably refused to mediate, but as it was successful on all substantive issues, the defendant was awarded two-thirds of its costs.

86 *AB v Ministry of Defence [2009] EWHC 3516 (QB)* at [18].

87 Anthony Colman J was a judge of the Commercial Court and chaired the working group considering implementing ADR orders in the Commercial Court in the mid-1990s. See his discussion in Symposium, "Mediation post-Woolf: can the American experience assist?" (2001) 67(1) Arbitration 35, 49; See also, Anthony Colman, "Mediation and ADR: a judicial perspective" (2007) 73(4) Arbitration 403. Colman J's decision in *RHL [2005] EWHC 873 (Comm)* undermines this view as do his continual references to the court directing parties to mediation.

88 *RHL [2005] EWHC 873 (Comm)* at [49]–[50].

89 Lord Phillips, "Alternative Dispute Resolution: an English viewpoint", India, 29 March 2008 in (2008) 74(4) Arbitration 406.

90 *Lord Clarke MR, "Mediation - An Integral Part of Our Litigation Culture" Littleton Chambers, Gray's Inn, 8 June 2008, p.2*.

91 *Wright v Michael Wright (Supplies) Ltd [2013] EWCA Civ 234; [2013] C.P. Rep. 32* at [3]. CPR r.26.4(2)(b) , which applied in this case, states: "*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. (2) Where (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." See http://www.legislation.gov.uk/uksi/1998/3132/article/26.4/made [Accessed 14 February 2016].

92 *Lord Neuberger, "Has Mediation had its Day" Gordon S Lynn Lecture 2010, para.26*; Lord Neuberger, "*Equity, Adr, Arbitration And The Law: Different Dimensions Of Justice*" The Fourth Keating Lecture, Lincoln's Inn, 19 May 2010 at [21]–[27]. See also, Lord Jackson, at fn.58. Lord Jackson takes a similar view.

93 *Lord Neuberger, "Has Mediation had its Day" Gordon S Lynn Lecture 2010, paras 11 and 19*; Lord Neuberger, "*Equity, Adr, Arbitration And The Law: Different Dimensions Of Justice*" The Fourth Keating Lecture, Lincoln's Inn, 19 May 2010 at [10]-[14].

94 *Halsey [2004] EWCA (Civ) 576; [2004] 1 W.L.R. 3002* at [16]. Koo, in examining cases applying the *Halsey* factors, suggests the list should be expanded: Koo, "Ten years after Halsey" (2015) 34 C.J.Q. 77.

95 See for example, *Bailey, Bidder, Bowers, Hampton, Hodge and Hughes, A Handbook for Litigants in Person (2013)*; *Susan Blake, Julie Browne & Stuart Sime, The Jackson ADR Handbook (Oxford: Oxford University Press, 2013)*. Briggs LJ in *PGF [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386* at [4] and [30] makes reference to the guidance provided by the *ADR Handbook* for the determination of whether to refuse mediation.

96 *Nigel Witham Ltd v Smith and Isaac [2008] EWHC 12 (TCC); [2008] T.C.L.R. 3* . See also *ADS Aerospace Ltd v EMS Global Tracking Ltd [2012] EWHC 2904 (TCC); 145 Con. L.R. 29* where the court examined the factors of *Halsey* including: (i) the claimant's conduct in offering mediation as a last resort just prior to trial; (ii) the lack of the willingness of the claimant to engage in any settlement discussions; (iii) the strong belief and intransigence of the claimant in seeing its case as a winning one; and (iv) finding that the defendant's belief in its case was not unsubstantiated.

97 *Rolf v De Guerin [2011] EWCA Civ 78; [2011] C.P. Rep. 24* .

98 *Rolf [2011] EWCA Civ 78; [2011] C.P. Rep. 24* at [41].

99 *Rolf [2011] EWCA Civ 78; [2011] C.P. Rep. 24* at [48]–[49].

100 *Swain Mason v Mills & Reeve [2012] EWCA Civ 498; [2012] 4 Costs L.O. 511* .

101 *Swain Mason [2012] EWCA Civ 498; [2012] 4 Costs L.O. 511* at [21]. In a more recent decision, a defendant was found to have acted unreasonably in refusing an offer to mediate because the parties were too far apart, despite the finding that the claimant's claim for costs had been exaggerated by over 40%; see *Bristow v Princess Alexander Hospital NHS Trust unreported 4 November 2015 RCJ Senior Courts Costs Office (WL 9298774)*.

102 *PGF [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386* .

103 *PGF [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386* at [56]. *PGF* was applied in a later case where a party was silent in response to a request to mediate: *NJ Rickard Ltd v Holloway unreported 3 November 2015 Court of Appeal (Civil Division)*.

104 *PGF [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386* at [54]–[55]. Recall also that Lord Briggs is not in favour of compulsory mediation: see fn.64.

105 Meggitt, "PGF II SA v OMFS Co and compulsory mediation" (2014) 33 C.J.Q. 335, 346 and 348.

106 *R. (on application of Paul Crawford) v University of Newcastle Upon Tyne [2014] EWHC 1197 (Admin)* .

107 Recall in *PGF [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386* , Briggs J considered whether silence to an offer to mediate constituted unreasonable behaviour.

108 The court also had regard to other arguments posed by the claimant to deny the defendant its costs, but they are not relevant for the purposes here. They had to do with other aspects of the conduct of the litigation. See at [76]–[91].

109 *LaPorte [2015] EWHC 371 (QB); [2015] 3 Costs L.R. 471* ; See also, *Newcastle [2014] EWHC 1197 (Admin)* .

110 Ahmed explores the issue of cost sanctions and the power of the courts to apply sanctions in the face of unreasonable refusal. He argues that the courts have power to apply stringent sanctions, but that the courts are reluctant to do so; Ahmed, "Bridging the gap between alternative dispute resolution and robust adverse costs orders" (2015) 66(1) N.I.L.Q. 71.

111 See for example, *P4 Ltd v Unite Integrated Solutions Plc [2006] EWHC 2924 (TCC); [2007] B.L.R. 1* .

112 *Garritt-Critchley v Ronnan [2014] EWHC 1774 (Ch); [2015] 3 Costs L.R. 453* .

113 *ADS Aerospace Ltd v EMS Global Tracking Ltd [2012] EWHC 2904 (TCC); 145 Con. L.R. 29* ; see also, *Hickman v Blake Lapthorn [2006] EWHC 12 (QB); [2006] 3 Costs L.R. 452* where the court did not find conduct to be unreasonable despite a successful mediation could have save thousands in costs.

114 *Shah v Joshi [2008] EWHC 1766 (Ch)* .

115 *Park Promotion Ltd v Welsh Rugby Union Ltd [2012] EWHC 2406 (QB)* , Case Analysis.

116 *LaPorte [2015] EWHC 371 (QB); [2015] 3 Costs L.R. 471* at [43], [54]–[56].

117 *Rolf [2011] EWCA Civ 78; [2011] C.P. Rep. 24* ; *Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd [2014] EWHC 3148 (TCC); [2015] 3 All E.R. 782* (Appeal on unrelated matter dismissed; *[2015] EWCA Civ 844; [2015] B.L.R. 657*).

118 *Northrop Grumman [2014] EWHC 3148 (TCC); [2015] 3 All E.R. 782* at [60].

119 *Northrop Grumman [2014] EWHC 3148 (TCC); [2015] 3 All E.R. 782* at [73].

120 *Northrop Grumman [2014] EWHC 3148 (TCC); [2015] 3 All E.R. 782* at [72].

121 Nolan-Haley, "Mediator Exceptionality" (2009–2010) 78 Fordham L. Rev. 1247, 1262.

122 Shipman, "Court approaches to ADR in the civil justice system", (2006) 25 C.J.Q. 181, pp 210-211.

123 Ahmed, "Implied compulsory mediation" (2012) 31 C.J.Q. 151. Yet if one looks at the decisions in *Rolf [2011] EWCA Civ 78; [2011] C.P. Rep. 24* and *Nigel Witham [2008] EWHC 12 (TCC); [2008] T.C.L.R. 3* , the courts took opposing views regarding the unreasonableness of the refusal although both cases dealt with low value awards.

124 Stakes are high not only for the successful party who unreasonably refuses to mediate who may find its entitlement to a costs award reduced as has been the case in the decisions referred to herein, but also

for the unsuccessful party who may find itself facing a cost order on an indemnity basis: see *Reid v Buckinghamshire Healthcare NHS Trust unreported 28 October 2015 RCJ Senior Courts Costs Office (2015 WL 8131473)*, and *Bristow unreported 4 November 2015 RCJ Senior Courts Costs Office (WL 9298774)*.

125 For example, Lord Neuberger, "*Equity, Adr, Arbitration And The Law: Different Dimensions Of Justice*" The Fourth Keating Lecture, Lincoln's Inn, 19 May 2010 at [41]. See also A.K. C. Koo, "Unreasonable refusal to mediate: the need for a principled approach - PGF II SA v OMFS Co 1 Ltd" (2014) 33 C.J.Q. 2014 261 at 264 in which Koo suggests that, while it is important for litigants to know what constitutes unreasonable refusal, clarity and consistency is offered by the decision of *PGF* (which applied *Halsey* and introduced a new factor of silence amounting to unreasonable refusal). This paper disagrees with that view.

126 *LaPorte [2015] EWHC 371 (QB); [2015] 3 Costs L.R. 471* .

127 See for example, *Lord Faulks, "Mediation and Government", Keynote Speech, The Civil Mediation Conference, 22 May 2014, paras 22–25*.

128 *Lord Faulks, "Mediation and Government", Keynote Speech, The Civil Mediation Conference, 22 May 2014, para.21*.

129 For example, policy often speaks of automatic referral to mediation when the referral is to an information session only. This too is confusing as it gives the impression that mediation is mandatory in respect of some courts, but this is not so: parties need to agree to attend mediation despite the 'automatic referral'. See earlier discussion about the referral schemes for the Small Claims Court (see fnn.40–42), the County Court Money Claims (see fn.43) and the Court of Appeal (see fn.44).

130 *Wright [2013] EWCA Civ 234; [2013] C.P. Rep. 32* .

131 For Sir Alan's comments on all these points, see *Wright [2013] EWCA Civ 234; [2013] C.P. Rep. 32* at [2]–[3].

132 *Faidi [2012] EWCA Civ 287; [2012] H.L.R. 27* at [39]–[40].

133 *Gilks [2015] EWCA Civ 5; [2015] 2 P. & C.R. 4* at [43].

134 Ahmed, "Bridging the gap between alternative dispute resolution and robust adverse costs orders" (2015) 66(1) N.I.L.Q. 71.

135 Ahmed, "Bridging the gap between alternative dispute resolution and robust adverse costs orders" (2015) 66(1) N.I.L.Q. 71, 86, 91–92.

136 *Lord Neuberger, "Equity, Adr, Arbitration And The Law: Different Dimensions Of Justice" The Fourth Keating Lecture, Lincoln's Inn, 19 May 2010, paras 9, 21–26, 43–45*.

137 *Jackson, "The Role of Alternative Dispute Resolution in Furthering the Aims of the Civil Litigation Costs Review", Eleventh Lecture in the Implementation Programme, RICS Expert Witness Conference, 8 March 2012*.

138 *Lord Neuberger, "A View From On High" Civil Mediation Conference 2015, 12 May 2015, paras 21–24*.

139 Civil Procedure Rule Committee, membership information available at https://www.gov.uk/government/organisations/civil-procedure-rules-committee/about [Accessed 14 February 2016].

140 The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (SI 2015/542) ; The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 (SI 2015/1392) . Other examples include the introduction of adjudication for construction contracts by way of statutory instrument under the Housing Grants, Construction and Regeneration Act 1996 Ch.53 s.108 or through a new bill such as the recently introduced Arbitration and Mediation Services (Equality) Bill 2015 (HL Bill No.12), HL Vol.762 col.162 (1st Reading), a Bill to make further provision about arbitration and mediation services and the application of equality legislation to such services; to make provision about the protection of victims of domestic abuse; and for connected purposes.

141 Directive 2013/11/EU Of The European Parliament And Of The Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC ; Regulation (EU) No 524/2013 Of The European Parliament And Of The Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC .

142 *Lord Clarke, "Mediation - An Integral Part of Our Litigation Culture" Littleton Chambers, Gray's Inn, 8 June 2008, paras 2, 14*.

143 For an example of a workable legislative provision in this regard, see r.24.1 of the Ontario Rules of Civil Procedure and accompanying information, see fn.8 above. The Ontario experience with mandatory

mediation in civil justice provides a good precedent for any proposed legislation. Ontario ran a pilot project before introducing rule change to incorporate a mandatory scheme for civil actions. It also provided for evaluation of both the pilot scheme and the first three years of the legislated scheme. The legislated scheme was also introduced in graduated stages, both in terms of regions and types of claims to be included. The rule was also adaptive: change was instituted through practice directions to meet regional needs. See also, *Hann, Baar et al., Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report — The First 23 Months (2001)*; *The Honourable Chief Justice Warren K. Winkler, Chief Justice of Ontario, Evaluation of Civil Case Management in the Toronto Region, A Report on the Implementation of the Toronto Practice Direction and Rule 78 (February 2008)*; Sue Prince, "Mandatory Mediation: the Ontario experience" (2007) 26 C.J.Q. 79.

144 The reference to a "truly mandatory" scheme here (and throughout this paper) is to a scheme which compels parties to the mediation table only. It would not compel parties to settle in mediation. For clarity, compulsory mediation in this regard does not mean compulsion to settle; it means compulsion to engage in the process of mediation. Any outcome remains within parties' control and decision. As such, the voluntary nature of the process as it relates to any outcome (and this includes any decision to terminate the process or to settle and on what terms, if a settlement is reached) is maintained. Also, see fn.145 below.

145 The Central London County Court ARM Pilot Scheme which was the subject of *Dame Hazel Genn's study in Twisting arms: court referred and court linked mediation under judicial pressure (May 2007)* was a "quasi-compulsory" scheme. See Executive Summary and pp.196–198 therein available at http://www.ucl.ac.uk/laws/judicial-institute/files/Twisting_arms_mediation_report_Genn_et_al_1.pdf [Accessed 14 February 2016].

