# Mediation Future

A quarterly newsletter for mediation and alternative dispute resolution matters

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# Welcome

**The litigation world never stands still and in this edition we look at how the system is changing following the Jackson reforms and consider the impact of recent Court decisions. We also examine the issue of access to justice and how increasing use of IT could improve this. As always, any feedback appreciated to enquiries@promediate.co.uk**

# Grasp the Nettle – Mediate Early

**The decision in Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537, [2013] 6 Costs L.R. 1008 has been softened by the case of DECADENT VAPOURS LTD CA (Civ Div) 04/07/2014.**

These cases involved the interpretation of the relief from sanction rule 3.9, which provided that parties in breach of a rule, practice direction or order need to apply for relief from sanction.

Following Mitchell, Judges were being encouraged to apply the new CPR "robustly". Parties were having to comply rigidly to the rules and to make applications for extensions of time if they could not comply with directions. The Courts were being swamped with applications for extensions of time and relief from sanction and dealing with satellite litigation.

The Court then introduced a new rule whereby the parties could agree to a buffer to agree to a 28 day extension of time for compliance with directions, as long as it does not affect the trial date. Rule 3.8 was amended (from 5 April 2014) to provide that parties may agree, in writing, to an extension of time, up to a maximum of 28 days without an application to the court. The parties may not make such an agreement,

if the court has ordered that such an agreement cannot be made, or if any extension of time agreed puts the hearing date at risk.

The case of Denton softens the harshness of the Mitchell decision in emphasising that on an application for relief from sanctions the court is required to consider all the circumstances of the case and that if the breach is a non-trivial one, and if there is no good reason for the breach that does not automatically mean that relief will be refused. The court is still obliged to consider all the circumstances of the case so as to deal with it justly.

In line with this, the factors (a) and (b) listed in CPR Part 3.9 (the need for litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance with rules, practice directions and orders) should be given "particular weight" by the courts rather than necessarily being of "paramount importance". The Court of Appeal also substituted a new test of "serious or significant" breach rather than the "trivial" wording used in Mitchell.

It was held that the need to comply with the rules and keep costs proportionate should be given "particular weight" whilst emphasising the need for the courts to consider the "third stage" referred to in Mitchell, being the need to consider all the circumstances of the case.

Parties to litigation are still left with considerable uncertainty about how a breach of a direction or order will affect them in a particular case, as it falls within the judge's discretion. There is, therefore, still an incentive to avoid proceedings and try to settle. In terms of timing, it is always better to offer to mediate before any problem with compliance with deadlines becomes apparent. A party that is prevented from continuing with litigation because of sanctions, lack of funding or any other reason, may be compromised in its ability to negotiate because it is negotiating from a weak position. Therefore, it is best to grasp the nettle and mediate early on before any of these issues arise. The best advice is to offer to mediate before proceedings commence and the parties are thrust onto the litigation conveyor belt.

# Mediation To The Rescue

## PHILLIP GARRITT-CRITCHLEY & ORS v (1) ANDREW RONNAN (2) SOLARPOWER PV LTD (2014) [2014] EWHC 1774 (Ch)


**In PGF ii SA – v – OMFS Company Limited [2013] EWCA CIV 1288, the claimant had made an offer to mediate and the defendant simply ignored it. The court held there was a refusal to mediate and the refusal was unreasonable. To ignore**

**or refuse mediation without explanation is now unreasonable conduct. If refusing to mediate, a party needs to inform the other party of specific reasons for refusal, which can then be challenged.**

In due course a Judge will review the correspondence and rule whether there was a good reason to refuse. If you want to mediate, it is advisable to send a carefully worded invitation to mediate, to rely upon later when it comes to costs. If you want to refuse, it is advisable to set out the reasons in correspondence, to justify the refusal in line with Halsey.

t does not stop there, however, as the High Court (Judge Waksman QC) has recently awarded indemnity costs against a defendant that persistently refused to mediate, with apparent justification, to include payment of £80,000 plus VAT on account of costs, in a case which settled for £10,000.

In Garritt-Critchley v Andrew Ronnan and Solarpower PV Ltd, which was a case which proceeded in the Manchester District Registry, the claimant made offers to mediate from the very start in the letter of claim. It repeated the offer a number of times right up to trial. In its response to the letter of claim, the Defendant said:

*"Both we and our clients are well aware of the penalties the court might seek to impose if we are unreasonably found to refuse mediation, but we are confident that in a matter in which our clients are extremely confident of their position and do not consider there is any realistic prospect that your client will succeed, the rejection is entirely reasonable."*

District Judge Khan even made an Ungley Order at a case management conference:

*"... the court considers the overriding objective would be served by the parties seeking to resolve the claim by mediation, the parties will no less than 21 days before trial file in a sealed envelope a witness statement which explains why a party refused to attend mediation."*

The defendant refused the offer and after a four day trial, but before judgment, the Defendants accepted a part 36 offer to pay the Claimant £10,000 and costs. Up until then, they had refused to mediate for various reasons including:

The Defendants thought they had a strong case:-

- They were so confident that they did not consider that it was necessary to instruct an expert, which the Judge considered took optimism to a new level!. In the Judge's view it was misconceived to consider that mediation was pointless because the sides were opposed on a black and white, binary issue. In the Judge's view, it was only exceptional cases where mediation might be ruled out such as where the party needed to resolve a point of law, considered that a binding precedent would of use, or where an injunction was sought. It was unrealistic for the defendant to say that they had "extreme confidence" in their case and the odds were so stacked in their favour that there was really no conceivable point in talking about settlement. If that had been their view, it was surprising that no application for summary judgment had been made.

There was considerable mistrust and dislike between the parties:

- The fact that there was considerable mistrust and dislike between the parties was often the case in litigation. It was where there might be distrust or emotion between the parties, which might be pushing them towards an expensive trial, where a mediator's skills were most useful. The parties did not know how far they were apart regarding settlement until they sat down and explored the position. If they were irreconcilably apart, which happened very rarely, the mediator would say so quickly.

Disproportionate cost:

- The Judge also considered that the argument that the cost of mediation would be disproportionate to the sums involved in the claim, and the offer made, was also misconceived. The costs of mediation were to be compared with the costs of a trial, not the costs of mediation, and would have been far less. There might even be more reason to mediate where the claim was in lower figures.

The court acknowledged the burden was on the claimant to show the refusal was unreasonable and examined the reasons put forward by the defendant

and the other reasons listed Halsey. The court rejected the reasons given, without wishing to discourage the acceptance of part 36 offers at a late stage. The Defendants were ordered to pay £80,000 plus VAT on account of costs.

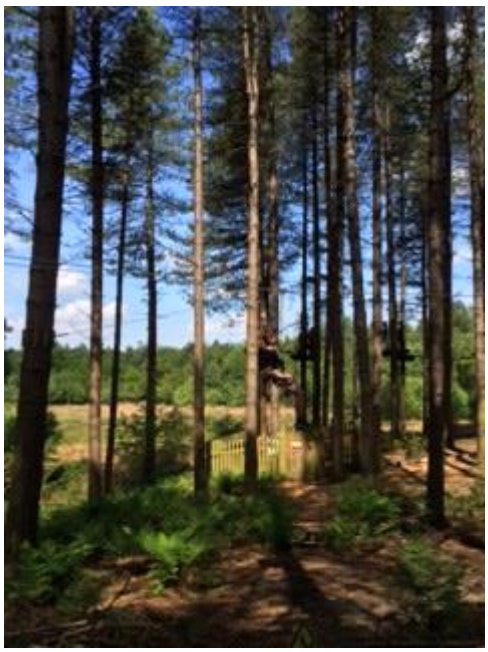
For anybody who often relies upon the reasons set out in Halsey to refuse to take part in mediation this case should be read alongside the PGF decision as both cases blow such arguments put forward in support of justifying those reasons out of the water.

The defendants also sought to rely upon the PGF case, arguing that they had not ignored the offers to mediate. Whilst the court accepted the defendant engaged in discussions about ADR as they are required to do, there had still been an unreasonable refusal to mediate.

It is clear, from this decision, that the Court will look behind the reasons given for refusing to mediate and it is only in an exceptional case that a refusal to mediate is reasonable, such as where there is a claim for an injunction, there is a point of law or a legal precedent to set. It is true that often parties will not know the lay of the land until they have started the mediation. Even if the positions seem very far apart in the litigation, and one party seems to have a stronger case, this does not mean that the other party may not appreciate this privately and want to try to settle the case. Even the strongest case carries with it a litigation risk in terms of costs recovery.

# Searching for Justice In An Age Of Austerity

**The Jackson reforms and the withdrawal of legal aid has caused a reduction in access to Justice. JUSTICE has launched a 12-month working party on 'Delivering Civil Justice in an Age of Austerity', chaired by The Rt. Hon. Sir Stanley Burnton, who is joined by Sir Geoffrey Bindman QC, Carlos Dabezies, Amanda Finlay CBE, Professor Rosemary Hunter, Sir Paul Jenkins KCB QC, Andrew Lidbetter, Andrew Lockley, Nigel Pleming QC, Shiva Riahi, Lucy Scott-Moncrieff and Professor Richard Susskind OBE.**



As part of its inquiry, the working party would like to hear any ideas and views on the subject and in particular would like to hear from people upon one or more aspects of the working party's inquiry:

(a) Making legal advice, assistance and representation more affordable and accessible;

(b) Making court and tribunal procedures more efficient and accessible; and

(c) Alternatives to court and tribunal procedures, including alternative dispute resolution and online dispute resolution.

Responses need to be emailed to Ruchi Parekh at RParekh@justice.org.uk.

In our view, this is an opportunity to explain how mediation, whilst not an universal panacea, could be more actively promoted by the Courts through case management and by adopting an "opt out" model whereby access to the Courts is seen as a last resort to be utilised once ADR has been exhausted.

# Litigants in Person – McKenzie Friends or Foes

**It is a truth universally acknowledged that litigants in person are increasing in numbers following the Jackson reforms.**

A Judicial Working Party has called for a consideration of reforms to the Civil Procedure Rules such as the introduction of a dedicated rule or rules relating to LIPs, or the introduction of a more inquisitorial procedure where they are concerned. A Judicial Working Party and the Legal Services Consumer Panel recommend in their reports that the Courts should adopt a more liberal and consistent approach to McKenzie friends and supporting the view that fee paid McKenzie friends should be accepted in the litigation process. The Law Society, the Bar Council and ILEX are drawing up guidance for lawyers faced with LIPs. There seems to be consensus that LIPs involve more Court resources than represented parties. In order to deal with LIPs, mediation should be


a first port of call. This is because the mediator, whilst not advising the LIP, may be able to carry out some reality checking with the LIP and assist them in coming to a fair and realistic resolution of the dispute. The LIP may be prepared to listen to the mediator, as an independent third party, as opposed to the Solicitor or representative on the other side.

# It's Better to Mediate! – Love Thy Neighbour

**Neighbour disputes can often lead to disproportionate legal costs, so that there are no winners and as an additional punishment the parties are always liable to have their dirty washing hung out to dry in esteemed publications like the Daily Mail!**

In May, they reported another sorry tale of neighbours at war. The story concerned Peter and Lesley Raymond who purchased Lin Crag Farm in Blawith in Cumbria for £600,000. As the Daily Mail so eloquently put it "It was supposed to be an idyllic second home, a rural Lake District retreat far away from the troubles of the rest of the world. But little did Peter and Lesley Raymond know when they settled on the lavish £600,000 Lin Crag Farm in Blawith, Cumbria, that they were buying in to a ruinous feud with 'neighbours from hell'. Steven and Fiona Young, would terrorise their home for years." Lin Crag Farm came complete with a helicopter garage, games room, bar and indoor badminton court. Their neighbours, the Youngs had lived in the neighbouring seven-bedroom Lynn Cragg Cottage for years, but had lived in the larger farmhouse decades ago and resented the new owners. Rotting rubbish was abandoned on their property, fences were damaged and their CCTV cameras were covered in paint. The Raymonds sued for harassment, trespass and nuisance - and eventually won their case. The judge awarded them £196,000 damages plus costs of £200,000, and the Youngs had to meet their own costs of £200,000 as well. Mrs Young was quoted as saying that the case had "destroyed" them. Even the most intractable of disputes can be resolved through mediation and it is

not reported whether the parties considered mediating the dispute. The Recorder described Mrs Young as: 'a plain-speaking lady with fixed interpretations of events to the point of being intransigent,' and there was clearly a lot of emotion running wild in this case, but that does not mean that mediation could have brought about a much cheaper solution and maybe avoided £400,000 costs.

It was recently reported that just over a quarter of UK adults have had a problem with a nuisance neighbour in the past year.

The poll for Which? found that among the 27% who have had issues with neighbours, loud voices and arguing topped the list of annoyances, suffered by 41%.

Problems with neighbours can lead to protracted litigation where no one is a winner. People can end up not bring able to sell their homes as a dispute has to be declared in the conveyancing process. Mediation can help sort out these issues.

# Case Update


## SM v DAM (2014) [2014] EWHC 537 (Fam) Fam Div (Mostyn J) 05/03/2014

**Agreements to Mediate – Are they binding?**

This was a family case where the wife applied for an enforcement order against the husband. The long and short of the case is that an agreement to mediate before litigating has to be very clearly expressed and in this case the family Court could only order a stay for mediation.

A maintenance order had been imposed requiring husband to make payments to the wife, including a lump sum of £1.3 million. Subsequently, they mediated and reached an agreement for a reduced lump sum amount, to be paid in instalments. The agreement was incorporated in a consent order with the proviso that if the husband defaulted the agreement and consent order would be dissolved and original order revived. The wife then issued a statutory demand against the husband. They entered into a further agreement which stated that the parties would attempt to compromise all existing legal disputes and that they would participate in mediation, which never took place. The wife sought to enforce, but the husband argued that she was prevented from doing so by virtue of the mediation agreement.

It was held that CPR r.1.4(2)(e) imposed a positive duty on the court to encourage alternative dispute resolution where appropriate and Rule 26.4(2A) enabled the court to impose a stay on proceedings, whether the parties agreed or not, for a specified period to "allow for settlement of the case". Any agreement which stipulated mediation before litigation had to have its terms carefully examined. If it was clear in what it said about the subject matter of the mediation, what the parties had to do and how they could bring it to an end, then it was likely to be upheld.

Where there was a written agreement to engage in ADR before proceeding with an enforcement application, r.3.3 of the Family Procedure Rules could be invoked to adjourn the application for a specified period to enable ADR to take place, even where one party was trying to back out of it. It was the fault of both parties that mediation had not happened and they both remained bound to mediate. However, the agreement did not prevent the wife from applying for enforcement unless and until mediation had taken place. A bar of that nature would operate as a restriction on the right to apply to the court. The most that could be done in balancing the obligation to mediate under the agreement and the right of access to justice was to adjourn proceedings for a specified period to give the parties a final opportunity to engage in ADR. The parties could not be compelled to engage in the mediation, but the court could robustly

encourage engagement by means of an order in terms that failure to justify a decision not to engage in mediation could result in costs sanctions.

## Emirates Trading Agency LLC v Prime Mineral Exports Private Limited [2014] EWHC 2104 (Comm) – Have a Friendly Chat First!


Ideally, a dispute should be settled pre-proceedings. Parties who enter into contracts are encouraged to include arbitration or mediation clauses. The Courts are likely to find these enforceable. In this case, the Judge considered whether the parties' agreement to first seek to resolve a dispute by "friendly discussion" constituted an enforceable condition precedent to arbitration. The Judge ruled that holding a "friendly discussion" acted as a condition precedent to arbitral jurisdiction. The English courts have so far generally not enforced an agreement to negotiate (see Walford v Miles [1992] 2 AC 128 and Cable & Wireless v IBM [2002] EWHC 2059 (Comm)) or an agreement to settle disputes amicably (see Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others [2012] EWCA Civ 638). This judgment represents a major change in the English courts' position on the enforceability of agreements to negotiate in dispute resolution clauses.

The obligation in the clause in Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia was to seek to have the dispute resolved amicably through mediation rather than by friendly discussions in good faith. The Judge considered this to be a material distinction. In his view, while an agreement to mediate without a named mediator, or an agreed process for appointing one, was incomplete, an agreement to seek to resolve a dispute by friendly discussions in good faith was not.

## BEAUTY STAR LTD v SHIRAZ JANMOHAMED (2014) [2014] EWCA Civ 451

## CA (Civ Div) (Laws LJ, Davis LJ, Ryder LJ) 14/04/2014

**Court upholds mediation agreement accountant expert mechanism**

The parties reached a mediation agreement which provided that a binding account would be taken of all sums paid by one party to another. An account was taken and one party was found to have overpaid. The other party issued proceedings for rescission or rectification of the agreement on the basis of mistake. The judge held that the accountant had been appointed under the agreement, rather than by the court's order. The Court held that the parties had been ordered to appoint the accountant, pursuant to the mediation agreement. Accordingly, the appointment of the accountant had been pursuant to the mediation agreement. Even if the accountant's report contained mistakes, it was binding, because that was what the parties had agreed. Any remedy would be against the accountant.

## PASHA SAIGOL v THORNEY LTD (T/A THORNEY MOTORSPORT) (2014) [2014] EWCA Civ 556 CA (Civ Div) 08/05/2014 – Part 36 offers

The perils following an unsuccessful mediation and

not accepting offers are illustrated by this salutary tale: The appellant appealed against part of a costs order made in proceedings against the respondent, on the basis that the judge had got it wrong about whether an offer was a part 36 offer.

This claim concerned the tuning and race preparation of a sports car. Once the work was done , Thorney refused to return the vehicle unless Mr Siagol paid a sum above that which they had agreed. Mr Saigol brought proceedings claiming the return of the car and damages for breach of contract. Thorney counterclaimed for payment of the sum that it claimed was still due. Thorney made two Part 36 offers: on 10 March

2011 (seeking a payment of £9,248 from Mr Saigol), an offer made a year before that of 8 March 2011; and on 8 October 2012 (seeking £4,000), an offer made seven months later. On March 8, 2012, following an unsuccessful mediation, Thorney made an offer to settle by paying Mr Saigol £2,000. The offer was to remain open for 24 hours, following which "it will lapse without further notice

The offer was not accepted and the case proceeded to trial. The judge found Mr Saigol liable to pay Thorney £15,750 by way of the price for the work done, of which he had already paid £14,200, leaving a balance of £1,550 still due. As to that, the judge deducted £1,175 for poor workmanship and so awarded Thorney only £375. He awarded Mr Saigaol the grand sum of £745 and applied the set off ,resulting in the order for the payment by Thorney to Mr Saigol of £370.

Needless to say, there was an argument about the costs of the litigation. At the costs hearing, the judge considered that Mr Siagol should pay Thorney's costs since the offer date, on the basis that it was a Part 36 offer, but this was reversed on appeal as the offer was not a Part 36 offer, but merely a factor to take into account in deciding the fair order as to costs. The order made was no order as to costs, meaning that neither party ended up benefiting from the litigation. This is a prime example of a case which should have settled.

**(1) IGLOO REGENERATION (GENERAL PARTNER) LTD (2) IGLOO REGENERATION (NOMINEE) LTD (3) IGLOO REGENERATION LTD (4) IGLOO REGENERATION PARTNERSHIP v POWELL WILLIAMS PARTNERSHIP (COSTS) (2013) [2013] EWHC 1859 (TCC) – Refusal to accept the same offer leads to indemnity costs order**

This was a decision on costs following a professional negligence claim between the claimant group of companies and the defendant surveyors. The claimant had sued the defendant for professional negligence during the course of its surveying, but lost. The Claimant accepted that, they had to pay the defendant's costs at least on a standard basis but the defendant argued for indemnity costs. After various offers and counter-offers, the Claimant offered to settle for £729,000 plus costs. That offer expired on a Monday afternoon, and D did not accept the offer by that time. A few days later the defendant made an offer for settlement at exactly that level but the Claimant refused to accept that offer. On the first day of trial the judge adjourned the trial but before he did so he expressed doubts about some of the evidence of the claimant's expert, which he thought led to concerns as to how the claimant's claim could proceed.

It was held that the parties should have considered seriously the impact of costs and the overriding objective. Where both parties were prepared to settle at exactly the same figure within a few days of each offer being put forward, for the Claimant to have withdrawn from settlement appeared unjustifiable. Nothing had happened between the time of the Claimant's offer had expired and the timing of the offer made by the defendant for settlement at exactly that level a few days later. An enormous amount of time and costs and court resources had been wasted as a result of the Claimant's unwillingness to accept the figure that they had been prepared to settle at only a few days earlier. That fact, coupled with the fact that the judge had expressed reservations about the Claimant's case, meant that there was no justification for going on with the case at that stage. The Monday following the hearing in front of the judge was an appropriate date for indemnity costs to start. This case illustrates the danger of withdrawing an offer or allowing it to lapse and then refusing to settle on the same basis thereafter.

# The IT Revolution

**On 8 September, Peter Causton attended the Law Society Access to Justice Day to present a webinar on the subject of Alternative Dispute Resolution and Online Dispute Resolution, introduced by the President of the Law Society. Peter was co-presenting with Professor Richard Susskind, author of Tomorrow's Lawyers.**

Professor Susskind is a member of the Civil Justice Council (CJC) advisory group, set up to explore the role that online dispute resolution (ODR) can play in resolving civil disputes of a value less than £25,000 in England and Wales. It will undertake an initial cost/benefit analysis of ODR as an alternative and accessible means of resolving disputes, identifying any limitations and drawbacks of the processes and consider the overlap between ODR and virtual courts. It will also start the policy process of considering options for ODR provision and regulation. A report will be prepared for the CJC with recommendations for next steps or further research required.

During the webinar, Peter spoke about the ways in which ADR is increasing through the Courts, providing cost effective solutions to those who are excluded financially, or businesses who want to save costs- what business would not want to save costs? Peter talked about the costs incentives and penalties causing people to choose ADR over traditional Court processes and about the impact of the Jackson reforms and pressure from Europe to encourage mediation. Professor Susskind spoke about the exponential increase in IT and predicted that the Courts will be embracing it. He explained that it is now possible to hold the entire musical work ever recorded in the palm of one's hand and that more data is produced in two days than in the entire history of the world up to 2003. He mentioned the use of social media and encouraged lawyers to use these channels of communication, saying that lawyers are not using them

as much as the public. He encouraged lawyers to come up with new ways of working, much as IT has led to innovations such as the cashpoint, for example. One interesting point that was made was that more people now have access to the Internet than access to justice. If so, how can the Internet increase access to justice? One can see many ways in which it could do so, such as providing advice and case preparation online, video conference hearings, online mediation, etc. IT has already begun revolutionising the way in which solicitors work, with electronic time recording, outsourcing of document creation, data rooms, electronic disclosure, voice recognition dictation software and, of course, all prevalent email. In the Court service documents can often be filed by email and some claims can be issued electronically (Money Claims Online). Courts do use telephone and video conferencing to a limited extent. This is only likely to increase. There is a clear intent to improve IT in the Court system, albeit the start has been somewhat slow.

On 28 March 2014, the Lord Chief Justice announced a Reform programme to deliver through the use of modern technology “a more effective, efficient and high performing courts and tribunal administra-

tion." This was to be enabled by a new one off investment, averaging up to £75m per annum over 5 years from 2015/16. It was said that the investment, would enable the legal profession and other justice agencies to adopt more efficient and cost saving working practices by using digital technology in their dealings with the Courts and Trinunals. It was said that users should only need to attend at a Court or tribunal when it is absolutely necessary. The idea was to give Court users maximum flexibility as to how they access the Courts, tribunals and their supporting administration.

Since then the focus has been upon introducing effective IT into the Rolls Building, with a start date of February 2014 and a go live date of 1 October. This is now likely to start in autumn 2014 and the finishing date to be postponed to late 2015. Sir Terence Etherton, head of the Chancery Division has made it clear that there is no plan as to how there might be a roll out of any IT to the Civil Justice system beyond the Rolls Building, however and the Lord Chief Justice has stated at the Annual conference for the Society of Computers and the Law that he does not know when IT improvements will be extended to the wider system.

However, an electronic filing system is being implemented in the Chancery Division: The Chief Master has issued a practice direction on 8 September directing that from 1 October, the Chancery Division will start to use the new CE-File electronic court file system and Court users will be unable to file documents direct with the Court until late 2015. This means that for the time being new claims will be dealt with using the electronic file and the Court will not keep any documents.

Ironically, as a result, more paper is required as the Court is demanding that all parties lodge a hearing bundle before any hearing and if there is no bundle there will be no hearing. It is unfortunate that the result of introducing a non-paper filing system appears to result in more document reliance at hearings.

Nonetheless, It is extremely unlikely that in 2020 the system will be recognisable compared to the way in which justice is delivered today. It may have had a slow start but there is no doubt that we stand on the verge of momentous change in the way in which justice is delivered.

For those who missed the webinar, have no regrets because it is available free of charge, online of course, by visiting http://cpdcentre.lawsociety.org.uk/course/6462/using-online-services-to-resolve-civil-disputes

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