1. - ADR and the CPR

White Book 2025 | Commentary last updated May 13, 2025

Volume 2

Section 14 - Alternative Dispute Resolution

Alternative Dispute Resolution

1. - ADR and the CPR

14-1 The CPR has promoted the use of alternative dispute resolution (ADR) since its introduction: see CPR r.1.4(2)(e). In *Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002* the Court of Appeal concluded, in obiter, that the promotion of ADR did not include the power for the court to mandate its use. That approach was followed by the courts until 2024 when the Court of Appeal in *Churchill v Merthyr Tydfil CBC [2023] EWCA Civ 1416; [2024] 1 W.L.R. 3827* reconsidered the approach taken in *Halsey*. In *Churchill*, the Court of Appeal confirmed that Halsey's comments on mandatory ADR were obiter. It went on to hold that civil courts could lawfully stay proceedings for, or order, the parties to engage in an ADR process subject to the provisos that the order made did not impair the very essence of the claimant's right to proceed to a judicial hearing, and was proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost. It should be noted that *Churchill* is not authority for the court having power to mandate a binding ADR process. Such a process, like arbitration, would not satisfy the caveats on the power articulated by the Court of Appeal.

Civil Procedure (Amendment No.3) Rules 2024 (SI 2024/839) (July 2024) made a series of amendments to the CPR consequent upon the *Churchill* judgment. Those amendments came into effect on 1 October 2024. Notably, they amended the overriding objective, so as to specifically refer to ADR, and amended the court's case management powers to confirm that they extend to ordering parties to engage in ADR in appropriate cases (CPR r.1.1(2)(f), r.1.4(2)(e) and r.3.1(2)(o)). Similar amendments were also made in respect of directions (r.28.7(1)(d) and r.29.2(1A)) and costs consequences where a party has failed to comply with an ADR order or unreasonably failed to engage in ADR (r.44.2(5)(e)).

For an outline of the development of ADR prior to the decision in *Churchill v Merthyr Tydfil CBC [2023] EWCA Civ 1416; [2024] 1 W.L.R. 3827* see Civil Procedure 2024, Vol.2, Section 14.

ADR and Pre-action Conduct

14-2 ADR is promoted explicitly by the Practice Direction—Pre-Action Conduct and the Pre-Action Protocols, which form an integrated means of managing litigation (*Jet 2 Holidays Ltd v Hughes [2019] EWCA Civ 1858; [2020] 1 W.L.R. 844* at [36]–[43]; see Vol.1 para.C1A-002). In *AP (UK) Ltd v West Midland Fire and Civil Defence Authority [2013] EWHC 385 (QB)* the court compared a party's actual conduct with that required by "Practice Direction—Pre-Action Conduct" (para.C1-001). It was found that failures to engage in the pre-action exchange of information, to seek a stay pending the use of that procedure and to attempt ADR in an attempt to forestall the claim proceeding beyond the issue and service stage altogether, should sound in costs. In *Rana v Tears of Sutton Bridge [2015] EWHC 2597 (QB)* the court found failure to engage in the Pre-Action Protocol and to accept a suggestion of alternative dispute resolution should be marked by adverse costs consequences. (Also see: *Roundstone Nurseries Ltd v Stephenson Holdings Ltd [2009] EWHC 1431 (TCC)*, where costs sanctions were imposed in circumstances where one party unilaterally cancelled an imminent pre-action mediation.)

ADR in Pre-action Protocols

14-3

Reference to ADR can be found in the Pre-Action Protocols as follows:

- Practice Direction—Pre-Action Conduct paras 8–11 and 13–16;
- Pre-Action Protocol for Personal Injury Claims para.9;
- Pre-Action Protocol for the Resolution of Clinical Disputes para.5;
- Pre-Action Protocol for Construction and Engineering Disputes paras 3.1.2 and 9.3;
- Pre-Action Protocol for Media and Communication Claims para.3.8;
- Pre-Action Protocol for Professional Negligence para.12;
- Pre-Action Protocol for Judicial Review para.9;
- Pre-action Protocols for Disease and Illness Claims paras 2A.1 to 2A.4;
- Pre-Action Protocol for Housing Condition Cases (England) para.4;
- Pre-Action Protocol for Housing Disrepair Claims (Wales) para.4;
- Pre-Action Protocol for Possession Claims by Social Landlords para.2.10;
- Pre-Action Protocol for Claims for Damages in Relation to the Physical State of Commercial Property at Termination of a Tenancy (The Dilapidations Protocol) para.8;
- Pre-Action Protocol for Debt Claims para 6; and
- Pre-Action Protocol for Resolution of Package Travel Claims para.14.

See Vol.1 Section C for commentary on the Practice Direction—Pre-Action Conduct and the Pre-Action Protocols, including commentary on the ability of the court to impose cost sanctions on parties for failing to comply with their requirements. Also see *AP (UK) Ltd v West Midland Fire & Civil Defence Authority [2013] EWHC 385 (QB)* and *Rana v Tears of Sutton Bridge [2015] EWHC 2597 (QB)*.

ADR in Court Guides and Handbooks

14-4 The use of ADR is also referred to in various court guides: see generally, Vol.2, Section 1 and Section 2. See, for instance:

- Chancery Guide 2022 (June 2024 edition), Ch.10; Appendices K and L;
- King's Bench Guide 2024, Ch.10;
- The Commercial Court Guide (incorporating The Admiralty Court Guide) 2022 (2023 edition), Section G (negotiated dispute resolution or "NDR" is referred to in previous editions of the Guide as "ADR"), Section O (Arbitration) and App.3;
- Technology and Construction Court Guide 2022 (2023 edition), Sections 7, 8, 9 and 10; and Appendices E, F and G.

End of Document

2. - ADR and Case Management

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Volume 2

Section 14 - Alternative Dispute Resolution

Alternative Dispute Resolution

2. - ADR and Case Management

ADR as Part of Active Case Management

14-5 The use of ADR is to be encouraged or, where appropriate, mandated by the courts as part of active case management: CPR rr.1.1(2)(f), 1.4(2)(e), 3.1(2)(o) and (p) (see Vol.1 paras 1.4.9 and 3.1.15).

Pre *Churchill* the emphasis was on the court encouraging ADR. Accordingly, until 1st October 2024, r.1.4(2)(e) stated that active case management includes the court's encouragement of the parties to use ADR procedures "if the court considers that appropriate". Such encouragement may be given at various points in the procedure laid down in the CPR and related practice directions and may be given, either on the court's own initiative, or in response to an initiative of the parties (as to the latter, see r.26.4). The Glossary attached to the CPR explains that ADR is a collective description of methods of resolving disputes "otherwise than through the normal trial process". In terms, this includes simple negotiation between the parties not involving third parties (apart from the parties' legal representatives). However, the purpose of r.1.4(2)(e) is to draw attention to methods other than simple negotiation.

Post April 2013 the court's duty to encourage the parties to use ADR has to be interpreted in light of the amendments relating to the overriding objective relating to proportionality. Moreover, the parties are equally enjoined to assist the court in furthering the overriding objective, which as Sir Geoffrey Vos, then Chancellor of the High Court stated in *OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195* at [9], obliges them "to conduct litigation collaboratively and to engage constructively in a settlement process". Post 1 October 2024 the CPR was amended to align the court's case management powers with *Churchill* and from that date 1.4(2)(e) provides that active case management includes "ordering or encouraging the parties to use, and facilitating the use of, alternative dispute resolution". See also the other *Churchill* related amendments made by the Civil Procedure (Amendment No.3) Rules 2024 (SI 2024/839) which are referred or in para.14-1.

The ADR process most often used, apart from negotiation, is mediation. Although it is a process that requires some time and cost, in difficult cases a skilled mediator can oil the wheels of settlement in ways that are likely to be more effective than the normal process of negotiation by discussion and offer and counter-offer (*Hickman v Blake Lapthorn [2006] EWHC 12 (QB)*). It should also be remembered that, when considering case management, mediation can be successfully deployed to deal with particular issues in a case if there are reasons not to attempt to settle the entire claim at that juncture—see paras 14-7 and 14-8. Another dispute resolution process is known as med-arb. In *IDA Ltd v Southampton University [2006] EWCA Civ 145; [2006] R.P.C. 21; (2006) 29(5) I.P.D. 29038, CA*, the Court of Appeal stated that this process (where a mediator trusted by both sides is given authority to decide the terms of a binding settlement agreement) is particularly apt for the resolution of disputes about entitlements to patents. Also note that Early Neutral Evaluation is referred to in the Court Guides listed in para.14-4 above. Further, in October 2015 the court's general powers of management at CPR r.3.1(2)(m) "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective" were amended by the addition of the following words: ", including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case: see *Lomax v Lomax [2019] EWCA Civ 1467; [2019] 1 W.L.R. 6527* (Vol.1 para.3.1.5)". Carr CJ, speaking at London International Dispute Week in June 2024, commented on the court's case management powers following *Churchill* stating that:

> "… judges are increasingly likely to be called upon—further to the requirement to manage cases—to consider whether to mandate the use of ADR. And not just to consider the question of whether to do so, but also the broader question of which form of dispute resolution to mandate."

The Lady Chief Justice added that the judiciary and legal practitioners will need to become familiar with the different forms of ADR explaining:

> "Here the parties will need to play their role. They will need to consider, constructively and further to the CPR's overriding objective, which process might best suit their circumstances. They will need to inform the court of this view. And, as importantly, judges will need to be familiar with the different forms and their features, so that they can properly assess which is best-suited" (Michael Cross, Lady chief justice calls for united front on ADR, Law Gazette, 4 June 2024).

The Power of the Court to Order ADR–Churchill

14-6 *Churchill v Merthyr Tydfil CBC [2023] EWCA Civ 1416; [2024] 1 W.L.R. 3827* made it clear that the court can order what it described as non-court-based dispute resolution, i.e. ADR. Before the appeal was heard it was apparent that *Halsey* was likely to be reviewed by the Court of Appeal, and seven organisations, including The Law Society, The Bar Council and several ADR organisations, intervened.

The Court of Appeal held that the court could lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process subject to these provisos: that the order made did not impair the very essence of the claimant's right to proceed to a judicial hearing and was proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost.

The Court of Appeal, however, did not lay down fixed principles as to what would be relevant to determining whether proceedings should be stayed or whether to order the parties to engage in ADR process. Instead, the approach is that the court should take into account all the circumstances of the case, including the nature of the ADR procedure in question, when considering whether a particular process is or is not likely or appropriate for the purpose of achieving the important objective of bringing about a fair, speedy and cost-effective solution to the dispute and the proceedings, in accordance with the overriding objective.

The Bar Council, intervening, submitted (at para.61) that the following factors were relevant to the exercise of the court's discretion:

(i)the form of ADR being considered;

(ii)whether the parties were legally advised or represented;

(iii)whether ADR was likely to be effective or appropriate without such advice or representation;

(iv)whether it was made clear to the parties that, if they did not settle, they were free to pursue their claim or defence;

(v)the urgency of the case and the reasonableness of the delay caused by ADR;

(vi)whether that delay would vitiate the claim or give rise to or exacerbate any limitation issue;

(vii)the costs of ADR, both in absolute terms, and relative to the parties' resources and the value of the claim;

(viii)whether there was any realistic prospect of the claim being resolved through ADR;

(ix)whether there was a significant imbalance in the parties' levels of resource, bargaining power or sophistication;

(x)the reasons given by a party for not wishing to mediate: for example, if there had already been a recent unsuccessful attempt at ADR; and

(xi)the reasonableness and proportionality of the sanction, in the event that a party declined ADR in the face of an order of the Court.

Vos MR in giving judgment in *Churchill* noted the observation by Dyson LJ in *Halsey* that he found "it difficult to conceive of circumstances in which it would be appropriate to exercise ..." a power to order unwilling parties to mediate but did not agree with it. He said:

> "Moreover, I would not go so far. Experience has shown that it is extremely beneficial for the parties to disputes to be able to settle their differences cheaply and quickly. Even with initially unwilling parties, mediation can often be successful. Mediation, early neutral evaluation and other means of non-court-based dispute resolution are, in general terms, cheaper and quicker than court-based solutions. Whether the court should order or facilitate any particular method of non-court-based dispute resolution in a particular case is a matter of the court's discretion, to which many factors will be relevant."

The Court of Appeal stated that these matters, those mentioned by Mr Churchill about the internal disputes' procedure and the *Halsey* factors (at [16]–[35]) were "…likely to have some relevance" and added: "But other factors too may be relevant depending on all the circumstances."

Mills and Reeve Trust Corp Ltd v Martin [2023] EWHC 654 (Ch) and *Jones v Tracey [2023] EWHC 2256 (Ch)* are examples of cases where the court has carefully considered all of the circumstances of the case in the context of ADR.

One aspect of the *Churchill* judgment which may fall to be clarified by the courts sooner rather than later is the weight that should be placed on the merits of the case when considering whether to encourage, stay for, or order ADR. "The merits of the case" is one of the tests referred to in *Halsey* as being relevant to the costs question of whether a party had behaved unreasonably in refusing ADR (para.16). To some, a case or a defence with excellent merits is a reason not to deploy ADR whereas to others that is a positive indication that some form of ADR should be used (see para.14-15). See also Masood Ahmed, University of Leicester, "The pre-ADR exception to the without prejudice rule, judicial ADR pluralism, and assessing an unreasonable refusal to ADR: *Jones v Tracey* "; C.J.Q. 2024, 43(1), [28]–[41]. Also, views on merits are by their nature subjective. As the court noted in *Stoney-Andersen v Abbas [2023] EWHC 2964 (Ch)* at [56]:

> "It is a commonplace that both sides are told by their lawyers that they will win. But they cannot both be right. Indeed, sometimes, both sides are wrong."

The issue of the merits of the case in this context fell to be considered in *DKH Retail Ltd v City Football Group Ltd [2024] EWHC 3231 (Ch)* when the court considered an application by a claimant for an order for mediation prior to an imminent trial. The defendant contested the application on several grounds, contending that mediation was not likely to lead to settlement, that the court should only order mediation where there was a realistic prospect that it would succeed, that the defendant was entitled to a judicial determination and that negotiations between experienced solicitors had not reached agreement. Miles J rejected the defendant's submissions stating:

> "… in many cases the parties' positions in the litigation are diametrically opposed and it may easily be said that each party requires a judicial determination. But nonetheless the parties come through ADR to recognise the desirability of settling for less than their strict legal rights and compromising their positions. Experience shows that mediation is capable of cracking even the hardest nuts. The process sometimes succeeds in cases where the parties appear at first to have intractable differences."

The court, having noted Churchill and the October 2024 amendments to the CPR (see para.14-1 above), ordered that mediation take place the following month. The court was informed shortly afterwards that the case had been settled.

In two post-*Churchill* cases the court has contemplated parties mediating for a second time where the first mediation did not result in resolution: *Heyes v Holt [2024] EWHC 779 (Ch)* (at [50]) and *Francis v Pearson, [2024] EWHC 605 (KB)* (at [87]–[92]). In *Pentagon Food Group Ltd and others v B Cadman Ltd [2024] EWHC 2513 (Comm)*, HHJ Tindal, sitting as a judge of the High Court, encouraged the parties to consider a third mediation:

> "It is quite possible that in the context of me having made the determinations that I have and having said the things that I just have, it may well be possible for the parties to finally put this litigation behind them."

Case Management and the Duty of the Parties

14-7 Parties have a duty to help the court in furthering the overriding objective and, therefore, they have a duty to consider seriously the possibility of ADR procedures being utilised for the purpose of resolving their claim or particular issues within it, when ordered or encouraged by the court to do so (see also para.14-8). In *Garritt-Critchley v Ronnan [2014] EWHC 1774 (Ch)* (at [25]) the court took the view this was a continuing duty, throughout the litigation. The discharge of the parties' duty in this respect may be relevant to the question of costs because, when exercising its discretion as to costs, the court must have regard to all the circumstances, including the conduct of all the parties (r.44.3(4) and (5) and "…. whether a party failed to comply with an order for alternative dispute resolution, or unreasonably failed to engage in alternative dispute resolution" r.44.2(5)(e)). Also see *PGF II SA v OMFS Co [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386*.

Case management: the manner in which the court may facilitate the use of ADR procedures

14-8 The overriding objective in the CPR, which is to enable "… the court to deal with cases justly and at proportionate cost" (r.1.1(1)), requires the court to order or encourage the use of an ADR procedure, in appropriate cases, and to facilitate the use of such procedure, as one of the elements of active case management (r.1.4(2)(e) as amended with effect from 1 October 2024—see para.14-1). Further, as mentioned in para.14-1, the Civil Procedure (Amendment No.3) Rules 2024 (SI 2024/839) made a series of amendments to the court's case management powers in relation to ADR, effective from 1st October 2024. The Court of Appeal has made it clear that "facilitating" includes staying proceedings for, or ordering, the parties to engage in ADR process: *Churchill v Merthyr Tydfil CBC [2023] EWCA Civ 1416; [2024] 1 W.L.R. 3827*. The concept of proportionality reinforces the need for the court to keep the potential of ADR procedures under review whenever it deals with any aspect of case management. It should be noted, when considering case management, that although ADR, and mediation in particular, often leads to settlement of the entire action, there is the potential to use an ADR process to attempt settlement or agreement of discrete issues. Recent examples of this include parties being ordered to use an ADR process to: (a) attempt agreement of a complex costs budget (*Hadley v Przybylo [2023] EWHC 1392 (KB)*); and (b) agree a bill of costs with a view to avoiding a detailed assessment (*Elphicke v Times Media Ltd [2024] EWHC 2595 (KB)*). Further, the recent decisions by Master Thornett in *Worcester v Hopley [2024] EWHC 2181 (KB)* and *Jenkins v Thurrock Council [2024] EWHC 2248* give rise to the prospect that parties might agree, or be ordered, to use an ADR process to explore agreement of costs budgets and or directions, rather than wait for a lengthy period until directions and decisions can be given at a Costs and Case Management Conference. (See also para.14-17.) It also includes the full integration of ADR into the litigation process: see *Abdel-Kader v Kensington and Chelsea RLBC (Grenfell Tower Litigation) [2022] EWHC 2006 (QB)*.

The following multi-party cases are further examples of ADR being used to resolve some, but not all, of the issues in the litigation: *Supershield Ltd v Siemens Building Technologies FE Ltd [2010] EWCA Civ 7; [2010] 2 All E.R. (Comm) 1185; [2010] 1 Lloyd's Rep. 349* and *Mouchel Ltd v Van Oord (UK) Ltd [2011] EWHC 72 (TCC); 135 Con. L.R. 183*. The report on Senior Master Fontaine's case management of the Grenfell Tower Litigation at *[2022] EWHC 2006 (QB)* illustrates many facets of how ADR can be deployed during the case management of a multi-party case and that both the court and lawyers now demonstrate a sophisticated grasp of how to interweave an ADR process in with the litigation process of a complex action. Master Fontaine said (at para.105):

> "I consider that the ADR process being established is the obviously appropriate course to attempt before proceeding with litigation involving more than 1,000 Claimants and multiple Defendants. Although it may be that

not all issues will be capable of settlement, it is highly likely that there will be a sufficient number of settlements and/or narrowing of issues so that when the stay is lifted more efficient progress to resolution of these claims can be made in the litigation."

The manner in which the court may facilitate the use of ADR procedure includes the following:

(i)by staying proceedings for, or ordering, the parties to engage in ADR process, provided that the order does not impair the very essence of the claimant's right to proceed to a judicial hearing, and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost (*Churchill v Merthyr Tydfil CBC [2023] EWCA Civ 1416; [2024] 1 W.L.R. 3827* and 1.4(2)(e) as amended from 1 October 2024—see para.14-1); see also the amendments to court's case management powers in relation to ADR referred to in the paragraph immediately above and note that, with reference to Multi-Track directions, r.29.2(1A) provides that "When giving directions, the court must consider whether to order or encourage the parties to engage in alternative dispute resolution". Note that the stay or order might be in contemplation of an ADR process being used to attempt resolution of the entire case or a discrete issue (see the first paragraph of para.14-7);

(ii)a stay may relate to the whole or part of the proceedings and be pursuant to the application of the parties or one of them (r.3.1(2)(g) and r.3.3(1))(see *Andrew v Barclays Bank [2012] C.T.L.C. 115* at [24], [28] and [41], *Hussain v Chowdhury [2020] EWHC 790 (Ch)* at [18], the Grenfell Tower Litigation: *Abdel-Kader v Kensington and Chelsea RLBC [2022] EWHC 2006 (QB)*), and *Hamon v University College London [2023] EWHC 1812 (KB)*;

(iii)a stay may also be ordered by the court of its own initiative (r.3.1(2)(g) and r.3.3(1));

(iv)by ordering such a stay of its own initiative (r.3.1(2)(g) and r.3.3(1)). An appropriate time to make such an order might be upon perusal of the parties' statements about ADR in their directions questionnaires;

(v)by ordering such a stay upon the written request of a party or of its own initiative when considering completed directions questionnaires (r.26.4). (See also Standard Directions Model Paragraph B05-stay for settlement which provides:

"1....

2.The claim is stayed until xxxx, during which period the parties will attempt to settle the matter or to narrow the issues.

3.By 4pm on xxxx the Claimant must notify the court in writing of the outcome of negotiations (without disclosing any matters which remain subject to "without prejudice" terms) and what, if any, further directions are sought. Failure to comply with this direction or to engage properly in negotiations may result in the application of sanctions. If settlement has been reached, the parties must file a consent order signed by all of them" (see https://www.justice.gov.uk/courts/procedure-rules/civil/standard-directions/list-of-cases-of-common-occurrence/menu-of-sd-paragraphs (B05-ADR.doc)));"

(vi)by ordering the parties to consider ADR using, for example a direction in the form of Standard Directions Model Paragraph A03-ADR.doc, whether at the time of giving standard directions or otherwise as follows:

"1....

2.At all stages the parties must consider settling this litigation by any means of Alternative Dispute Resolution (including Mediation); any party not engaging in any such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal; such witness statement must not be shown to the trial judge until questions of costs arise.

3.'21 days' can be altered manually. The words 'and not less than 28 days before trial' can always be added after the word 'proposal' by the managing judge if appropriate. Not necessary for every Order." (See https://www.justice.gov.uk/courts/procedure-rules/civil/standard-directions/list-of-cases-of-common-occurrence/menu-of-sd-paragraphs (A03-ADR.doc)). It might be particularly appropriate to consider directions of the type referred to immediately above when considering cost budgets and proportionality during the costs management and case management process. Such directions might be combined with directions designed to facilitate the holding of an immediate mediation. For example, provision could be made for early disclosure of a particular category of

documents that would facilitate a mediation prior to full disclosure. See *Mann v Mann [2014] EWHC 537 (Fam); [2014] 1 W.L.R. 2807; [2014] 2 F.L.R. 928* at [525] and *Mengrani v Mohamed [2025] EWHC 1131 (Ch)* at [62].

(vii)by ensuring that the opportunity to explore ADR prospects is not prejudiced by the rigours of case management procedures generally. (For example, see *Electrical Waste Recycling Group Ltd v Philips Electronics UK Ltd [2012] EWHC 38 (Ch)* where the court considered how ordering a split trial might impact on the prospects of mediating the matter.) In *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd [2014] EWHC 3546 (TCC); [2015] 1 All E.R. (Comm) 765; 156 Con. L.R. 202*, Coulson J suggested "A timetable for trial that allows the parties to take part in ADR along the way is a sensible case management tool";

(viii)by acting as a source of information about professional and commercial bodies providing ADR services (for example, see https://civilmediation.org/about-mediation;

(ix)by verbally encouraging the parties to consider ADR at a hearing or telephone conference, such as a case management conference or a pre-trial review;

(x)by making an order, whether on directions for allocation or a later stage, of the type referred to in the Multi-Track Practice Direction (sometimes referred to as an "Ungley Order") (29PD.4);

(xi)by making an ADR order on the basis of the draft in App.7 to the Admiralty and Commercial Courts Guide. The draft order includes the following paragraph: "4. The parties shall take such serious steps as they may be advised to resolve their disputes by ADR procedures before the neutral individual or panel so chosen by no later than [*].";

(xii)by making an ADR order on the basis of the draft order in App.E to and Section 7 of the Technology and Construction Court Guide. Although these Guides refer to their particular courts there appears to be no reason why the type of ADR orders made in these courts could not be made, where appropriate, in other courts;

(xiii)by ordering Early Neutral Evaluation. See CPR r.3.1(2)(p) and *Lomax v Lomax [2019] EWCA Civ 1467; [2019] 1 W.L.R. 6527*;

(xiv)by, in a case which is suitable to be resolved by an ADR procedure except for one sticking point, ordering the hearing of that point as a preliminary issue with a view to the case then being referred to ADR (see s.8 of the Technology and Construction Court Guide, again there is no reason why the approach taken by the Technology and Construction Court cannot be taken by other courts, where appropriate);

(xv)by, ordering a stay for mediation followed, if necessary, by either an order for mediation or for compulsory early neutral evaluation. Such a tiered approach was suggested by HHJ Stephen Davies as part of a streamlined proportionate procedure for domestic property renovation building contract disputes in the *Sky's the Limit Transformations Ltd v Mirza [2022] EWHC 29 (TCC)*;

(xvi)by arranging, in the Admiralty and Commercial Court or the Technology and Construction Court, for the court to provide Early Neutral Evaluation. Further, in the Technology and Construction Court the court can provide a judge to act as a mediator (see http://www.justice.gov.uk/downloads/courts/tech-court/tech-con-court-guide.pdf);

(xvii)by arranging or, where appropriate, ordering, in the Business and Property Courts, a mediation, an Early Neutral Evaluation or a Chancery Financial Dispute Resolution ("Chancery FDR") (Chancery Guide, Ch.18.);

(xviii)by refusing a party's application to the court unless and until ADR is attempted. See *Hussain v Chowdhury [2020] EWHC 790 (Ch)* at [18] where HHJ Jarman QC refused to give permission to commence charity proceedings until the parties "engaged in a meaningful way in mediation with a professional mediator". See also *Jaffer v Jaffer [2021] EWHC 1329 (Ch)*. Another example is *Wilmington Trust SP Services (Dublin) Ltd v Spicejet Ltd [2021] EWHC 1117 (Comm)* where the court considered (at [74]):

> "… that the course most conducive to the furtherance of the overriding objective and the interests of justice (was) to give judgment for the First Claimant's undisputed claims but to stay execution. In that way, the entire dispute can be brought within the ambit of any ADR procedures that the parties may choose to adopt"

;

(xix)by making an appropriate costs order (or advising that such an order might be made in the future) in respect of failure to give adequate consideration to ADR prior to the commencement of proceedings;

(xx) by providing information about PD 36V regarding the Family Mediation Voucher Scheme, which is designed to offer a financial contribution of £500 towards mediation costs for eligible cases: Family Procedure Rules 2010 (SI 2010/2955) r.36.2;

(xxi)by referring a small claim to the Small Claims Mediation Service.

Case management: the stages at which ADR may be encouraged

14-9 The issue of timing, as in when is the best stage of a case to use an ADR procedure, is often a complex question.

Clearly, there is a duty on the parties to consider ADR pre-proceedings in accordance with the relevant pre-action protocol (see para.14-2).

In *Nigel Witham Ltd v Smith [2008] EWHC 12, (TCC); [2008] T.C.L.R. 3; 117 Con. L.R. 117* Judge Peter Coulson QC offered general guidance saying that a premature mediation simply wasted time and could sometimes lead to a hardening of positions on both sides whereas, conversely, a delay in any mediation until after full particulars and documents had been exchanged could mean that the costs that had been incurred to get to that point became themselves the principal obstacle to a successful mediation. He added:

> "The trick in many cases was to identify the happy medium: the point when the detail of the claim and the response were known to both sides, but before the costs that had been incurred in reaching that stage were so great that a settlement was no longer possible."

In *Bradford and another v James [2008] EWCA Civ 837* the court suggested, in relation to neighbour disputes, that:

> "An attempt at mediation should be made right at the beginning of the dispute and certainly well before things turn nasty and become expensive. By the time neighbours get to court it is often too late for court-based ADR and mediation schemes to have much impact. Litigation hardens attitudes. Costs become an additional aggravating issue. Almost by its own momentum the case that cried out for compromise moves onwards and upwards to a conclusion that is disastrous for one of the parties, possibly for both."

The relevance of escalating costs was highlighted by Ward LJ in *Shovelar v Lane [2011] EWCA Civ 802; [2012] 1 W.L.R. 637; [2011] 4 All E.R. 66*. He said, at [61]:

> "If the claimants are right in their assessment of their costs, then, even without a success fee, the costs incurred by them exceed the sum over which battle has been joined. The great British public must think that something has gone wrong somewhere if litigation is conducted in that way. I share that sense of horror. One answer has to be to engage in mediation constructively and at the very earliest stage."

Similarly, in *Matthews v Matthews [2018] EWHC 906 (Fam)*, Holman J stated at [28]:

> "As this case is now going off again for a period, I wish very strongly indeed to stress to both parties (as will be recorded on the face of my formal order today) that this case urgently requires to be resolved before costs and delay become disproportionate. In the exercise of my powers and duties under the overriding objective under rule 1 of the Civil Procedure Rules, I very strongly encourage all the parties to give fresh consideration to seeing if these issues cannot be resolved by mediation. I am fearful that a considerable amount of money may yet be expended, which will become completely disproportionate to the size and value of the claim."

In *Hamon v University College London [2023] EWHC 1812 (KB)* Senior Master Fontaine added at [66]:

> "The most important considerations are that both parties know the other parties' case, so that the litigation risk can be assessed, and that ADR is attempted at a sufficiently early stage to enable costs to be saved, so that parties are not discouraged from settlement by the extent of incurred costs."

Masood Ahmed, University of Leicester has opined:

> "The ADR duty is an on-going one and as such litigating parties are required to actively engage in an ADR dialogue. This on-going duty and dialogue will mean that, if the matter is not ripe for ADR at a particular time, it may be at a later stage when the issues have matured. Therefore, in exercising its discretion on costs, the courts should only penalise a party when it is clear that a party has clearly failed to respond to an invitation to ADR; to engage in a constructive ADR dialogue or where its behaviour is such that it undermines or frustrates the parties' ADR duty." ("The ADR duty and costs: *Ali v Channel 5 Broadcast Ltd" [2018] EWHC 298 (Ch); C.J.Q. 2018* at 37(4), 407–412.)

The first main opportunity the court has to consider ADR is at the allocation stage. One of the matters a court may then consider, in the context of ADR, is whether the parties have complied with the ADR provisions of any relevant pre-action protocol. The court will also consider the parties' directions questionnaire forms. (See Form N150 (directions questionnaire), Section A.) CPR r.26.4 provides that a party, when completing the directions questionnaire required by r.26.3, may 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.

Section A of the directions questionnaire, under the heading "Settlement", states: "Under the Civil Procedure Rules parties should make every effort to settle their case before the hearing". This could be by discussion or negotiation (such as a roundtable meeting or settlement conference) or by a more formal process such as mediation. The court will want to know what steps have been taken. Settling the case early can save costs, including court hearing fees.

Legal representatives are asked to confirm that they have explained to their client the need to try to settle, the options available, and the possibility of costs sanctions if they refuse to try to settle. The form then poses three questions, noting that answers will be considered in the context of CPR r.44.3(4):

> "1) Given that the rules require you to try to settle the claim before the hearing do you want to attempt to settle at this stage? 2) If Yes, do you want a one month stay? 3) If you answered 'No' to question 1, please state below the reasons why you consider it inappropriate to try to settle the claim at this stage."

The issue of timing is always an issue, and will differ from case to case. There will be occasions when it is clear to the parties and the court that a case is ready for mediation. On other occasions it is the circumstances of the litigation that may make mediation appropriate. For example, where a court is considering making a costs management order; it may be the view of the court that it is likely to be cost effective and proportionate to stay the case for mediation immediately on the basis that it may ultimately prove to be unnecessary to make such an order. On the other hand, where the claim or defence involves some complexity, the court may want to see a matter properly pleaded before mediation is attempted: *Williams v Seals [2014] EWHC 3708 (Ch); [2015] W.T.L.R. 339*, Richards J at [48]. In *Mengrani v Mohamed [2025] EWHC 1131 (Ch)* (at [62]) the court contemplated ordering a stay for ADR, but only after first listing a directions hearing to enable the court to adjudicate on what issues remain outstanding between the parties and what evidence would be necessary for ADR.

In *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd [2014] EWHC 3546 (TCC); [2015] 1 All E.R. (Comm) 765; 156 Con. L.R. 202* Coulson J put the emphasis on the parties consensually agreeing on the best time to mediate, suggesting: "A timetable for trial that allows the parties to take part in ADR along the way is a sensible case management tool." He added "A stay or a fixed 'window' is likely to lead to delay, extra cost and uncertainty, and should not ordinarily be ordered."

CPR r.29.2 states that, when it allocates a case to the multi-track, the court will give case management directions. This provision is supplemented by paras 4.1 to 4.11 of Practice Direction (The Multi-Track) (see Vol.1, para.29PD.4). Paragraph 4.10 states the general approach that the court will adopt where it gives directions on its own initiative without holding a case management conference and is not aware of any steps taken by the parties other that the exchange of statements of case. Subparagraph (9) of para.4.10 states that a direction requiring the parties to consider ADR is included among the directions that the court may give in these circumstances and sets out the form of Order, known as an "Ungley Order" which may be made; this is as follows:

> "The parties shall by [the date determined by the court] consider whether the case is capable of resolution by ADR. If any party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the trial, should the judge consider that such means of resolution were appropriate, when he is considering the appropriate costs order to make. The party considering the case unsuitable for ADR shall, not less than 28 days before the commencement of the trial, file with the court a witness statement without prejudice, save as to costs, giving reasons upon which they rely for saying that the case was unsuitable."

A variation on the above requires a more immediate statement of parties' intentions concerning ADR:

The parties shall by [14 days from the date of this order] consider whether the claim is capable of being resolved by Alternative Dispute Resolution and:

a)if either party considers that the claim is unsuitable for Alternative Dispute Resolution, that party shall, not less than 28 days from today, serve on the other party a witness statement giving the reasons upon which that party relies in saying the claim is unsuitable;

b)a party served with such a statement may within 14 days after receiving it serve on the other party a witness statement in response;

c)all witness statements so served shall be disclosed to the trial judge at, but not until, the conclusion of the trial;

d)at the conclusion of the trial, when deciding on the appropriate costs order to make, the trial judge shall take all such witness statements into account in considering whether such means of resolution were appropriate; and

e)a party who objected to Alternative Dispute Resolution but has not served such a witness statement may be presumed to have objected for no good reason.

Paragraph 4.10 of the Practice Direction should now be read in the context of *Churchill* and the amendments to the CPR in 2024. See also, regarding such directions, Model Paragraph A03-ADR.doc as referred to in para.14-8 above. See also *PGF II SA v OMFS Co [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386* at [35] et seq where Briggs LJ outlined the desirability of requiring reasons for refusing ADR being put in writing at the time of the refusal. Failure to provide a written statement, when ordered to do so, is to invite a costs sanction: *BXB v Watch Tower and Bible Tract Society of Pennsylvannia [2020] EWHC 656 (QB)*. See also *Appiah v Leeds City Council [2025] EWHC 1537 (KB)*.

Note that CPR r.29.2(1A) provides, with effect from 1 October 2024, that "when giving directions, the court must consider whether to order or encourage the parties to engage in alternative dispute resolution".

Case management: the personal and emotional impact of the litigation process on the parties

14-10

The benefits of ADR, not least mediation, are not restricted to the savings of costs and court time. The court will consider the impact of the litigation process on the parties. This can be done retrospectively. For example, in *Bell v Commissioner of Police of the Metropolis (2) 2024 EWHC 650 (KB)* the court imposed a financial penalty on a defendant who had, contrary to the obligation on all parties to engage meaningfully with settlement possibilities, conducted the litigation in a manner that prolonged and exacerbated the claimant's distress. Prospectively, the court can use case management powers to reduce potential impact of litigation: in *Bernadette Rogers v Andrew Wills [2025] EWHC 1367 (Ch)* (at [248]) the court recommended mediation on the basis that it may avoid "further costly and emotionally wearing court hearings".

Another example of the court considering personal and emotional aspects arose in the case of the baby Charlie Gard, which attracted public attention around the world in 2017. It was the court's duty, in *Great Ormond Street Hospital for Children NHS Foundation Trust v Yates [2017] EWHC 1909 (Fam)*, to consider whether to confirm declarations previously made, that it was in the child's best interests for artificial ventilation to be withdrawn and for his treating clinicians to provide him with palliative care only. Francis J explained why, even if the prospects of reaching agreement between the parties appears impossible, mediation should be used. He said:

> "… it is my clear view that mediation should be attempted in all cases such as this one even if all that it does is achieve a greater understanding by the parties of each other's positions. Few users of the court system will be in a greater state of turmoil and grief than parents in the position that these parents have been in and anything which helps them to understand the process and the viewpoint of the other side, even if they profoundly disagree with it, would in my judgment be of benefit…"

The passage immediately above was referred to by one of the parties in the Grenfell Tower Litigation in support of a submission for a stay for ADR *[2022] EWHC 2006 (QB)* at [54]. The advice given by Francis J has been noted. For example, in *X (A Child), Re v [2020] EWHC 1958 (Fam)* Ms Justice Russell DBE reported that:

> "... the Court had to insist that mediation was imperative, both to assist in narrowing the issues to be decided, and to reduce the levels of distress for this family."

See also *Newcastle Upon Tyne Hospitals NHS Foundation Trust v H (A Child) [2022] EWCOP 14* (Hayden J, pp.25):

> "The availability of such a (mediation) service strikes me as having invaluable potential, even where it doesn't achieve its stated objectives. It may for example, establish a greater respect for and understanding of different views. This in turn may defuse some distress and anger and benefit the parties in the court process that follows."

Re NR (A Child) (Withholding CPR) [2024] EWHC 61 (Fam) at [39] and *Mrs R v King's College Hospital NHS Foundation Trust [2024] EWHC 2400 (Fam)* at [29].

Case management: where a public authority is a party

14-11 In *R. (Cowl) v Plymouth City Council [2001] EWCA Civ 1935; [2002] 1 W.L.R. 803*, CA, the Court of Appeal noted that, in disputes between public authorities and members of the public for whom they were responsible, insufficient attention is being paid to the paramount importance of saving cost and reducing delay by avoiding recourse to the application for judicial review procedure (This point was cited with approval in *Hamon v University College London [2023] EWHC 1812 (KB)* at [50]). The court said that the High Court should scrutinise extremely carefully such applications and should use its powers to ensure that the parties tried to resolve their dispute with the minimum involvement of the court. To achieve that objective, the court might have to hold (of its own initiative) a hearing at which the parties could explain what steps they had taken to resolve or reduce their dispute by means alternative to the procedure. In *Practice Statement (Admin Ct: Administration of Justice) v [2002] 1 W.L.R. 810*, QBD (sub nom *Practice Statement (Admin Ct: Annual Statement) [2002] 1 All E.R. 633*), the lead judge of the Administrative Court drew attention to the *Cowl* case and stated that the judges of that court "were fully committed to resolving disputes by alternative means where appropriate and are exploring ways of promoting this". It has since been suggested, in

Halsey, that the issue of public money is not a special factor and that the list of factors outlined in *Halsey* determine when it is reasonable to refuse ADR.

See also *R. (Essex CC) v Secretary of State for Education [2016] EWHC 1724 (Admin)*, where the parties were criticised for not compromising the litigation. The court said that there was no reason why mediation or others forms of alternative dispute resolution should not have a role in judicial review cases which did not raise any recurring principle or policy.

In *JR138's Application for Judicial Review [2022] NIQB 46*, an application in Northern Ireland, the court identified the case as an example of litigation coming before the court with increasing frequency. This was where a person in need contends that a health and social care trust is not providing them with the services to which they are entitled and which they desperately need. The court analysed (at [39]) why it was often unable to be of significant assistance in such matters and urged parties dealing with these issues to give serious consideration to mediation.

Case management: miscellaneous

14-12 CPR r.3.1(2) states that the court's general powers of case management include the power to order that a party or a party's legal representative be required to attend the court. Such an order may be made with a view to making an ADR order (though the attendance of any party is not required for this purpose) or to otherwise facilitate settlement, but should not be made for the purpose of putting pressure on the party to discontinue the proceedings (*Tarajan Overseas Ltd v Kaye [2001] EWCA Civ 1859*).

Although the court has jurisdiction to order that parties should be adequately represented at a mediation, it has no jurisdiction to order that a particular person should attend, especially where that person was not a party to the proceedings (*Shirayama Shokusan Co Ltd v Danovo Ltd [2004] EWHC 390 (Ch); [2004] 1 W.L.R. 2985; (2004) 101(13) L.S.G. 34*; (Blackburne J) (D applying for order staying proceedings until conclusion of mediation attended by a third party (X) as a representative of C, where D contending that X's presence was essential to meaningful mediation)).

Case management: adjournment of a trial for ADR

There will rarely be circumstances where a court would be willing to adjourn a trial on the grounds that the parties wish to use ADR. See *Elliott Group Ltd v Gecc UK (formerly GE Capital Corp) [2010] EWHC 409 (TCC)*.

Case management: mediation and delay

A request for mediation followed by a lengthy discussion will not justify delay: *UK Highways A55 Ltd v Hyder Consulting (UK) Ltd [2012] EWHC 3505 (TCC)*.

Case management: purpose of mediation

A party should not be required to mediate merely for the purpose of finding out the other party's case: *Brooks v Armstrong [2016] EWHC 2893 (Ch)*.

In a housing dispute, it would be wrong for a social landlord to use recourse to mediation as a delaying tactic having the effect of causing a tenant to lose priority status for housing (*Robinson v Hammersmith and Fulham London BC [2006] EWCA Civ 1122; [2006] 1 W.L.R. 3295; [2007] H.L.R. 7*, CA).

As to ADR in the Court of Appeal, see Vol.1 para.52.0.11.

For use of ADR procedures for purpose of resolving conflict of expert evidence in lease renewal claims, see commentary in para.56PD.1.

End of Document

3. - ADR and Costs

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Volume 2

Section 14 - Alternative Dispute Resolution

Alternative Dispute Resolution

3. - ADR and Costs

Cost Sanctions and ADR

14-13 *This section should be read in the context of para.14-1.*

Numerous reported cases deal with costs sanctions where the issue is unreasonable refusal to mediate (or use some other form of ADR process). There will probably be fewer cases in future, following *Churchill v Merthyr Tydfil CBC [2023] EWCA Civ 1416; [2024] 1 W.L.R. 3827* and the series of post-*Churchill* amendments to the CPR confirming that the court's case management powers do extend to ordering parties to engage in ADR in appropriate cases (see para.14-1). Parties ordered to attempt ADR are likely to comply. Also, a party who is met with an opponent's failure to engage in ADR now has the opportunity to apply to the court for a stay for ADR or an order directing ADR. Further, with reference to costs, r.44.2(5)(e) now provides, with effect from 1 October 2024, that when considering a party's conduct in relation to costs, the court will have regard to, among other things, whether a party failed to comply with an alternative dispute resolution order or unreasonably failed to engage in alternative dispute resolution.

The following cases are post *Churchill* examples where the court has imposed costs penalties for failure to mediate: *Northamber Plc v Genee World Ltd [2024] EWCA Civ 428*, *Conway v Conway [2024] EW Misc 19 (CC)*, *Payone Gbmh v Logo [2024] EWHC 981 (KB)* and *Cabo Concepts Ltd v MGA Entertainment (UK) Ltd [2025] 7 WLUK 21*. It is important to add the rider, however, that in matters regarding conduct and costs the court invariably considers all of the circumstances of the case. A post *Churchill* example is *Invenia Technical Computing Corp v Hudson [2024] EWHC 1302 (Ch)*. See also *Assensus Ltd v Wirsol Energy [2025] EWHC 503 (KB)* and *Chassy v Left Shift IT Ltd [2025] EWHC 1701 (KB)*.

With reference to r.44.2(5)(e) and the provision that the court will have regard to whether a party failed to engage in alternative dispute resolution, the case of *Appiah v Leeds City Council [2025] EWHC 1537 (KB)* turned on whether a defendant had failed to so engage. The defendant was asked about ADR and responded that its view was that expert evidence should be served first. The court found (at para [85]) that this was a failure to engage.

The following cases on costs sanctions should all be read in the context of *Churchill* and the subsequent changes to the CPR.

Regardless of the court's power to order ADR, it is clear that judicial encouragement in the context of the court's discretion on costs has been very powerful in the past. See, for example, *Brookfield Construction (UK) Ltd v Mott MacDonald Ltd [2010] EWHC 659 (TCC)* where Coulson J said (at [55]):

> "In the present case, there is a clear and obvious alternative: ADR. In my view, the parties need to explore that option as soon as possible after the service of (… amended pleadings …). I should make it clear that … I will make detailed costs orders and that, on the basis of the documents, my perception of one side's willingness (or otherwise) to participate in ADR will be an important element of my deliberations on costs."

and *Cumbria Zoo Co Ltd v The Zoo Investment Co Ltd [2022] EWHC 3379 (Ch)* where HHJ Pearce, having noted the case was ideally suited to mediation, invited the parties to consider mediation in light of the "carrot", represented by the peace of mind and cost saving arising from settlement, and the "stick" of an adverse costs order risked by a party unwilling to engage in the process.

Jackson LJ reviewed costs sanctions in the context of encouraging ADR by costs orders post the CPR reforms in April 2013. His view was that such sanctions:

> "... might include (a) reduced costs recovery for a winning party; (b) indemnity costs against a losing party, alternatively reduced costs protection for a losing party which has the benefit of qualified one way costs shifting." (See https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lj-jackson-speech-eleventh-lecture-implementation-programme.pdf.)

Evidence of cost sanctions forming part of a tougher case management regime can be seen in the following cases. In *AP (UK) Ltd v West Midland Fire and Civil Defence Authority [2013] EWHC 385 (QB)* the court compared a party's actual conduct with that required by "Practice Direction—Pre-Action Conduct" (para.C1-001). It was found that failures to engage in the pre-action exchange of information, to seek a stay pending the use of that procedure and to attempt ADR in an attempt to forestall the claim proceeding beyond the issue and service stage altogether, should sound in costs. In *Rana v Tears of Sutton Bridge [2015] EWHC 2597 (QB)* the court found failure to engage in the Pre-Action Protocol and to accept a suggestion of alternative dispute resolution should be marked by adverse costs consequences. (Also see: *Roundstone Nurseries Ltd v Stephenson Holdings Ltd [2009] EWHC 1431 (TCC)*, where costs sanctions were imposed in circumstances where one party unilaterally cancelled an imminent pre-action mediation.)

In *Lewicki v Nuneaton and Bedworth BC [2013] UKUT 120 (LC)* the court stated, in agreement with the view of Jackson LJ immediately above, that in principle, the refusal of a party to participate in mediation might justify an adverse costs order on the indemnity basis. Indemnity costs were awarded by way of a sanction in *Garritt-Critchley v Ronnan [2014] EWHC 1774 (Ch)*, *Reid v Buckinghamshire Healthcare NHS Trust [2015] 10 WLUK 752*, and *Bristow v Princess Alexandra Hospital NHS Trust [2015] 11 WLUK 67*, *DSN v Blackpool Football Club Ltd [2020] EWHC 670 (QB)* and *BXB v Watch Tower and Bible Tract Society of Pennsylvannia [2020] EWHC 656 (QB)*. In *PGF II SA v OMFS Co [2013] EWCA Civ 1288* the Court of Appeal clearly contemplated that an unreasonable refusal to mediate might be met by a range of sanctions. The court suggested that the otherwise successful party might be ordered to pay part of the unsuccessful party's costs, and only in the event of the most serious and flagrant failures to engage would it be appropriate to adopt the draconian sanction of depriving it of all of its costs.

In *Lynn v Borneos LLP (t/a Borneo Linnels) [2015] 3 Costs L.R. 439* HHJ Cooke, having found that a party had unreasonably refused to mediate, stated that the sanction "ought to be proportionate and proportionate to the degree to which the court can realistically infer that there was actually an opportunity to save costs". As he concluded that it was unlikely that a mediation would have resulted in settlement he reduced the successful defendant's cost by 40%, so that it received 60% of its costs instead of 100%. In *Rana v Tears of Sutton Bridge [2015] EWHC 2597 (QB)* the court also imposed the same costs sanction on a successful defendant, namely a costs reduction of 40%. A similar approach was taken in *Stoney-Andersen v Abbas [2023] EWHC 2964 (Ch)* at [56].

In *Laporte v The Commissioner of Police of the Metropolis [2015] EWHC 371 (QB); [2015] 3 Costs L.R. 471* the court, having found that the defendant had failed, without adequate justification, to fully and adequately engage in the ADR process, which had a reasonable chance of success, imposed a costs sanction. Although the defendant was successful on every substantive issue and, although ADR made settlement a sufficiently likely possibility, it would not have been certain, the court ordered that he should only receive two thirds of his costs, to be assessed.

In *OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195; [2017] 1 W.L.R. 3465; [2018] 1 All E.R. 703* the costs sanction took the form of enhanced interest:

> "As long as the award (of interest) was proportionate to the facts of the case, it could include a non-compensatory element to encourage parties to engage in reasonable settlement negotiations and to mark the court's disapproval of unreasonable conduct."

See also *Hochtief (UK) Construction Ltd v Atkins Ltd [2019] EWHC 3028 (TCC); [2020] Costs L.R. 1* at [16].

In *Moradi v Home Office [2022] EWHC 3125 (KB)* the successful claimant suffered a 33% deduction from a portion of her costs on the ground that her failure to negotiate for a period of months had been moderately unreasonable. Reference was made to there being a costs risk in making unrealistic or inflated offers.

In *Northamber Plc v Genee World Ltd [2024] EWCA Civ 428* the costs penalty was an increase of 5% on the costs the refusing party had been ordered to pay and in *Conway v Conway [2024] EW Misc 19 (CC)* the successful defendants had their recoverable costs reduced by 25%.

Cases where refusal to mediate was found not to be unreasonable

14-14 Notwithstanding the above there are a number of authorities which demonstrate that a refusal to mediate will not always be visited by a sanction. In *Uwug Ltd (In Liquidation) v Ball [2015] EWHC 74 (IPEC)* the court considered that

> "... the defendant's refusal to enter into mediation should not count against him as it would have been likely to have been unsuccessful and to have led to a waste of time and expenditure."

In a similar vein, in *Assensus Ltd v Wirsol Energy [2025] EWHC 503 (KB)* Constable J, considered a refusal to mediate by the party that succeeded at trial. He found that the refusal was not unreasonable given the gap, 'the gulf', between the parties such that it was 'very unlikely indeed that ADR would have been successful. In *Butler v Butler [2016] EWHC 1793 (Ch)* the court said: "Mediation requires a willingness on the part of all parties to compromise; in this case it was not a realistic option." In *Gore v Naheed [2017] EWCA Civ 369; [2017] 3 Costs L.R. 509; [2018] 1 P. & C.R. 1*, Patten LJ considered *PGF II SA v OMFS Co 1 Ltd [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386* in relation to a claimant who declined to mediate and said that he had:

> "... 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."

He took into account the view of the claimant's solicitor that mediation had "no realistic prospect of succeeding" and the trial judge's view that "the case raised quite complex questions of law which made it unsuitable for mediation".

In *Richards v Speechly Bircham Llp [2022] EWHC 1512 (Comm)* HHJ Russen (sitting as a High Court judge) refused an application for indemnity costs notwithstanding that the defendants had been unreasonable in failing to mediate. He found that, in the circumstances of the case, this was only one aspect of the conduct to be considered in the exercise of the discretion under CPR 44.2. and such a such refusal did not automatically lead to costs penalties. Masood Ahmed, University of Leicester, has analysed the judgment in a Law Society Gazette article at https://www.lawgazette.co.uk/legal-updates/unreasonable-refusal-to-engage-with-adr/5113250.article.

In *Parker Lloyd Capital Ltd v Edwardian Group Ltd (formerly Parker Lloyd Capital Plc) [2017] EWHC 2421 (QB)* the court concluded that a refusal to mediate was founded on a belief that the offer to mediate was a mere tactic to extract payment and, therefore, was not unreasonable. See also *Tradeouts Ltd, Re [2018] EWHC 1066 (Ch)*, where a refusal to mediate was not, in the circumstances, visited with a costs sanction. In *Ali v Channel 5 Broadcast Ltd [2018] EWHC 840 (Ch); [2018] 2 Costs L.R. 373*, the court found that, in the circumstances, there had not been refusal to engage in ADR. True, the claimants did not embrace the first suggestion of ADR but they did assert that they would keep it under review and in response to the second suggestion they maintained that they were fully prepared to engage in ADR at a suitable time. A mediation did ultimately take place. In *PJSC Aeroflot - Russian Airlines v Leeds [2018] EWHC 1735 (Ch); [2018] 4 Costs L.R. 775* a refusal to mediate was not unreasonable in the context of serious allegations of fraud. Per Rose J at para 93: "… where allegations of fraud and serious wrongdoing are made, the proceedings are intrinsically unsuitable for mediation". In *Kelly v Kelly [2020] EWHC 1027 (QB)* a refusal to mediate was reasonable in light of the previous conduct of the party offering mediation. In *Philip Warren & Son Ltd v Lidl Great Britain Ltd [2021] EWHC 2372 (Ch)* the defendant was found to be not unreasonable in not taking up an invitation to mediate. In *Von Westenholz v Gregson [2022] EWHC 3374 (Ch)* a failure to mediate on the basis that the parties were far apart and there were allegations of malice and potential dishonesty was found to be not so unreasonable as to justify an award of indemnity costs.

In *Coldunell Ltd v Hotel Management International Ltd [2022] EWHC 3084 (TCC)* a claimant who declined a second mediation was not unreasonable, given that the first mediation had failed a few months earlier. It should be noted, however,

that post *Churchill* the court may consider ordering a second mediation where a first attempt did not achieve resolution; see: *Heyes v Holt [2024] EWHC 779 (Ch)* (at [50]) and *Francis v Pearson [2024] EWHC 605 (KB)* (at [87]–[92]).

In *Hotel Portfolio II UK Ltd (In Liquidation) v Ruhan [2022] EWHC 3385 (Comm)*, it was found that seeking (a) an indication that that a suggestion of mediation was genuine and (b) a means of demonstrating that, did not amount to an unreasonable refusal.

See also *Benyatov v Credit Suisse Securities (Europe) Ltd [2022] EWHC 528 (QB)* (Freedman J, pp.29–34), *Huntsworth Wine Co Ltd v London City Bond Ltd [2022] EWHC 97 (Comm)*, *Ineos Upstream Ltd v Boyd [2023] EWHC 1756 (Ch)*, *Hamon v University College London [2023] EWHC 1812 (KB)*, *Jones v Tracey [2023] EWHC 2256 (Ch)*, *Invenia Technical Computing Corp v Hudson [2024] EWHC 1302 (Ch)*.

Contrast those findings, however, with the assertion by the Court of Appeal that: "No dispute was too intractable for mediation" (*N J Rickard Ltd v Holloway [2015] EWCA Civ 1631; [2017] 1 Costs L.R. 1*).

Costs Where ADR Declined

14-15 For the reasons mentioned in para.14-9, the following cases on costs sanctions should all be read in the context of *Churchill* and the subsequent changes to the CPR referred to in para.14-1.

The question as to when the court should impose a costs sanction against a successful litigant on the grounds that he has refused to take part in an alternative dispute resolution (ADR), referred to in *Dunnett v Railtrack Plc*, op cit, was considered by the Court of Appeal in *Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002*, CA. The court said the fundamental principle is that departure from the general rule (that the unsuccessful party should be ordered to pay the costs of the successful party) is not justified unless it is shown (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR. The court gave guidance (see especially para.16) as to the factors that should be considered by the court in deciding whether a refusal to agree to ADR is unreasonable. *Halsey*, however, should now be viewed in the light of the more recent Court of Appeal decision of *Churchill v Merthyr Tydfil CBC [2023] EWCA Civ 1416; [2024] 1 W.L.R. 3827*. Although the latter was primarily concerned with the power of the court to order ADR, there is a considerable overlap between the power of the court to order ADR and the costs issues where ADR is declined. Further, the recent decision identifies parts of the *Halsey* decision which it regarded as non-binding or obiter.

For cases following *Halsey*, see *Reed Executive Plc v Reed Business Information Ltd [2004] EWCA Civ 887; [2004] 1 W.L.R. 3026*, CA, *Wills v Mills & Co Solicitors [2005] EWCA Civ 591*, *Daniels v Commissioner of Police of the Metropolis [2005] EWCA Civ 1312*, *Hickman v Blake Lapthorn [2006] EWHC 12 (QB)* (Jack J) (reviewing the authorities and summarising the principles). This matter is dealt with in commentary following r.44.3 (court's discretion and circumstances to be taken into account when exercising discretion as to costs), in particular in para.44.3.13. In a given case it is quite conceivable that, before legal proceedings were commenced, the parties may have made a genuine but unsuccessful attempt to reach agreement on an ADR procedure or, indeed, may have participated in such a procedure in an unsuccessful (or only partly successful) effort to settle their dispute. The failures in these respects should not blind the parties or the court to the possibility that an opportunity may arise during the pre-trial process (or even on appeal) when an ADR procedure might yet be used to good effect. See *Heyes v Holt [2024] EWHC 779 (Ch)* (at [50]) and *Francis v Pearson [2024] EWHC 605 (KB)* (at [87]–[92]).

In *Societe Internationale de Telecommunications Aeronautiques SC (SITA) v Wyatt Co (UK) Ltd [2002] EWHC 2401 (Ch)* (Park J) it was held that, in the circumstances, it was reasonable for a Pt 20 defendant to refuse to participate in a mediation between the claimant and the defendant (which led to a compromise), or a mediation between themselves and the claimant, offered by the claimant shortly before trial of the Pt 20 claim at which judgment was given in their favour, and therefore they should not be deprived of any part of their costs. Other cases in which the imposing of a costs sanction on a party for their failure to take up an offer of mediation was countenanced, and in some instances effected, include: *Hurst v Leeming [2002] EWHC 1051 (Ch); [2003] 1 Lloyd's Rep. 379* (Lightman J), *R. (Cowl) v Plymouth City Council [2001] EWCA Civ 1935; [2002] 1 W.L.R. 803*, CA, *Leicester Circuits Ltd v Coates Brothers Plc [2003] EWCA Civ 333*.

In *Reed Executive Plc v Reed Business Information Ltd [2004] EWCA Civ 159* the Court of Appeal invited submissions on the relevance to the question of costs of the defendants' refusal of a number of offers to go to mediation. After noting that the

defendants had engaged in serious settlement negotiations, Jacob LJ said (para.167) that such negotiations were not the same as mediation as:

> "… a good and tough mediator can bring about a sense of commercial reality to both sides which their own lawyers, however good, may not be able to convey."

In a similar vein, in *Garritt-Critchley v Ronnan and Solarpower PV Ltd [2014] EWHC 1774 (Ch)* and *Bristow v Princess Alexander Hospital NHS Trust [2015] 11 WLUK 67*, the court rejected arguments that a refusal to mediate was reasonable because the parties were too far apart. In *Garritt*, HHJ Waksman QC said (para.22) that:

> "Parties don't know whether in truth they are too far apart unless they sit down and explore settlement. If they are irreconcilably too far apart, then the mediator will say as much within the first hour of mediation. That happens very rarely in my experience."

See also *TMO Renewables Ltd (In Liquidation) v Yeo [2022] EWCA Civ 1409* where one of the parties dismissed a proposal to mediate as "an expensive waste of time". Males LJ and Asplin LJ, rejecting this, were of the view that the case was ideally suited to mediation. "Instead" added Males LJ:

> "… because none of the parties was prepared to be reasonable, they marched on with colours flying to the disaster which the trial proved to be for them all" (at paras 38 and 40).

In contrast, however, in *Patel v Barlows Solicitors (A Firm) [2020] EWHC 2795 (Ch)*, HHJ Mithani QC found that a party reasonably refused mediation because its lawyer:

> "... felt that mediation was unlikely to be productive because of how far apart the parties were in terms of what they would be prepared to accept. In those circumstances, it is difficult for me to see what else could have been achieved by mediation. I cannot see any basis upon which the Claimants can be criticised for refusing to mediate when without prejudice communication had been attempted and proved wholly unsuccessful. Either party could have improved on the offer which they had made. Neither did so. There was, therefore, no reason to explore mediation any further. It was unlikely that either party would have been prepared at any mediation meeting to make the sort of concessions which would have resulted in the resolution of the Claim."

In *Vale of Glamorgan Council v Roberts [2008] EWHC 2911 (Ch)* an unsuccessful litigant claimed costs against the successful defendant local authority. His application did not succeed. The court noted that the defendant had not positively suggested mediation and said that it would be going too far to disallow costs incurred by a local authority because that authority did not initiate suggestions for a mediation. Making contact with a mediation provider does not amount to an offer to mediate: *Park Promotion Ltd v Welsh Rugby Union Ltd [2012] EWHC 2406 (QB)*.

In *S v Chapman [2008] EWCA Civ 800; [2008] E.L.R. 603; (2008) 152 S.J.L.B. 29* the court found that the defendant was entitled to await the outcome of its application to strike out before deciding whether or not it was either necessary or advantageous to enter into mediation of the substantive issues with the claimant. There was no reason to depart from the normal principle that costs followed the event. See also *Mobiqa Ltd v Trinity Mobile Ltd [2010] EWHC 253 (Pat); (2010) 33(4) I.P.D. 33025*:

> "... whilst it might be said that a resolute refusal to mediate or to take part in any discussions might attract adverse criticism, that certainly does not seem to have happened in the present case. Both of the suggestions of meetings were taken up and in relation to the offer of mediation, the defendant's suggestion was simply that it should proceed, once the parties' expert evidence had been exchanged, so it could be seen whether in fact the claimant had any case" (per Floyd J, para.29).

See also *National Museums and Galleries On Merseyside Board of Trustees v AEW Architects and Designers Ltd [2013] EWHC 3025 (TCC)*. The court will, however, disregard an offer to mediate which is made subject to an unreasonable pre condition: *R (Royal Free London NHS Foundation Trust) v Secretary of State for the Home Department [2013] EWHC 4101 (Admin)* and

in *Ineos Upstream Ltd v Boyd [2023] EWHC 1756 (Ch)* the court found that the circumstances were such that no discernible weight could be attached to the offer to mediate.

For an application, and discussion, of the concept of "unreasonable refusal to mediate" and the principles established in *Halsey* see *The Claimants appearing on the Register of the Corby Group Litigation v Corby DC [2009] EWHC 2109 (TCC)* where the court also considered the approach taken by Lightman J in *Hurst v Leeming* (see above). See also *Gill v Woodall [2009] EWHC 834 (Ch)*. In *Swain Mason v Mills & Reeve [2012] EWCA Civ 498*, *Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB [2012] EWHC 749 (Comm)* and *ADS Aerospace Ltd v EMS Global Tracking Ltd [2012] EWHC 2904 (TCC)* the court found parties who had refused to mediate were not unreasonable. In Swain, it was held, following *Halsey*, that where a party reasonably believed that he had a watertight case, that might well be a sufficient justification for a refusal to mediate, even if on some issues the defence did not succeed (see also the discussion about the merits of the case at para.14-6 above).

In *Primeview Developments Ltd v Ahmed [2017] UKUT 57 (LC)* the Upper Tribunal (Lands Chamber) decided, by reference to *Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576*, that a party's refusal to mediate was not unreasonable. The critical issues were that the prospects of success were slight and the costs of mediation were likely to be disproportionately high.

A claim that a party has a strong defence, however strong, is not of itself a guarantee that a court will find a refusal to mediate was reasonable, as the defendant found in *DSN v Blackpool Football Club Ltd [2020] EWHC 670 (QB)* where Griffiths J outlined (at para.28) the potential benefits that could arise from a mediation notwithstanding the defendants' views on the merits. (Followed in *Cabo Concepts Ltd v MGA Entertainment (UK) Ltd [2025] 7 WLUK 21*.) In *Stoney-Andersen v Abbas [2023] EWHC 2964 (Ch)* HHJ Paul Matthews (sitting as a Judge of the High Court) said, with reference to arguments about the merits of the case when considering ADR:

> "It is a commonplace that both sides are told by their lawyers that they will win. But they cannot both be right. Indeed, sometimes, both sides are wrong. The combination of litigation risk and irrecoverable costs almost always makes it worthwhile considering mediation and other ADR."

It is often the case, where a party has refused mediation, that the court has a number of factors to consider, in relation to r.44.3(4)(a) and the parties' conduct, rather than (as in *Halsey*) the single issue of whether refusal was unreasonable. The overall nature of the court's discretion on costs can be seen in *Multiplex Construction (UK) Ltd v Cleveland Bridge (UK) Ltd [2008] EWHC 2280*, TCC where Jackson J made a comprehensive review of costs authorities from which he derived (at para.72) eight principles. These included:

> "(v) In many cases the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order
>
> (vi) In considering the circumstances of the case the judge will have regard not only to any part 36 offers made but also to each party's approach to negotiations (insofar as admissible) and general conduct of the litigation."

In two cases, *Whitecap Leisure Ltd v John H. Rundle Ltd [2008] EWCA Civ 1026* and *Shah v Joshi [2008] EWHC 1766 (Ch)*, the court's overall approach to costs was seen. Features of the parties' conduct included the following. In *Whitecap*, the conduct of each party was described as having been as bad as the other, although one party's obdurate attitude was more striking than the other's conduct, and an offer of mediation was rejected as was a very favourable Pt 36 offer. In *Shah*, mediation was proposed but flatly rejected, as was a Calderbank offer. The parties did undertake mediation shortly before trial, but it was unsuccessful. On the first day of the trial, the judge emphasised to the parties the extreme desirability of a settlement but despite giving an extended adjournment to facilitate a settlement no agreement was reached. In *Whitecap* the court came to deal with costs and ordered that one party should recover only 80% of its costs of the appeal and that the costs of the claim and the costs of the appeal should be set off against each other. In *Shah* an application for indemnity costs in respect of a successful claims and counterclaim was only granted in part; the court took into account all the circumstances, including the losing party's attitude at the time when the other party first proposed mediation. These cases perhaps demonstrate that if a party rejects an offer of mediation, or fails to give ADR adequate consideration when following a pre-action protocol or completing the directions questionnaire, it will run the risk of an adverse costs order when costs are dealt with and the court considers the overall conduct of the litigation.

This was in fact the approach taken by the Court of Appeal in *Bray (t/a Building Co) v Bishop [2009] EWCA Civ 768* when it considered conduct in relation to costs and took into account a number of factors, including one party's rejection of a Pt 36 offer

and the other's refusal to engage with a suggestion of mediation. See also *Sonmez v Kebabery Wholesale Limited [2009] EWCA Civ 1386*, *Fitzroy Robinson Ltd v Mentmore Towers Ltd [2010] EWHC 98 (TCC)*, *Brookfield Construction (UK) Ltd (formerly Multiplex Constructions (UK) Ltd) v Mott MacDonald Ltd [2010] EWHC 659 (TCC)*, *Kayll v Rawlinson [2010] EWHC 1789 (Ch); [2010] W.T.L.R. 1479*, *Oliver v Symons [2011] 4 WLUK 427*, *Camertown Timber Merchants Ltd v Sidhu [2011] EWCA Civ 1041*, *Nelson's Yard Management Co v Eziefula [2013] EWCA Civ 235*, *Bristow v Princess Alexander Hospital NHS Trust [2015] 11 WLUK 67*, 4 November 2015, unrep., *Flanagan v Liontrust Investment Partners LLP [2016] EWHC 446 (Ch)*, *Kupeli v Kibris Turk Hava Yollari Sirketi (t/a Cyprus Turkish Airlines) [2016] EWHC 1478 (QB)*, *NJ Rickard v Holloway [2015] EWCA Civ 1631*, *Car Giant Ltd v Hammersmith LBC [2017] EWHC 464 (TCC)*, *Inchbald v Inchbald [2017] EWHC 616 (Ch)*; *MacInnes v Gross [2017] EWHC 127 (QB)*, *Lloyds Bank PLC v McBains Cooper [2017] EWHC 30 (TCC); [2017] 1 Costs L.O. 95*, and *Burgess v Penny [2019] EWHC 2034 (Ch)* and *Wales (t/a Selective Investment Services) v CBRE Managed Services Ltd [2020] EWHC 1050 (Comm)* and *Geoquip Marine Operations AG v Tower Resources Cameroon SA [2022] EWHC 1408 (Comm)*.

In *Marsh v Ministry of Justice [2017] EWHC 1040 (QB)* the claimant bettered a Part 36 Offer in circumstances where the defendant had refused to engage in mediation notwithstanding an order that the parties must consider settlement by ADR, including mediation. (The order was in the form of Standard Directions Model Paragraph A03-ADR.doc https://www.justice.gov.uk/courts/procedure-rules/civil/standard-directions/list-of-cases-of-common-occurrence/menu-of-sd-paragraphs.) The court ordered the defendant to pay indemnity basis costs and awards under CPR r.36.17. The following two cases make no reference to mediation but demonstrate how the court is prepared to award costs sanctions where there has been a failure to engage properly in settlement negotiations: *Jordon v MGN Ltd [2017] EWHC 1937 (Ch)* and *Dickinson v Cassillas [2017] EWCA Civ 1254*. As Sir Geoffrey Vos, then Chancellor of the High Court, stated in *OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195* (para.29): "The parties are obliged to conduct litigation collaboratively and to engage constructively in a settlement process." For a forensic analysis of a challenge about whether a party had failed to engage in settlement discussions see *Pallett v MGN Ltd [2021] EWHC 76 (Ch)*. See also *TMO Renewables Ltd (In Liquidation) v Yeo [2021] EWHC 2773 (Ch)* at [65] and *Moradi v Home Office [2022] EWHC 3125 (KB)*.

In *Roundstone Nurseries Ltd v Stephenson Holdings Ltd [2009] EWHC 1431 (TCC)* mediation was not declined initially but one party unilaterally cancelled an imminent pre-action mediation. The TCC held that this was wrong, that it was an agreed part of the pre-action process in which that party was obliged to participate, and that the other party was entitled to its costs thrown away by the late cancellation (albeit on a standard, not indemnity, basis). In *Gresport Finance Ltd v Battaglia [2015] EWHC 2709 (Ch)* the court found that failure to attend a mediation, having agreed to do so, may be sufficient conduct, of itself, for the court to reject an application where that party is asking the court for relief on the ground that it is just to make the order sought.

In *Rolf v De Guerin [2011] EWCA Civ 78* Rix LJ reviewed the authorities (at [42] and [47]) before opining that in this small building dispute, on the facts, negotiation and/or mediation would have had reasonable prospects of success. He concluded that:

> "The spurned offers to enter into settlement negotiations or mediation were unreasonable and ought to bear materially on the outcome of the court's discretion (on the question of costs)."

Rix LJ noted that the party refusing negotiation/mediation wanted his day in court and that such a wish had been cited as a reason why the courts have been unwilling to compel parties to mediate rather than litigate. To that he said that did not seem to him to be an adequate response to a proper judicial concern that parties should respond reasonably to offers to mediate or settle and that their conduct in this respect can be taken into account in awarding costs. See also *Seef v Ho [2011] EWCA Civ 186* and *Southern Counties Fresh Foods Ltd, Re [2011] EWHC 1370 (Ch); (2011) 161 N.L.J. 882* for further examples of a refusal of mediation influencing the ultimate costs order.

The issue for Mr Recorder Furst QC in *PGF II SA v OMFS Co [2012] EWHC 83 (TCC)* was whether a failure to respond to an offer to mediate amounted to an unreasonable refusal that should sound in costs. Having considered the factors set out in *Halsey* he decided that it did. In particular he found that that there were reasonable prospects that a mediation would have been successful and that the parties, being well-advised commercial parties, with the benefit of lawyers, would have been able to reach an accommodation ([42]). The absence of expert evidence was cited as justification for a failure to mediate and to this he responded:

> "Experience suggests that many disputes, …are resolved before all material necessary for a trial is available. Either parties know or are prepared to assume that certain facts will be established …. The rationale behind the Halsey decision is the saving of costs and this is achieved (or at least attempted) by the parties being prepared

> to compromise without necessarily having as complete a picture of the other parties' case as would be available at trial" ([45]).

The court also made it clear that a party should put reasons for refusing mediation in writing at the time adding:

> "… the court should be wary of arguments only raised in retrospect as why a party refused to mediate or as to why it cannot be demonstrated that a mediation would have had a reasonable prospect of success" ([44]).

This decision was subsequently upheld by the Court of Appeal (*PGF II SA v OMFS Co [2013] EWCA Civ 1288*). Briggs LJ found that silence in the face of an invitation to participate in ADR was, as a general rule, unreasonable and, as such, should be visited by a costs sanction. He went on to endorse the ADR Handbook that Jackson LJ had called for in his Costs Review. He added that 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. He concluded that:

> "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, even if a little more vigorous than I would have preferred, nonetheless operates pour encourager les autres."

See also *Northamber Plc v Genee World Ltd [2024] EWCA Civ 428* where a case management order required the parties to consider settling by alternative dispute resolution and provide written reasons for rejecting any ADR proposal. An offer to mediate was met with silence. No written reasons were given. The court imposed a proportionate costs penalty (at para.107) and also opined that there was no obligation on a party offering ADR to chase the other party for a response (at para.105)

In *Thakkar v Patel [2017] EWCA Civ 117* the Court of Appeal developed PGF. Here the defendants did not ignore or refuse an offer to mediate, "but they dragged their feet and delayed until eventually the claimants lost confidence in the whole ADR process". Jackson LJ stated:

> "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."

The court enumerated the factors that suggested there were good prospects of a successful mediation in this case.

It is not, however, the case that silence in response to an offer to mediate will always attract a costs sanction: see *R. (Crawford) v Newcastle Upon Tyne University [2014] EWHC 1197 (Admin)* and *AL v A [2021] EWHC 1761 (QB)* at [43], where Robin Knowles J noted a proposal to mediate an interlocutory dispute had met with silence, did not impose a penalty but added "I trust this will not happen again". See also *Jones v Tracey [2023] EWHC 2256 (Ch)* at [27]. Also, a party that refuses to mediate but then changes its mind may escape a costs sanction. It is "not to be fixed with a once stated but changed intention in relation to mediation": *Murray v Bernard [2015] EWHC 2395 (Ch); [2015] 5 Costs L.O. 567*.

The Court of Appeal in PGF II SA also made it clear that a party should put reasons for refusing mediation in writing at the time and endorsed the view of the court below:

> "… the court should be wary of arguments only raised in retrospect as why a party refused to mediate or as to why it cannot be demonstrated that a mediation would have had a reasonable prospect of success" (Briggs LJ, paras 33–40).

When considering the issue of costs sanctions in relation to mediation it should be borne in mind that senior members of the judiciary frequently draw attention to the potential of mediation, particularly where costs are out of all proportion to what is at stake. See for example the observations by Ward LJ:

> "If the claimants are right in their assessment of their costs, then, even without a success fee, the costs incurred by them exceed the sum over which battle has been joined. The great British public must think that something has gone wrong somewhere if litigation is conducted in that way. I share that sense of horror. One answer has to be to engage in mediation constructively and at the very earliest stage" (*Shovelar v Lane [2011] EWCA Civ 802; [2012] 1 W.L.R. 637; [2011] 4 All E.R. 669*).

> "As I observed at the outset of this judgment, the costs are out of all proportion to what is at stake, particularly from (the defendant's) perspective. The legal process appears to have caused the parties to become entrenched in their positions rather than seeking common ground. I suspect that the costs will themselves quickly have become an obstacle to settlement ... [I]n future disputes of this nature the possibility of mediation should be explored as soon as is practicable" (*Samuel Smith Old Brewery (Tadcaster) v Lee (t/a Cropton Brewery) [2011] EWHC 1879 (Ch); [2012] F.S.R. 7; [2012] Bus. L.R. D97*).

See also *Page v Hewetts Solicitors [2013] EWHC 2845 (Ch); [2014] W.T.L.R. 479* (at [61]), *Grace v Black Horse Ltd [2014] EWCA Civ 1413; [2015] 3 All E.R. 223; [2015] 2 All E.R. (Comm) 465* (at [54]) and *Jones v Tracey [2023] EWHC 2256 (Ch)* (at [27]).

In *Garritt-Critchley v Ronnan [2014] EWHC 1774 (Ch); [2015] 3 Costs L.R. 453* HHJ Waksman QC sitting as a Judge of the High Court examined and dismissed a series of arguments that a refusal of mediation had been reasonable and awarded indemnity costs by way of sanction. A costs sanction for unreasonable refusal to mediate was also imposed in *Lakehouse Contracts Ltd v UPR Services Ltd [2014] EWHC 1223 (Ch)*. In *Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd [2014] EWHC 3148 (TCC); [2015] 3 All E.R. 782* Ramsey J decided that an unreasonable refusal to mediate should not result in a costs sanction because of other relevant conduct by the refusing party. There was a similar result in *Courtwell Properties Ltd v Greencore PF (UK) Ltd [2014] EWHC 184 (TCC); [2014] 2 Costs L.O. 289; [2014] C.I.L.L. 3481* and in *Richards v Speechly Bircham LLP [2022] EWHC 1512 (Comm)*, but contrast these cases with *Lakehouse Contracts Ltd v UPR Services Ltd [2014] EWHC 1223 (Ch)* where again there were conduct issues on both sides. In *Lynn v Borneos LLP (t/a Borneo Linnels) [2014] 1 WLUK 783*, 30 January 2014, unrep. HHJ Cooke found that there was an unreasonable refusal to mediate notwithstanding that the action was fiercely contested and that it was unlikely that a mediation would have resulted in settlement. The latter factor was taken into account in exercising discretion about the level of the sanction which, in the circumstances, was to deny the successful party 40% of its costs.

Similarly, in *Laporte v Commissioner of Police of the Metropolis [2015] EWHC 371 (QB); [2015] 3 Costs L.R. 471* the defendant, who was successful on every substantive issue, was awarded only two thirds of his costs. This was the consequence of the court's finding that the defendant had failed, without adequate justification, to fully and adequately engage in the ADR process, notwithstanding that the outcome of such process was not certain.

In *Rana v Tears of Sutton Bridge [2015] EWHC 2597 (QB)* the court found that the defendant had, in all the circumstances, unreasonably failed to engage with ADR. His Honour Judge McKenna added:

> "I am not impressed by their arguments that simply because liability was still in issue and because there was not sufficient information as to the quantification of the loss of profits claim, still less that disclosure had not taken place, an attempt at alternative dispute resolution should not have taken place."

In *OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195; [2017] 1 W.L.R. 3465; [2018] 1 All E.R. 703* Vos LJ said, at para.41, that a:

> "... blank refusal to engage in any negotiating or mediation process, ... to seek to frustrate a claimant's attempts to reach a compromise solution should be marked by the use of the court's powers to discourage such conduct."

In *EAXB v University Hospitals of Leicester NHS Trust* (unrep.) the court considered the conduct of a party during a joint settlement meeting. The defendant instigated the meeting but then took the position of making no offers. The claimant successfully argued that such an approach was entirely inappropriate and this was one of the reasons why the claimant secured indemnity costs

(See https://www.kingschambers.com/case/satinder-hunjan-qc-successful-in-establishing-liability-and-securing-indemnity-costs-for-downs-syndrome-arising-out-of-a-failure-for-organising-urgent-appointments-for-a-combined-test/).

In *Webster v WPP Group (UK) Ltd [2021] EWHC 2153 (Comm)* the court criticised a party's conduct in the lead-up to a mediation and reflected this in an indemnity costs order. A similar penalty was imposed on a party that reneged on an agreement made at mediation in *Denny v Babaee [2023] EWHC 1490 (TCC)*.

Disputes About Costs

14-16 ADR is as relevant to disputes about costs as it is to all other types of litigation. This proposition is reinforced by the recent cases of *Hadley v Przybylo [2023] EWHC 1392 (KB)* and *Churchill v Merthyr Tydfil CBC [2023] EWCA Civ 1416*, in addition to those mentioned below.

In particular an unreasonable refusal to mediate a costs dispute may, and in a number of cases has, resulted in a costs sanction. In *Lakehouse Contracts Ltd v UPR Services Ltd [2014] EWHC 1223 (Ch)* a failure to mediate was taken into account in dealing with the costs of a winding-up petition. In *Morris v The County Court*, 2 February 2015, unrep. (Kingston upon Hull) the defendant paying party received two CPR r.47.20 offers prior to a detailed assessment but did not respond to them. The District Judge found that the defendant failed to make any offer and/or to actively consider dispute resolution and concluded that this was a conduct issue. He said, following *Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002* and *PGF II SA v OMFS Co 1 Ltd [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386*, that the parties were expected to engage in alternative dispute resolution. He considered it likely that further mediation could have achieved a far speedier conclusion and at less cost and concluded that the defendant's conduct was also conduct contrary to the overriding objective.

See also *Reid v Buckinghamshire Healthcare NHS Trust [2015] 10 WLUK 752*, 28 October 2015, unrep., and *Bristow v Princess Alexandra Hospital NHS Trust [2015] 11 WLUK 67*, 4 November 2015, unrep.

The fact that disputes about costs are being mediated is demonstrated by *Sugar Hut Group Ltd v A J Insurance Service [2016] EWCA Civ 46; [2016] C.P. Rep. 19*: the Court of Appeal judgment noted that Property Damage costs in the matter were agreed at a mediation.

In *Ineos Upstream Ltd v Boyd [2023] EWHC 1756 (Ch)* the party refusing to mediate a costs dispute was not penalised because of the circumstances in which the offer was made.

The significance of Hadley v Przybylo [2023] EWHC 1392 (KB)

14-17 As mentioned above, Master Victoria McCloud ordered the parties in a personal injury claim to engage in ADR regarding a complex disputed costs budget (para.14-8). This bold order was made before Churchill was decided. As reported by the Court of Appeal (when there was an appeal on another point in Hadley) "The Master ordered that the parties engage in ADR in respect of the future costs. They did so successfully, and leading counsel on both sides stressed the value and economy of that exercise." (*[2024] EWCA Civ 250* at [9] (Coulson LJ)).

Worcester v Hopley [2024] EWHC 2181 (KB) and *Jenkins v Thurrock Council [2024] EWHC 2248* give rise to the prospect that parties might agree, or be encouraged or ordered, to use an ADR process to explore agreement of costs budgets and or directions, rather than wait for a lengthy period until directions and decisions can be given at a Costs and Case Management Conference. In both cases the focus was on the appropriate order for costs where the claimants' costs budgets were significantly reduced at Costs Management Hearings following Case Management Hearings. The purpose in arranging these hearings separately was to facilitate further discussion and negotiation about budgets. The consequence of the parties not doing this to the court's satisfaction was that the claimant suffered adverse costs orders.

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4. - ADR, Confidentiality, Without Prejudice and “Mediation Privilege” in Relation to Mediation

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Volume 2

Section 14 - Alternative Dispute Resolution

Alternative Dispute Resolution

4. - ADR, Confidentiality, Without Prejudice and “Mediation Privilege” in Relation to Mediation

14-18 It is very important, for reasons of public policy, that communications between parties to a mediation, and between those parties and the mediator, remain private and confidential. The courts will, generally, be ready to reinforce the cloak of confidentiality under which settlements are reached:

> “... communications made with a view to an amicable settlement ought to be held very sacred; for if parties were to be afterwards prejudiced by their efforts to compromise, it would be impossible to attempt an amicable arrangement of differences” (per Lord Scott, quoting Romilly M.R. in *Hoghton v Hoghton 51 E.R. 545*, 321 when discussing the “without prejudice” rule in *Ofulue v Bossert [2009] UKHL 16; [2009] 2 W.L.R. 749*).

In the context of ADR, Dyson LJ said in *Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002* (at [14]):

> “… parties are entitled in an ADR to adopt whatever position they wish and if, as a result the dispute is not settled, that is not a matter for the court … if the integrity and confidentiality of the process is to be respected, the court should not know, and therefore should not investigate, why the process did not result in agreement.”

In *Woodward v Santander UK Plc (formerly Abbey National Plc) [2010] I.R.L.R. 834*, Employment Appeal Tribunal, the rationale for confidential, without prejudice discussions was put (at [61]) in this way:

> “It is important that parties should be able to settle their differences (whether by negotiation or mediation) in conditions where they can speak freely. A claimant must be free to concede a point for the purposes of settlement without the fear that if negotiations are unsuccessful he or she will be accused for that reason of pursuing the point dishonestly. A respondent must be free to adhere to and explain a position, or to refuse a particular settlement proposal, without the fear that in subsequent litigation this will be taken as evidence of committing or repeating an act of discrimination or victimisation. And it is idle to suppose that parties, when they participate in negotiation or mediation, will always be calm and dispassionate. They should be able, within limits, to argue their case and speak their mind.”

Finally, in *Cumbria Waste Management Ltd v Baines Wilson (A Firm) [2008] EWHC 786 (QB)*, HHJ Kirkham said: “… the court should support the mediation process by refusing, in normal circumstances, to order disclosure of documents and communications within a mediation.” There are different ways in which mediation communications are protected and, as the cases mentioned below demonstrate, it can be important to differentiate between the concepts of confidentiality, “without prejudice”, legal professional privilege, and (if it exists) “mediation privilege”. The cloak of confidentiality is, in fact, multi-layered. These cases will also demonstrate that, and again this is for reasons of public policy, confidentiality is not absolute and there are exceptions whereby a court may wish to examine mediation matters that usually remain private and confidential. Such exceptions are limited in nature and guarded by the court. Essentially, when considering whether matters in relation to a particular mediation should remain confidential, the court will usually be involved in a careful public policy balancing act, weighing the importance of encouraging parties to settle against, for example, some kind of impropriety.

Paragraph 14-24 mentions some less obvious aspects relating to confidentiality.

Issues that relate to confidentiality in its broadest sense are of importance in various ways; they are relevant, for example, to lawyers advising a party before a mediation, to mediation providers when drafting agreements to mediate, to lawyers and mediators in relation to the conduct of a mediation and to lawyers and the courts when there are applications, post mediation, that the court should explore what took place at a mediation.

Correspondence Setting up ADR Meetings—Not Privileged

14-19 In *Jones v Tracey [2023] EWHC 2256 (Ch)*, Master Marsh held that a letter simply proposing mediation does not attract privilege, even if headed without prejudice. Also, the Civil Justice Council's working group on pre-action protocols has recommended that correspondence setting up mediations should not be privileged. (See CJC Review of Pre-Action Protocols–Final Report Part I Annex 2 Draft General Pre-Action Protocol (Practice Direction) and Joint Stocktake Template (at para.4.17): https://www.judiciary.uk/guidance-and-resources/civil-justice-council-publishes-final-report-on-pre-action-protocols.)

Confidentiality, Without Prejudice and "Mediation Privilege" in Relation to Mediation

14-20 In *Farm Assist Ltd (in liquidation) v Secretary of State for the Environment, Food and Rural Affairs [2009] EWHC 1102 (TCC); [2009] B.L.R. 399; 125 Con. L.R. 154* ("*Farm Assist 2*") the court gave guidance on these matters. It did so in the context of an application by a mediator to set aside a witness summons that was intended to require her to give evidence about what had taken place at a mediation. Having reviewed the authorities Ramsey J gave the following summary of the different concepts or principles that are applied in the protection of the privacy of mediation:

> "(1) Confidentiality:
>
> The proceedings (at a mediation) are confidential both as between the parties and as between the parties and the mediator. As a result even if the parties agree that matters can be referred to outside the mediation, the mediator can enforce the confidentiality provision. The court will generally uphold that confidentiality but where it is necessary in the interests of justice for evidence to be given of confidential matters, the Courts will order or permit that evidence to be given or produced.
>
> (2) Without Prejudice Privilege:
>
> The proceedings are covered by without prejudice privilege. This is a privilege which exists as between the parties and is not a privilege of the mediator. The parties can waive that privilege.
>
> (3) Other Privileges:
>
> If another privilege attaches to documents which are produced by a party and shown to a mediator, that party retains that privilege and it is not waived by disclosure to the mediator or by waiver of the without prejudice privilege."

These three concepts of privilege will be explored in more detail below.

The mediator's application in this case to set aside the witness summons was dismissed for a number of reasons: the parties had, as they were entitled to do, waived the without prejudice privilege and, although the mediator was on the face of it entitled to enforce the confidentiality provision in the Mediation Agreement, it was held that this was: "… a case where, as an exception, the

interests of justice lie strongly in favour of evidence being given of what was said and done (at the mediation)." These findings, however, had no practical consequences as the mediator did not have any relevant notes or any recall of the issues; further, the case went on to settle in any event. *Farm Assist 2* has attracted the attention of mediators and has resulted in the publication by the Civil Mediation Council of two Guidance Notes "Mediation Confidentiality—Guidance Note 1" and "Chairman's Note on Farm Assist v DEFRA".

In *Wedgwood v Hosein [2024] EWHC 1836 (Ch)* Master Marsh (sitting in retirement) provided a brief exposition on mediation confidentiality. The context was an application for Beddoe relief, but the passages referred to below are of general application:

> "17.Caution should be exercised before there is any encroachment upon the confidentiality of a mediation, which will be governed by the mediation agreement. It may be permissible, depending upon the express or implied terms of the agreement, to refer to offers made during the mediation; but even this cannot be taken for granted. Offers made outside of mediation can be referred to in the context of a Beddoe application but it does not necessarily follow that the court may be referred to offers that are made within the scope of the mediation agreement.
>
> 18.The parties to a Beddoe application will need to consider the contractual obligations they have entered into carefully before referring to any aspect of the mediation. Unless the agreement expressly permits a party to reveal, to a greater or lesser degree, confidential information relating to the mediation, it will be wise for consent to be sought from all parties to the agreement, including the mediator. The position is even more sensitive concerning information shared or discussions in open or private sessions during the mediation. It is doubtful whether it will ever be appropriate, even with full consent, to place such matters before the court."

Confidentiality

14-21 As in *Farm Assist 2*, most agreements to mediate include clauses providing that, in addition to the mediation being conducted on a without prejudice basis, the parties and the mediator are required to treat the proceedings as confidential. In *Farm Assist 2* Ramsey J also found that the confidentiality would have been implied, even if the mediation agreement had not agreed it expressly.

In concluding that the court can override such confidentiality, where it is necessary in the interests of justice, the court in *Farm Assist 2* took into account on the following passage in Toulson and Phipps on Confidentiality 2nd ed. (2006):

> "Generally speaking, confidentiality is not a bar to disclosure of documents or information in the process of litigation, but the court will only compel such disclosure if it considers it necessary for the fair disposal of the case: see … *British Steel Corporation v Granada Television Ltd [1981] A.C. 1096*" (para.17-001).

If there is an explicit agreement on confidentiality it will, as with any other type of agreement, fall to be construed by the court. In *Farm Assist 2* the confidentiality provisions were narrowly drawn and not as wide as the mediator might have wished.

Another particular point clarified by this case was the finding that the mediator could enforce the provisions relating to confidentiality, as against the parties. This means that where, as in *Farm Assist 2*, the parties have waived without prejudice privilege the mediator may nevertheless be able to require that confidentiality will be maintained. (As in *Farm Assist Ltd*, the Court may not always treat the mediator's word on this issue as decisive: see the comment by Nicol J in *Commodities Research Unit International (Holdings) Ltd v King and Wood Mallesons LLP [2016] EWHC 63 (QB)* at [21].)

Where there is a risk that a party may act in breach of the agreement that proceedings at a mediation be kept confidential they may be restrained by an injunction (*Venture Investment Placement Ltd v Hall [2005] EWHC 1227 (Ch); [2005] All E.R. (D) 224* and *Instance v Denny Brothers Printing Ltd (Interim Injunction) [2000] F.S.R. 869*.

How far does the duty of confidentiality extend? In *Aujla v Aujla [2022] 10 WLUK 191* the court examined the role of the mediator, concluding that there was not a:

> "… relationship between mediator and litigator that gave rise to a relationship of trust and confidence sufficient to found an assertion of undue influence. A mediator has a duty of confidentiality, but otherwise his role is simply to explore and facilitate the parties reaching their own settlement. He does not assume any fiduciary duties or invite either party to the dispute to repose in him the type of trust and confidence necessary for a finding of undue influence."

Without prejudice

14-22 It is apparent, from the analysis in *Farm Assist 2*, that part of the mediation cloak of confidentiality is based on without prejudice privilege, and that such privilege can be waived by the parties. For a straightforward application of the without prejudice rule to mediation communications see *Mason v Walton on Thames Charity [2010] EWHC 1688 (Ch)*. For a fuller statement of the without prejudice rule or concept see *Cutts v Head [1984] Ch. 290; [1984] 1 All E.R. 597*, CA; *Unilever Plc v The Proctor & Gamble Co [2000] 1 W.L.R. 2436; [2001] 1 All E.R. 783*; *Muller v Linsley & Mortimer [1996] P.N.L.R. 74* and Vol.1, para.31.3.40. There are, however, exceptions to this privilege (helpfully summarised by Robert Walker LJ in *Unilever Plc v Procter & Gamble Co [2000] 1 W.L.R. 2436*) which are of importance in the context of mediation and ADR. A number of these exceptions, which are largely based on public policy and the better administration of justice, appear in the following cases.

In *Muller*, the claimant's initial claim had been against his fellow shareholders in a private company following his dismissal as a director of that company. He settled that claim following without prejudice correspondence. Subsequently, he sued the solicitors who had advised him in the initial claim, alleging negligence. It was held that the without prejudice correspondence in the initial claim was disclosable in the subsequent claim. The public policy reasons that would have applied to prevent disclosure in the initial claim did not apply in the context of the subsequent claim: any without prejudice statements or offers made in the initial claim were kept from the court, in that claim, lest they be treated as an admission of liability. Once that claim has been concluded, however, that reason fell away. (See Vol.1, para.35.12.3 and also *Bradford & Bingley Plc v Rashid [2006] 1 W.L.R. 2066*.)

The decision in *Muller* seems applicable in circumstances where there is a subsequent claim following an earlier claim and there are relevant mediation communications in the earlier claim that do, on the face of it, appear to be subject to without prejudice privilege. This was the finding in *Cattley v Pollard [2007] EWHC B16 (Ch); [2007] EWHC 5561 (Ch)*. There the claimants in the initial action were the executors of an estate who sued various defendants, including the solicitors acting in the estate, for misappropriation of estate funds. A settlement was reached at a successful mediation involving some of the defendants. A subsequent action was bought by the claimants against one of the defendants in the initial action who had not been involved in the mediated settlement. The defendant in this subsequent action was concerned about the issue of double recovery by the claimants and sought disclosure of mediation documents. The defendants resisted disclosure, arguing that mediations will not succeed if confidentiality is broken. The court held, following *Muller* and taking account of the overriding objective to deal justly with cases, that there should be disclosure limited to such parts of the mediation bundle as were factually material to the defendant's argument relating to double recovery.

See also *Youlton v Charles Russell [2010] EWHC 1032 (Ch); [2010] Lloyd's Rep. P.N. 227*, *Curtis v Pulbrook [2011] EWHC 167 (Ch)* and *Commodities Research Unit International (Holdings) Ltd v King and Wood Mallesons LLP [2016] EWHC 63 (QB)*. These are solicitor's professional negligence claims where it was necessary for the court to enquire into the detail of proceedings of a prior mediation to deal with the subsequent claim against the solicitors.

In *Cumbria Waste Management Ltd v Baines Wilson (A Firm) [2008] EWHC 786 (QB); [2008] B.L.R. 330*, however, the court found that *Muller* did not apply and refused to order disclosure of confidential mediation documents for the purposes of a subsequent action. The parties to the mediation did not waive privilege and the court held that the documents should remain privileged, both on the basis that they were subject to without prejudice privilege and were confidential by virtue of the agreement to mediate. HHJ Kirkham said that the court should support the mediation process by refusing, in normal circumstances, to order disclosure of documents and communications within a mediation. The court found that the disclosure

sought here did not fall within the exception to the without prejudice rule set out in *Muller* and, further, noted that the court in *Muller* gave no consideration to the position of third parties.

In *Pentagon Food Group Ltd v B Cadman Ltd [2024] EWHC 2513 (Comm)* (9 August 2024), HHJ Tindal, sitting as a judge of the High Court, found that evidence of the matters dealt with at a mediation were admissible in relation to a subsequent, separate claim of misrepresentation which stemmed from the mediation. Two exceptions to without prejudice privilege applied. (See para.14-23 below.) The court went on to find that when interpreting a settlement agreement, which was concise and drafted quickly at the close of a mediation, the evidential context was perhaps more important than in a complex commercial contract negotiated in detail over a lengthy period. The context could include matters which would otherwise be without prejudice. Therefore, the circumstances in which the agreement was produced could be considered, even though that was in mediation (paras 68–69).

Without prejudice—exceptions

14-23 *Muller* and the applicability of the without prejudice rule fell to be considered by the House of Lords in *Ofulue v Bossert [2009] UKHL 16; [2009] 2 W.L.R. 749*. This property case concerned two sets of proceedings between the same parties and, in particular, without prejudice negotiations between the parties during the first set of proceedings. The House of Lords said that the without prejudice rule was based on both the public policy of encouraging the negotiated settlement of actions and the express or implied agreement of the parties that communications in the course of such negotiations should not be admissible in evidence. It was held that the rule did extend to without prejudice negotiations conducted during earlier proceedings involving an issue which was still unresolved. The court further found that, although there were exceptions to the rule where justice required it, as where it was necessary to prevent the rule being used to further impropriety, reasons of legal and practical certainty made it inappropriate to create a further exception to limit the protection to identifiable admissions. Lord Hope referred to Ormrod J's words in *Tomlin v Standard Telephones & Cables Ltd [1969] 1 W.L.R. 1378* when he said that the court should be very slow to lift the without prejudice umbrella unless the case for doing so is absolutely plain. Lord Neuberger explained that if the House of Lords created further exceptions to the without prejudice rule this would severely risk hampering the freedom parties should feel when entering into settlement negotiations. In *Briggs v Clay [2019] EWHC 102 (Ch)* a similar line was taken, the court providing a reminder that the without prejudice rule was broad in its effect, with narrow exceptions. The exceptions to the without prejudice rule deriving from the decision in *Muller* were considered in the context of a prior mediation.

Another well-established exception to the without prejudice rule is that it does not prevent the admission in evidence of what parties said to one another when the issue is whether or not such communications resulted in a concluded settlement agreement (see Vol.1, para.31.3.40). At the trial of such issue, the fact that such communications took place between the parties at a mediation does not confer on them a status distinct from any other without prejudice communications sufficient to take them outside the scope of the exception or otherwise to render them inadmissible (*Brown v Rice [2007] EWHC 625 (Ch); [2007] B.P.I.R. 305; [2008] F.S.R. 3*; *Oceanbulk Shipping and Trading SA v TMT Asia Ltd [2010] UKSC 44* and *Aujla v Aujla [2022] 10 WLUK 191*, at [8].)

As seen in *Farm Assist 2*, parties can waive their entitlement to without prejudice confidentiality and did so in *Chantry Vellacott v Convergence Group [2007] EWHC 1774*, *Carleton (Earl of Malmesbury) v Strutt & Parker (A Partnership) [2008] EWHC 424 (QB)* and *Pedriks v Grimaux [2021] EWHC 3448 (QB)* (at [13]). In *Carleton*, Jack J made adverse findings in relation to a party's recovery of costs on the basis of that party's conduct during a mediation. He said that "the claimant's position at the mediation was plainly unrealistic and unreasonable" and found that, had they made an offer which truly reflected their position, the mediation might have succeeded. Note, however, that without prejudice privilege is effectively regarded as a joint privilege and cannot be waived by one party alone (see *Somatra Ltd v Sinclair Roche & Temperley (No.1) [2000] 1 W.L.R. 2453; [2000] 2 Lloyd's Rep. 673*, referred to in Vol.1 at para.31.3.40).

In *Smith Group v Weiss*, 22 March 2002, unrep., the court followed Somatra (see above) when considering whether material, prepared for a mediation that did not result in a settlement, should retain its without prejudice status. It was held that the material should remain without prejudice save in clear and unequivocal circumstances.

The court had to consider whether in all the circumstances it was fair and just to allow a party to rely on the material.

Where the court directs under r.35.12 that there should be a discussion between experts and that they must prepare a statement for the court, any such statement is available for use in the proceedings and is not protected by the without prejudice privilege (see Vol.1, para.35.12.3 below). Consequently, where a mediation takes place after such order, it cannot be argued in subsequent proceedings before the court that the statement cannot be referred to, even though the direction was made by the court with an eye to assisting a contemplated mediation (*Aird v Prime Meridian Ltd [2006] EWCA Civ 1866; [2007] C.P. Rep. 18; [2007] B.L.R. 105*, CA). See also *Krishna Holdco Ltd v Gowrie Holdings Ltd [2025] EWHC 341 (Ch)*.

In *Farm Assist Ltd v Secretary of State [2008] EWHC 3079 (TCC); [2009] B.L.R. 80; [2009] P.N.L.R. 16* (the precursor to *Farm Assist 2*) the issue concerned legal advice privilege rather than the without prejudice concept. Party 1 sought to set aside the agreement resulting from a mediation on account of duress by party 2. Party 2 said that, as the allegations about duress went to party 1’s state of mind, it should be able to see the (usually privileged) documents containing the legal advice to party 1. It was held that disclosure be refused, there having been no waiver of legal advice privilege. In *Aujla v Aujla [2022] 10 WLUK 191*, however, the court did review the conduct of the mediation when dealing with an application to set aside an agreement resulting from a mediation on account of duress.

See also *Berkeley Square Holdings v Lancer Property Asset Management Ltd [2020] EWHC 1015 (Ch)* and *King v Stiefel [2021] EWHC 1045 (Comm)* for an example of where the court will review confidential mediation papers in subsequent proceedings. An example of a case where the court refused to permit a party relying on matters that took place at a mediation is *E (A Child) (Mediation Privilege), Re [2020] EWHC 3379 (Fam)*.

In *Pentagon Food Group Ltd v B Cadman Ltd [2024] EWHC 2513 (Comm)*, the court found (at [61]–[65]) that two exceptions to without prejudice privilege applied. These were the Unilever exception (*Unilever v Procter & Gamble [2000] 1 W.L.R. 2436*—unambiguous impropriety) and the Oceanbulk exception (*Oceanbulk Shipping & Trading SA v TMT Asia Ltd [2010] 3 W.L.R. 1424 (SC)*—admissibility of evidence of facts within the parties' common knowledge conveyed during without prejudice negotiations where relevant to interpreting contractual words).

As mentioned in para.14-15, correspondence setting up ADR meetings will probably treated as not privileged, even where it is marked Without Prejudice.

Without prejudice—threats

14-24 In *Ferster v Ferster [2016] EWCA Civ 717; [2016] C.P. Rep. 42* a without prejudice offer to sell shares for an increased amount, on the basis that alleged wrongdoing could lead to the company taking committal proceedings against the offeree, was held to amount to blackmail. The threat fell within the unambiguous impropriety exception to prejudice and the offeree was permitted to rely on it in his unfair prejudice petition. In *Holyoake v Candy [2016] EWHC 2119 (Ch)* a text message threat made during without prejudice negotiations ahead of a commercial trial had not amounted to unambiguous impropriety and was therefore not admissible in evidence. The threat did not amount to an abuse of a privileged occasion; it was no more than the sort of negotiating tactic that the parties to the hard-fought commercial litigation would have expected. See also *Interactive Technology Corporation Ltd v Ferster [2015] EWHC 3895 (Ch)*.

Without prejudice save as to costs

14-25 In *Savings Advice Ltd v EDF Energy Customers Plc [2017] 1 WLUK 179*, during costs proceedings subsequent to the main action, Master Howarth allowed a party to refer to costs information provided during a mediation of the main action. This was on the basis that the duty of confidence and without prejudice privilege existed to protect the disclosure of admissions or concessions made in negotiations, not costs information in the form of purely factual statements which had been disclosed “without prejudice save as to costs”. See also *Willers v Joyce [2019] EWHC 937 (Ch)*.

Mediation privilege

14-26 The question of “mediation privilege”, something wider than traditional without prejudice privilege, is discussed below.

This question fell to be considered in *Pentagon Food Group Ltd v B Cadman Ltd [2024] EWHC 2513 (Comm)*. This case was heard not long after *Churchill* and the amendments to the CPR in October 2024 (as mentioned in 14-1) and the court opined that, even though these developments enhanced the importance of ADR, this did not justify an enhanced form of "mediation privilege" beyond without prejudice privilege. The reasoning of HHJ Tindal, sitting as a judge of the High Court, was that, in the context of mediation, the without prejudice privilege duties of confidentiality can be enhanced by the parties' agreement to mediate, and their conduct, to impose duties of confidentiality over and above those flowing from without prejudice privilege. Those enhanced duties, he said, could even be raised by the mediator if called upon to give evidence, even if the parties both waived without prejudice privilege ([55]–[57] and [60]).

Historically, questions of mediation privilege arose in *Farm Assist 2* when Ramsey J, having considered “other privileges” (see (3) in para.14-12 above), noted that in H. Brown and A. Marriott ADR Principles and Practice, 2nd edn (London: Sweet & Maxwell, 1999) the authors discuss the possible existence of and desirability for a distinct privilege attaching to the mediation process:

> “It remains to be resolved definitively by the English Courts (if not by the legislature) whether there is a privilege attaching to the whole mediation process, including all communications passing within that process, whether the mediation relates to family matters, civil or commercial disputes or any other kind of issue” (para.22-088).

He went on to canvass the “… the need for a further ‘privilege’ which arises other than the Mediator’s right to confidentiality in relation to the mediation proceedings.” In *Brown v Rice [2007] EWHC 625 (Ch); [2007] B.P.I.R. 305; [2008] F.S.R.* the court commented, although it did not have to make a finding on the point, that:

> “It may be in the future that the existence of a distinct mediation privilege will require to be considered by either the legislature or the courts …”

Mr Justice Briggs, as he then was, has written on “Mediation Privilege?” in an authoritative two-part review in the New Law Journal (159 N.L.J. 506 and 159 N.L.J. 550). Having reviewed the various concepts of privilege in relation to mediation he goes on to develop a potential common law solution. This is based on a distinction between the facts that:

> “... a mediator will act as a conduit for the sharing of such information between the parties as is commonly shared in without prejudice negotiations: (shared information)”

and

> “... the important part of the mediator’s facilitative role (which) is to encourage the parties to share with him or her information, views, hopes and fears about the dispute which the party communicating them does not wish the other party to know, and which the mediator agrees to keep secret from the other party (mediator secrets).”

His thesis likens mediator secrets to legal professional privilege, on the basis that parties to disputes should be able to unburden themselves with absolute frankness to a mediator in the same way as with their legal advisers, and to argue that public policy may justify a new privilege strictly limited to mediator secrets. He adds that such a privilege would not be likely to interfere with the application to shared information in mediation of the recognised exceptions to the without prejudice principle, as occurred in both *Brown* and *Cattley*. Mr Justice Briggs supports the idea of a new privilege by referring to the ability of the common law to recognise a new form of privilege, where, in a new context, the public interest so requires, pointing out that a distinct form of non-status based privilege, in connection with matrimonial conciliation relating to children, has recently been recognised: see *Re D (Minors) (Conciliation: Disclosure of Information) [1993] Fam 231* at 238. He concludes:

> "There is in principle therefore good reason why the courts should now recognise that the undoubted public interest in facilitating the process of mediation as a desirable and often preferable means of dispute resolution, by comparison with the full panoply of a trial, justifies the identification of a narrow form of mediator secret privilege of the type described above. There is no reason why a party to a mediation should not be encouraged to be as frank with the mediator as with his or her legal adviser. The similarity with the underlying justification for legal professional privilege is therefore very close."

Mr Justice Briggs' call for a development in this area was made all the more timely by virtue of the fact that the EU Mediation Directive (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) carries the requirement that member states must ensure that, with reference to cross-border mediation, mediators must not be compellable to give evidence in civil proceedings or arbitration regarding information arising out of or in connection with a mediation, except where overriding considerations of public policy otherwise require, or where disclosure of the content of the mediation settlement agreement is necessary in order to implement or enforce it. The Directive is no longer, post-Brexit, operative in England and Wales.

Other aspects relating to confidentiality

14-27 There are other ways in which mediation confidentiality may be called into question including, for example, money laundering (Proceeds of Crime Act 2002), breaches of professional conduct, insolvency proceedings in circumstances where the court reserves the power to veto settlement agreements and, arguably, a mediation settlement involving a minor where court approval is required. Other examples might possibly include applications of the UK General Data Protection Regulation and the Data Protection Act 2018 and the Freedom of Information Act 2001. For a review of confidentiality in this area see "The practical significance of confidentiality in mediation" by Andrew Agapiou and Bryan Clark C.J.Q. 2018, 74.

In *Glencairn IP Holdings Ltd v Product Specialities Inc (t/a Final Touch) [2019] EWHC 1733 (IPEC)* the claimant had two similar intellectual property actions against separate defendants, and both of these instructed the same firm of solicitors. The claimant sought an order restraining the firm from acting for the defendant in the second action. This was on the grounds that the solicitors should not act in the second action because of what they had learned, in a mediation in the first action, of the claimant's negotiating position and the terms on which the claimant was prepared to settle. The court declined to grant the order. *Bolkiah v KPMG [1999] 2 A.C. 222* considered.

Mediation Costs—Recoverability

14-28 There are three important points regarding the recoverability of mediation costs (both the fees paid to the mediator and the costs and disbursements in preparing for and attending mediation) that need to be considered before a mediation takes place. The first concerns the provisions regarding costs in the mediation agreement (that is, the agreement which forms the contractual basis under which the mediation takes place), the second relates to recoverability generally and the third is concerned with the costs of mediations which take place pre-proceedings.

The costs provisions in a mediation agreement were considered in *National Westminster Bank Plc v Thomas Feeney and Linda Feeney [2006] EWHC 90066 (Costs)* and [2007] (Costs Appeal). Eady J held that the successful party could not recover the mediator's costs or its costs for preparing for and attending at the mediation because: (a) the mediation agreement entered in to by the parties on the mediation provider's standard terms was on the basis that the mediator's fee would be borne equally by the parties who would bear their own costs; (b) the Tomlin Order agreed when settlement was reached did not deal explicitly with the costs of the mediation; and (c) it was held that the Tomlin Order did not alter the mediation agreement. This approach was followed in *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd [2008] EWHC 413 (TCC); [2008] 2 All E.R. 1173; [2008] 1 B.C.L.C. 722*.

Subject to the provisions of the mediation agreement, mediation costs are, on the face of it, recoverable. In Feeney, Eady J said that:

> "... as a matter of general principle, costs incurred in a mediation would form part of the costs of the action just as any reasonable costs of negotiation would (see Costs Practice Direction para.4.6(8))."

Whether mediation costs are recoverable in pre proceedings mediations, however, appears to depend on both the provisions of the mediation agreement (see above) and whether or not the mediation took place as part of the pre-action protocol work. This is important, because, in accordance with the pre-action protocols, mediations are increasingly carried out pre-proceedings. The cases dealing with this issue have involved the construction of s.51 of the Senior Courts Act 1981. In *Lobster* Coulson J was considering mediation costs as one aspect of an application for security for costs and he put forward a number of reasons for his view that the costs of the pre-action mediation were not recoverable:

> "16. First, unlike the costs incurred in a pre-action protocol, I do not believe that the costs of a separate pre-action mediation can ordinarily be described as 'costs of and incidental to the proceedings' (pursuant to s.51 of the Senior Courts Act 1981). On the contrary, it seems to me clear that they are not. They are the costs incurred in pursuing a valid method of alternative dispute resolution. Those costs were incurred in a form of dispute resolution which had no connection to these proceedings, and which here took place 2.5 years before the proceedings even started."

In *McGlinn v Waltham Contractors Ltd [2005] EWHC 1419 (TCC); [2005] All E.R. 1126*, Judge Peter Coulson QC had also considered s.51 of the Senior Courts Act. He held that, although costs in respect of claims dropped by a claimant prior to the commencement of proceedings were not, in unexceptional circumstances, capable of amounting to costs "incidental" to the proceedings, the costs incurred in complying with a pre-action protocol may be recoverable as costs "incidental to" any subsequent proceedings. Further, in *Roundstone Nurseries Ltd v Stephenson Holdings Ltd [2009] EWHC 1431 (TCC); [2009] 5 Costs L.R. 787* the court, noting that a pre proceedings mediation was treated by the parties as an integral part of the pre-action protocol work, applied McGlinn and held that, as a matter of principle, costs incurred during the pre-action protocol process could be recovered as costs incidental to the litigation. The court did confirm that the costs of a separate, stand-alone pre-proceedings mediation or ADR process would not usually form part of the costs of, or incidental to, litigation and would not, therefore, be recoverable.

These decisions were discussed in *North Oxford Golf Club v A2 Dominion Homes Ltd [2013] EWHC 852 (QB); [2013] 3 Costs L.R. 509*. See also *Earl of Malmesbury v Strutt & Parker [2008] EWHC 424 (QB); 118 Con. L.R. 68; [2008] 5 Costs L.R. 736* and the comments on costs sanctions in relation to conduct at a mediation, above.

Multi-tier Dispute Resolution Clauses

14-29 Parties may enter into multi-tier dispute resolution clauses, which the courts are increasingly likely to uphold: see *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd [2019] EWHC 2246 (TCC); [2020] 1 ALL E.R. (Comm) 786* and *Children's Ark Partnerships Ltd v Kajima Construction Europe (UK) Ltd [2022] EWHC 1595 (TCC)* at [39]–[83].

See, however, *Kajima Construction Europe (UK) Ltd v Children's Ark Partnership Ltd [2023] EWCA Civ 292* where the Court of Appeal held that a judge had been correct to conclude that a dispute resolution procedure in a construction contract had been unenforceable for uncertainty, and that even if it had been enforceable the proper exercise of discretion under CPR r.11(1)(b) would have been to stay the claim rather than strike it out.

Miscellaneous Matters

14-30

Where the parties freely consent to arbitration there is unlikely to be a denial of access to a court within the meaning of ECHR art.6(1): *Deweer v Belgium (1979–1980) 2 E.H.R.R. 439*; *Axelsson v Sweden No.11960/86*, decision of 13 July 1990, unrep., EComHR, Pastore v Italy No.46483/*Pastore v Italy No.46483/99*, 25 May 1999, unrep., ECtHR, 2nd chamber. The key is the absence of restraint: ibid. Where the court was excessively forceful in its encouragement of the use of ADR, ECHR art.6(1) might be engaged. Any waiver of art.6 rights must be unequivocal: *Zumtobel v Austria (1994) 17 E.H.R.R. 116*, *Gustafson v Sweden (1998) 25 E.H.R.R. 623*. The authorities concerning art.6 and ADR were reviewed by the Court of Appeal in *Churchill v Merthyr Tydfil CBC [2023] EWCA Civ 1416*.

For the enforcement of a contractual ADR clause and comparison with an arbitration clause, see *Cable & Wireless Plc v IBM United Kingdom Ltd [2003] EWHC 316 (Comm); [2002] All E.R. (D) 277* (Colman J). In *Kaur v Malhi [2022] EWHC 2219 (Ch)*, the court effectively upheld a mediation clause in refusing to grant injunctive relief where parties had not attempted mediation in contravention of the clause.

Routinely, the courts will exercise their inherent jurisdiction to stay legal proceedings where there is an extant arbitration clause, in effect enforcing the agreement to arbitrate the dispute. See, for example, *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] A.C. 334*. Initially, it appeared that the English courts were tentative in edging towards the position that they should exercise their jurisdiction to stay legal proceedings where there was an agreement between the parties to negotiate or mediate (albeit an agreement that might be lacking in the certainty traditionally regarded as necessary for enforceability and perhaps even non-binding) (ibid.; cf., *Halifax Financial Services Ltd v Intuitive Systems Ltd [1999] 1 All E.R. (Comm) 303* (McKinnon J)). See further Vol.2, paras 9A-176 to 9A-177. See also *Ardentia Ltd v British Telecommunications Plc [2008] EWHC 2111 (Ch)* where one of the parties commenced proceedings before a tiered dispute resolution procedure had been exhausted. The procedure made an exception to the bar on commencing proceedings where, as was the case, interim relief was sought from the court. The court, however, having granted interim relief, then stayed the matter to enable the other issues between the parties to be dealt with under the procedure. See also *Sulamerica CIA Nacional de Seguros SA v Enesa Engenharia SA [2012] EWHC 42 (Comm); [2012] Lloyd's Rep. I.R. 198*: the agreement considered by the court was found to provide no unequivocal commitment to engage in mediation. The parties had merely agreed in general, non binding, terms to attempt to resolve differences by mediation. See also *Wah v Grant Thornton International Ltd [2012] EWHC 3198 (Ch); [2013] 1 All E.R. (Comm) 1226; [2013] 1 Lloyd's Rep. 11* and *Mann v Mann [2014] EWHC 537 (Fam); [2014] 1 W.L.R. 2807; [2014] 2 F.L.R. 928*.

In *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd [2014] EWHC 2104 (Comm); [2015] 1 W.L.R. 1145; [2014] 2 Lloyd's Rep. 457*, Teare J held that a dispute resolution clause in a contract which required the parties to seek to resolve a dispute by friendly discussions in good faith and within a limited period of time before the dispute could be referred to arbitration was enforceable. Further, in *R. (on the application of Med Chambers Ltd) v Medco Registration Solutions Ltd [2017] EWHC 3258 (Admin)* (*Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] A.C. 334* followed) the court had to consider an escalation procedure which included a referral to mediation. Lavender J found that this should have been followed, stating:

> " Prima facie, a Court should, in the absence of reasons to the contrary, refrain from exercising jurisdiction over a dispute which a party has promised to refer to a particular dispute resolution procedure."

In *NWA v FSY [2021] EWHC 2666 (Comm)*, however, it was held that the failure of a party to comply with a term of an arbitration agreement to seek to mediate a settlement of their dispute before referring it to arbitration did not result in the arbitral tribunal not having jurisdiction to hear the dispute. The failure was a potential breach of a procedural requirement going to the admissibility of the dispute for arbitration, and it was for the arbitrator to determine the consequence of any such breach.

In *Lancashire Schools SPC Phase 2 Ltd (formerly Catalyst Education (Lancashire) Phase 2 Ltd) v Lendlease Construction (Europe) Ltd (formerly Bovis Lend Lease Ltd) [2024] EWHC 37 (TCC)* the court accepted jurisdiction over a claim issued in breach of a mandatory adjudication clause in a private finance initiative project agreement. Although the clause made adjudication a condition precedent to litigation, there were good reasons for not staying or striking out the claim. The dispute was a multi-party one and was unlikely to be resolved by the bilateral adjudication mandated by the clause. Further, the claim was likely to be consolidated with ongoing proceedings, and to delay the disposal of both claims pending adjudication would be contrary to the CPR r.1.1 overriding objective.

See also *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd [2019] EWHC 2246 (TCC)*. Any agreement reached at mediation needs to be recorded carefully and arrangements need to be made to implement the agreement in a manner that reflects

the outcome intended to be agreed between the parties. This involves consideration of all aspects relating to implementation e.g. the impact of any taxation provisions that may arise during implementation e.g. the impact of s.2 of the Law of Property (Miscellaneous Provisions) Act 1989. See *Moore v Revenue and Customs Commissioners [2016] UKFTT 115 (TC)* and *Abberly v Abberley [2019] EWHC 1564 (Ch)*. In *ELM Property Finance Ltd v Johal [2018] EWHC 1000 (QB)* a plea of non est factum in relation to a settlement agreement reached at mediation was rejected. See also *Pedriks v Grimaux [2021] EWHC 3448 (QB)* where the court considered alleged breaches of a mediation settlement agreement in a commercial dispute relating to fiduciary relationships and estoppel by representation. In *Denny v Babaee [2023] EWHC 1490 (TCC)* indemnity costs were ordered after a party reneged on an agreement made at mediation.

An interesting practice point arose in *Savings Advice Ltd v EDF Energy Customers Plc [2017] 1 WLUK 179* , Master Howarth stated:

> “29. In my judgment it is imperative that when parties enter into a formal mediation or informal negotiations for settlement of a claim that they do so in the full knowledge of their opponent’s costs. The amount of the costs of litigation condition any subsequent negotiations or mediation that may follow.”

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