CHAPTER 21

COSTS INDUCEMENTS TO SETTLE – ADR

INTRODUCTION TO COSTS INDUCEMENTS TO SETTLE – ADR

[21.1]

It is over 15 years since Sir Rupert Jackson dwelt on the merits of Alternative Dispute Resolution ('ADR') at some length in his final report. He considered that:

> 'ADR is relevant to the present Costs Review in two ways. First, ADR (and in particular mediation) is a tool which can be used to reduce costs. At the present time disputing parties do not always make sufficient use of that tool. Secondly, an appropriately structured costs regime will encourage the use of ADR. It is a sad fact at the moment that many cases settle at a late stage, when substantial costs have been run up. Indeed some cases which ought to settle (because sufficient common ground exists between the parties) become incapable of settlement as a result of the high costs incurred. One important aim of the present Costs Review is to encourage parties to resolve such disputes at the earliest opportunity, whether by negotiation or by any available form of ADR.'

It is over ten years since Ward LJ in *Wright v Michael Wright Supplies Ltd* [2013] EWCA Civ 234 raised the spectre of revisiting *Halsey v Milton Keynes General NHS Trust; Steel v Joy* [2004] EWCA Civ 576 and, in particular, the rule expressed by the Court of Appeal in that case that 'to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court'. He expressed the concern that there are always cases that illustrate that parties determined to have their day in court cannot be compelled to try to resolve their dispute through ADR despite the most persuasive judicial cajoling. With customary eloquence, he identified the problem in this way:

> 'You may be able to drag the horse (a mule offers a better metaphor) to water, but you cannot force the wretched animal to drink if it stubbornly resists. I suppose you can make it run around the litigation course so vigorously that in a muck sweat it will find the mediation trough more friendly and desirable. But none of that provides the real answer. Perhaps, therefore, it is time to review the rule in *Halsey* . . . .'

However, whilst there have been increasing calls for reform in the intervening periods, the decision in *Halsey* remained the benchmark, with the Civil Procedure Rules limited to 'encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure' at CPR 1.4(2)(e).

For many years, and certainly since the appointment of the current Master of the Rolls ('MR'), the likelihood of increased court powers to compel ADR (or simply 'dispute resolution' as he sees nothing alternative about it, instead regarding it as an integral part of case management), rather than simply imposing retrospective costs sanctions for a failure to embrace it, has seemed inevitable. And so it has come to pass. Indeed, the last few years have seen:

- the introduction from May 2024 of a pilot scheme under CPR PD 51ZE for automatic referral to mediation as part of the small claims track process for nearly all specified money claims valued at no more than £10,000. This pilot amends provisions in CPR 26.6, CPR 27 generally, and CPR 45.13 to permit the court to impose sanctions, including, but not limited to, in respect of costs, for a failure to attend mediation. CPR PD 27A appendix B standard direction 1 has also been amended to include provision for the filing of an explanation for non-attendance at a mediation by any party, and for any representations any other party wishes to make about the failure to attend;
- the decision of the Court of Appeal in *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416, in which the court addressed 'the headline questions . . . whether a court can lawfully order the parties to court proceedings to engage in a non-court-based dispute resolution process, and, if so, in what circumstances it should do so'; and
- the formal codification of procedural change in the Civil Procedure (Amendment No 3) Rules 2024 (SI 2024/839), giving the court prospective case management powers to enable it to order the parties to engage in ADR, coupled with the retrospective powers to impose costs sanctions.

As there will be cases where issues relating to the use, or not, of ADR pre-date the changes and, as the consideration of conduct in respect of costs awards under CPR 44.2(5) will still chime, in part, with the guidelines set out in *Halsey*, we shall consider that case as our starting point in this chapter, but then move on to chart the steps along the way to change, as they, too, may inform how some of the rules are applied, and conclude with further consideration of the enhanced powers of the court.

THE *HALSEY* TEST

[21.2]

In *Halsey v Milton Keynes General NHS Trust; Steel v Joy* [2004] EWCA Civ 576, the Court of Appeal considered previous decisions to set out clear guidelines. In doing so, it held that there was no presumption that a party to a dispute should agree to mediation or other ADR processes. The general rule is that costs of litigation should follow the event. It concluded that refusal to agree to ADR does not justify departure from the general rule unless it is shown that the successful party acted unreasonably in refusing to do so. To oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right to access the court, and indeed, a court order to mediate could itself be a violation of article 8 of the European Convention on Human Rights. The court set out the following factors that the court ought to consider when determining if a refusal to engage in ADR was reasonable or unreasonable:

- The nature of the dispute – although the court suggested a few categories of cases that might be unsuitable for ADR, it concluded that 'most cases are not by their very nature unsuitable for ADR'.

- The merits of the case – clearly the strength of a case is relevant to whether a refusal to engage in ADR is reasonable. The court acknowledged that if this were not accepted, a party with a weak case could almost compel the other party to engage in ADR and make some concession by threat of an adverse costs order. However, as we know, a party's belief in the impregnability of its position is often as much self-righteous hope as it is reality. As the court summarised the position:

  > 'The fact that a party unreasonably believes that his case is watertight is no justification for refusing mediation. But the fact that a party reasonably believes that he has a watertight case may well be a sufficient justification for a refusal to mediate.'

- Whether other settlement methods have already been attempted – while the fact that previous offers have been made may illustrate that one party may be making efforts to settle and the other is blithely pressing on regardless and justifies the refusal of the offering party to enter into ADR, the court was keen to stress that ADR can prove successful even in cases where previous offers have not prompted counter-offers.
- Whether the costs of ADR would be disproportionately high – clearly this factor weighs heavier in justifying a refusal of ADR when the sums in dispute are smaller.
- Delay – the stage at which ADR is offered is relevant, as if it is suggested late in the day, acceptance of it may have the effect of delaying the trial of the action.
- Whether the mediation has a reasonable prospect of success – objectively viewed, does the ADR have any real prospect of success or would it simply have added an extra tier of costs to no avail?

A FEW ILLUSTRATIONS OF THE APPLICATION OF THE *HALSEY* GUIDELINES

Failure to engage in ADR leading to a costs sanction

[21.3]

In *Dunnett v Railtrack plc (in railway administration)* [2002] EWCA Civ 303, on granting the claimant permission to appeal against the dismissal of his action for damages for negligence by Railtrack, the judge told both parties they should attempt ADR, but Railtrack refused to do so, on the grounds that it was not prepared to make any further payment to the claimant and was confident that it would succeed on the appeal. Railtrack did indeed succeed in having the appeal dismissed, but the Court of Appeal demonstrated its displeasure at Railtrack's outright refusal to consider ADR by depriving it of its costs, noting that parties and their lawyers should ensure that they are aware that it is one of their duties fully to consider ADR, especially when the court has specifically suggested it, and not merely flatly to turn it down.

The court maintained the same line in *Virani Ltd v Manuel Revert y CIA SA* [2003] EWCA Civ 1651, when it ordered an unsuccessful appellant to pay costs on the indemnity basis because of a refusal of the offer of the Court of Appeal's own mediation service on being granted permission to appeal, failure to negotiate or to enter into any form of ADR.

A party who agrees to mediation but then causes the mediation to fail by reason of an unreasonable position in the mediation is, in reality, in the same position as a party who unreasonably refuses to mediate. In *Seventh Earl of Malmesbury v Strutt & Parker* [2007] EWHC 2199, the court determined that had the claimant made an offer which better reflected its true position, the mediation might have succeeded. The court said 'It would be wrong to say more', presumably because it could only say what it did because both parties waived privilege for the mediation. The judge reduced the claimant's costs to 80% to reflect the unreasonable attitude in the mediation.

The Court of Appeal emphasised the importance of engaging properly in ADR, upholding a decision to order a defendant to pay 75% of the claimant's costs, notwithstanding that the claimant had not beaten an offer (albeit one that the defendants had withdrawn), in part because the defendants, whilst not refusing to mediate, dragged their feet and delayed the process until eventually, the claimants lost confidence in ADR (*Thakkar v Patel* [2017] EWCA Civ 117).

The last two cases illustrate that the sanction that the court chooses to impose is a discretionary one. It is not an 'all or nothing' argument. Instead, it is a matter of judgment in the individual case. For example, in *Wales (trading as Selective Investment Services) v CBRE Managed Services Ltd* [2020] EWHC 1050 (Comm), the court deprived the successful first defendant of 20% of its costs from the date upon which the other parties had suggested a mediation could actually take place, but in *Northamber plc v Genee World Ltd* [2024] EWCA Civ 428, the court increased the costs award at first instance by 5% in respect of a failure both to respond to an offer to mediate and to comply with an order to explain that failure.

Failure to engage in ADR – no costs sanction

[21.4]

As a starting point, there will be cases where the court must first determine if certain actions amount to a refusal to engage in ADR (eg *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 840 (Ch)).

In *Hurst v Leeming* [2001] EWHC 1051 (Ch), Mr Leeming was held to have been justified in taking the view that mediation was not appropriate because it had no realistic prospect of success as, viewed objectively, the mediation had no real prospect of success. It was plain that Mr Hurst had been so seriously disturbed by the tragic course of events resulting from the dissolution of his partnership that he was incapable of a balanced evaluation of the facts, was determined to obtain a substantial sum in the mediation process and was not likely to accept any mediation which did not achieve that result, although his claim plainly entitled him to nothing (as he had conceded by the time of this decision).

In *Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd* [2014] EWHC 3148 (TCC), Ramsey J considered the refusal of the defendant to mediate on the basis that it had a strong claim was

unreasonable but balanced that against the fact that the claimant had rejected an offer to settle that was more advantageous than the eventual outcome. He concluded that the unreasonable failure to mediate should not impact on the costs order in that situation. The judgment also considers the 'positive impact' that an independent perspective offered by mediation can bring to a dispute, which can steer it to a resolution that recognises the strong case of one or other party – noting that a successful mediation does not have to result in the payment of money by one party to another. In other words, it qualifies, to an extent, the relevance of 'strength of case' as a reason to refuse ADR. It is right to note that the cost of mediation in *Northrop* would only have been about 1.3% of the amount in dispute.

In *Gore v Naheed* [2017] EWCA Civ 369, the Court of Appeal upheld the trial judge's unqualified award of costs to a successful party in a claim for damages and an injunction arising out of the obstruction of a right of way. This was despite the fact that the defendants sought some recognition in costs of the fact that the claimant had failed to engage in their suggestion that the matter should be referred to mediation. Whilst acknowledging that the claimant's solicitor had viewed mediation as having no prospect of success, which would simply add a tier of cost and that the trial judge had found the claim to raise complex questions of law rendering it unsuitable for mediation, Patten LJ appeared to take a rare judicial step back from encouragement for ADR, stating:

> 'Speaking for myself, I have some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated.'

THE PROGRESSION TO CHANGE

Case law

[21.5]

Although the case of *Gore* was a setback in court encouragement of ADR, it seemed very much a last, and futile, attempt to hold back the tide of change. It highlighted a marked difference in approach to ADR in the Court of Appeal. As was noted in the October 2017 Civil Justice Council interim report 'ADR and Civil Justice'. That report pointed to its discernible difference of emphasis from that of a differently constituted Court of Appeal in *PGF II SA v OMFS Co 1 Ltd* [2013] EWCA Civ 1288. *PGF* followed quickly on the heels of the introduction of the 2013 'Jackson' changes. The judgment even referred to the Jackson-led ADR Handbook, which had just been introduced, and concluded that:

> ' . . . the time has now come for this court firmly to endorse the advice given in Ch 11.56 of the ADR Handbook, that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds. . . . There are in my view sound practical and policy reasons for this modest

> extension to the principles and guidelines set out in the *Halsey* case, which concerned reasoned refusals, provided in prompt response to the request to participate in ADR.' (Briggs LJ paras 34 and 35).

The *PGI* approach prevailed in *Thakkar v Patel* [2017] EWCA Civ 117, in which the court set out this unambiguous position:

> 'The message which this court sent out in PGF II was that to remain silent in the face of an offer to mediate is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed. The message which the court sends out in this case is that in a case where bilateral negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction.' (Jackson LJ para 31).

The opportunity to confirm the position of ADR within case progression arose in *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416 and it was seized with eagerly awaiting arms. Although it was a case relating to a non-court-based internal complaints procedure, the MR, giving a judgment with which both the Lady Chief Justice and the Deputy Head of Civil Justice agreed, made clear in the first line of the judgment that the case raised two much broader issues, namely:

> 'The headline questions in this case are whether a court can lawfully order the parties to court proceedings to engage in a non-court-based dispute resolution process, and, if so, in what circumstances it should do so.'

So far as the answer to the first question is concerned, the court concluded that:

- The relevant extract from *Halsey*, namely 'to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court' was obiter (or, as the MR rightly put it, in the light of Lord Woolf's rejection of the continued use of Latin in the court, was the extract a necessary part of the reasoning that led to the decision in that case).
- As a matter of law, the court can lawfully stay existing proceedings for, or order, the parties to engage in a non-court-based dispute resolution.

So far as the answer to the second question is concerned, the court concluded that:

- The court cannot, and should not, lay down fixed principles. However, as we have stated earlier when explaining why the judgment in *Halsey* remains relevant, the guidelines set out in it, the submissions made on behalf of both the Bar Council (at para 61, which, in part, overlap with the Halsey guidelines) and Mr Churchill (at para 63, which were far more case-specific – explaining why fixed principles defer to case-specific reasoning), are likely to be of relevance.

In the time since *Churchill*, the courts have been keen to emphasise the value of the new approach. In *Stoney-Andersen v Abbas* [2023] EWHC 2964 (Ch), Judge Paul Matthews, sitting as a High Court Judge, held a party had been wrong to ignore her opponent's offer of mediation no matter how much she was being told that she would be likely to win, explaining that 'the combination of litigation risk and irrecoverable costs almost always makes it worthwhile considering mediation and other ADR' (at [56]). In *Northamber plc v Genee*

World Ltd [2024] EWCA Civ 428, the Court of Appeal took the further opportunity to observe that whilst an unreasonable refusal to mediate does not automatically require a costs penalty, it is a factor to be taken into account when considering all the circumstances of the case. Here, it was held that silence in the face of an offer to mediate was in and of itself unreasonable, and the court increased the award of costs in the claimant's favour from 70% to 75% to reflect that unreasonable conduct. That being said, not every refusal to mediation will sound in costs. In *Assensus Ltd v Wirsol Energy Ltd* [2025] EWHC 503 (KB), Constable J held that where a party had been entirely vindicated at trial, where he had made offers to settle, and where it was therefore unlikely that a mediation would have persuaded him to alter his stance, it would be inappropriate to deprive him of costs, having succeeded at trial.

The introduction of early neutral evaluation

[21.6]

In 2015, the CPR was amended to give the court the additional case management power at CPR 3.1(2)(m) of 'hearing an early neutral evaluation with the aim of helping the parties settle the case'. In *Lomax v Lomax* [2019] EWCA Civ 1467, the court concluded that this power was not constrained by the necessity of all parties consenting to its exercise. In so doing, the court dismissed the suggestion that *Halsey* precluded this level of compulsion in these terms:

> 'I do not consider that *Halsey v Milton Keynes* assists with the proper interpretation of subparagraph (m) because it was dealing with a very different situation. It was concerned with whether a court can oblige parties "to submit their disputes to mediation". It does not, therefore, in my view assist with the interpretation of subparagraph (m), which is dealing with an ENE hearing as part of the court process.
>
> In any event, ENE does not prevent the parties from having their disputes determined by the court if they do not settle their case at or following an ENE hearing. It does not, in any material way, obstruct a party's access to the court. Insofar as it includes an additional step in the process, this is not in any sense an "unacceptable constraint", to use the expression from *Halsey*. In my view, it is a step in the process which can assist with the fair and sensible resolution of cases.
>
> . . . I see no reason to imply into subparagraph (m) any limitation on the court's power to order an ENE hearing to the effect that the agreement or consent of the parties is required. Indeed, in my view such an interpretation would be inconsistent with elements of the overriding objective, in particular the saving of expense and allotting to cases an appropriate share of the court's resources, and would, therefore, be contrary to rule 1.2(b).' Moylan LJ (paras 25, 26 and 32).

The reference to CPR 3.1(2)(m) being 'part of the court process' is one that chimes clearly with the subsequent terms of reference resulting in the Civil Justice Council report on 'Compulsory ADR' in June 2021. This is no surprise as in *McParland & Partners Ltd and another company v Whitehead* [2020] EWHC 298 (Ch), before becoming the MR, in his then role as Chancellor of the High Court, Sir Geoffrey Vos highlighted that *Lomax* raised the question of whether the court might also require parties to engage in mediation despite the decision in *Halsey*.

The Civil Justice Council Report on Compulsory ADR June 2021

[21.7]

A working group under the leadership of Asplin LJ was asked by the Civil Justice Council ('CJC') 'to report on the issues in relation to compulsory ADR . . . in order to inform possible future reform and development in this area'. This, in turn, led to the publication of the CJC's report in June 2021. The report answered the two key questions that it addressed in these terms:

> 'The legality question: we have concluded that parties can lawfully be compelled to participate in ADR.
>
> The desirability question: we think we have identified conditions in which compulsion to participate in ADR could be a desirable and effective development. In doing so we recognise that the compulsory ADR processes which are already part of the civil justice system in England and Wales at a number of points are successful and are accepted.'

Upon his appointment as MR, Sir Geoffrey Vos, and prior to publication of the CJC report, made it clear immediately that he saw ADR as central to his vision for civil justice (see the minutes of the Civil Procedure Rule Committee open meeting in May 2021, in which he made reference to the impending CJC report) and in his speech at Hull University in March 2021. He had this to say on compulsion:

> 'To return briefly to compulsion, this is highly controversial. In the landscape I have already described, there are areas of compulsion. For example, you need to attend a MIAM before you start private family proceedings, and you need to talk to ACAS before you can start a claim in the Employment Tribunal. But otherwise, mediation and ADR is not generally compulsory in England and Wales. The Civil Justice Council, which I chair, is looking at whether it is desirable for any, and if so what, forms of ADR to be made compulsory, and if so in what circumstances. The sub-group's report should be available shortly.'

After publication of the report, he welcomed the conclusions in these terms:

> 'As I have said before, ADR should no longer be viewed as "alternative" but as an integral part of the dispute resolution process; that process should focus on "resolution" rather than "dispute". This report opens the door to a significant shift towards earlier resolution.
>
> Meanwhile, it is exciting to see the HMCTS reform project delivering online justice. All kinds of dispute resolution interventions will be embedded within that online process.'

Like Spring, change seemed just around the corner.

CHANGE

CPR PD 51 ZE the small claims track automatic referral to mediation pilot scheme

[21.8]

There has long been a voluntary mediation scheme for cases proceeding in the small claims track. 'Voluntary' because CPR 26.6(2)(b) required the consent of

all the parties. Its existence has not been trouble-free. Over time, it has been criticised for a number of reasons eg, it replaced local schemes that had better settlement rates, it was under-resourced and understaffed, that it was too easy for parties to indicate in their directions questionnaires that they opted out of the scheme and that there were no real sanctions for a failure to use the service. However, from May 2024 (and applying to most specific sum claims which would ordinarily be allocated to the small claims track issued on or after 22 May 2024), CPR PD 51ZE introduced a two-year pilot scheme with automatic referral to mediation. The pilot also has the 'bite' of potential sanctions. This is because the pilot amends CPR 26.6 and CPR 27 in cases in which it applies to provide that:

- the court must consider whether any sanction is appropriate in all the circumstances having regard to whether the parties attended mediation (under a new CPR 26.6(6) and a new CPR 27.8(7)); and
- when considering how to exercise its discretion to order or decline to order costs falling within paragraph 27.14(2) (including when considering under paragraph (2)(g) whether a party has behaved unreasonably), the court may also take into account any failure by a party to attend mediation (under a new CPR 27.14(2A)).

As we set out in the introduction to this chapter above, included in the standard directions specifying what documents every party must deliver to the other parties and the court in the court, is a requirement to include, if a party failed to attend mediation provided by the Mediation Service, that party's explanation for that failure, and any other party's comments on the matter, with any supporting documents (under an amended standard direction 1 in Appendix B to CPR PD 27A).

It will be interesting to see what effect the pilot has on the percentage of those small claims in which mediation is attempted, the ability of the mediation service to provide a timely service which does not impact on small claim hearing time limits, settlement rates and the incidence and form of sanctions, of both costs and any other nature.

The Civil Procedure (Amendment No 3) Rules 2024

[21.9]

The Civil Procedure (Amendment No 3) Rules 2024 (SI 2024/839) include the provisions that complete the transition from voluntary use of ADR, backed by increasing judicial encouragement, to court-compelled engagement in ADR. This transition is effected by amendment to the overriding objective and its application (CPR 1.1(2)(f) and 1.4(2)(e)), the express provision of the power to order the parties to engage in ADR in CPR 3.1(2)(o), the reminder to consider this when giving case management directions in CPR 28.7(1)(d), CPR 28. 14(1)(f) and CPR 29.2(1A) and the inclusion of failure to comply with an order to engage, or unreasonably failing to engage, with ADR, when considering conduct on the award of costs under CPR 44.2(5)(e).

These rule changes took effect from 1 October 2024.

From 6 April 2025, these changes were expressly incorporated into the specialist rules relating to the Commercial and Circuit Commercial Courts at CPR 58.13 and CPR 59.11 respectively.

CONCLUSION

[21.10]

The long-expected increased case management powers of the court to order parties to engage in ADR bring with them some interesting and inevitable questions for the future as they 'bed in'. Some that spring readily to mind are:

- What general themes, as opposed to case-specific contextual decisions, if any, will emerge by way of guidelines when the court exercises its discretion both in deciding to order and not to order engagement in ADR?
- How often will ADR orders be deployed? With the progression of the digital court process and 'standardised' orders, will an order to engage in ADR become routine?
- How will the court determine whether there has been compliance, eg, if a party is said to have paid lip service to such an order by attending a mediation, but with no intention to compromise?
- If a party fails to comply with such an order, will any other party be able to secure an order requiring compliance, and, if so, what will be the sanction imposed for breach of that further order? Taking this to the extreme, could a statement of the case be struck out and a claim be dismissed or a judgment entered as a consequence of persistent breach?
- What will be the effect on case numbers? Will the knowledge that the court may order it result in greater participation in pre-issue ADR? Indeed, will pre-action protocols with requirements to engage in ADR become a part of an expanded holistic claim process – with letters of claim on the digital process becoming the commencement of that process, and with the court able to 'step in' to the pre-action process to compel ADR at this stage? Will a greater number of those cases that are issued settle without trial?
- What non-costs sanctions may/will be imposed in the small claims track pilot?

Progress certainly, but whilst policy has been declared, it is now time for the details to emerge from implementation.