

Mediation Future

A quarterly newsletter for mediation and
alternative dispute resolution matters



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Alternative Dispute Revolution



The uncertainty caused by the implementation of the Jackson Reforms is making

mediation first choice for resolving disputes and this is only going to increase with further changes to the Court system.

There will shortly be an update to the CPR, the introduction of a single County Court and the Brooke Reforms: - the result will be more claims proceeding in the County Court and higher cost.

Increasing the financial limit of the County Court's equity jurisdiction from £30,000 to £350,000.

- ◆ Increasing the financial limit below which claims may not be commenced in the High Court from £25,000 to £100,000 with the exception of personal injury claims which have a limit of £50,000.
- ◆ Following a consultation, Court fees are going to rise, with fees for claims between £5,000 and £10,000 increasing from £245 - £445 with fees for claims over £300,000 increasing to £1,870. There are further proposals to increase fees for some commercial cases to up to £5,000, on the basis of litigants paying "enhanced fees"
- ◆ The Small Claims Mediation Service pilot is over and so, depending on capacity, the SCM Service

will be mediating all issued claims where the parties indicate that they want to mediate up to £10,000.

Jackson Reforms:

Everyone is acutely aware of the stringent approach being applied to compliance with Court orders and directions. The Courts are being clogged up with applications to extend time, made in advance in order to try to avoid having to apply for relief from sanction. Notifications to professional indemnity insurers are soaring. What are the main drivers for ADR?

- ◆ Litigants can no longer rely on the Courts to give them time to put their cases. Parties are having to comply rigidly with the rules at the expense of justice;
- ◆ Parties are also having to accurately predict the costs that will be incurred in the proceedings and have their budgets approved by the Courts, restricting what they can spend.

Following the recent Civil Justice Council conference, Jackson indicated that he was not for turning, saying that the reforms needed time to bed in, despite the negative comments from consultees, one of whom hit the nail on the head when he commented that: "Some recent cases have shown a worrying trend that indicates that we have neither encouragement to use ADR but rather a compulsion to get cases out of the Court system into the clutches of private people."

Let me know your thoughts at enquiries@promediate.co.uk.

Tactical Mediation

Mediate or Be Damned!



Rightly or wrongly, there is an increasing trend whereby parties are taking advantage

of the costs sanctions for failure to mediate and are proposing mediation to gain a tactical costs advantage, rather than from a genuine desire to settle claims.

The Court of Appeal has at last made it clear that when considering conduct, Court will look at the conduct of the parties at the time, from a subjective point of view. This was enshrined in the decision of *PGF ii SA – v – OMFS Company Limited* [2013] EWCA CIV 1288 2nd October Court of Appeal.

The Court held that as a general rule, silence in the face of a mediation invitation is of itself unreasonable conduct. The Court was not persuaded that even making a Part 36 offer was sufficient to excuse the party from responding to a mediation proposal. So costs no longer follow the event when mediation is concerned.

Parties have realized that offering mediation can be a trump card, particularly if the other side refuses to play ball. Some canny firms are offering to mediate

in the Letter of Claim. In order to avoid cost sanctions, the refusing party has to set out clearly in correspondence, or witness statement in the case of a Jordan or Ungley Order, why mediation isn't a good idea. Even then, there is a risk that the judge will not accept the explanation and come down hard on them in respect of costs, whatever the outcome. Some parties are also making applications for these orders, or adding them to directions.

This is where offering to have a time limited or telephone mediation is a good idea, as so far the Court has not drawn any distinction between different types of mediation. From the Court's perspective, it is not winning but taking part that counts.



If you would like assistance in putting forward a mediation invitation, get in touch at enquiries@promediate.co.uk as we have various precedents that can be used for such situations. We can also offer telephone and time limited mediations. For details please see our website: www.mediate.guru

All Change In The Chancery Division

It is all aboard the ADR train in the Chancery Division as Briggs LJ signals a change of culture, to direct cases towards ADR, if his review of the Chancery Division is implemented and he even sees a place for FDR hearings.



Lord Justice Briggs in his review of the modernization of the division, published in December 2013, set aside a section dealing with ADR. He has quite radical plans, which will encourage the use of mediation in the Chancery Division. The

settlement rate is already at an astonishingly high 92.3%-94.4%. Even though the settlement rate is so high, Briggs LJ clearly considers that it could improve. His suggestions include:

- ◆ More use of Financial Dispute Resolution hearings, borrowed from the family courts, particularly in Inheritance Act, contested probate and TOLATA cases, to include a voluntary protocol followed by standard directions for exchanging information.
- ◆ More use of Early Neutral Evaluation by the case management (or other) judge;
- ◆ Case Management to be directed towards dispute resolution. A change of culture so that ADR is not seen as a separate part of the dispute resolution process;

- ◆ The Court to take a more active role in the facilitation and management of dispute resolution so that ADR is seen as integral to the process, introducing procedures to make sure that parties have all the information they need at an earlier stage.

What does this mean in practice? In Briggs LJ's view the Directions Questionnaire should contain more questions about ADR, to include:: whether it is suitable, whether facilitative or evaluative is preferable, when on the time line of increasing information and increasing cost, ADR would be most cost effective, whether the Court can assist with limited information exchanges. He thinks that a thorough review of ADR options should be a normal part of an oral CMC and that progress of ADR should be monitored at every future hearing, but without invading confidentiality.



Briggs LJ also considers that ADR should not necessarily be considered to have failed simply because there hasn't been a settlement and that a failed mediation can help to narrow the issues and save costs that way. He suggests that the parties should report to the Court following ADR explaining which issues have been agreed, voluntarily waiving confidentiality, although he recognizes that this idea did not meet with much enthusiasm. Nonetheless he considers that this idea is worth exploring further.

Despite the report having been published in December, there have not been any further developments and we wonder therefore whether the plans have hit the buffers.

Consumer ADR Is Coming!

The implementation of the EU ADR/ODR Directive is likely to bring ADR centre stage, with a clear signal from Europe that ADR should be available for all consumer disputes.

Imagine that you buy a new laptop online and it isn't



fit for purpose, so you reject it and ask for a refund. From 2015, details of the company's ADR scheme will be on its website and in its terms and conditions. The Department for Business Innovation

and Skills has to implement the directive by July 2015. The consultation closes on 3 June 2014. The stated objective is to make ADR available for any dispute regarding contractual obligations that a consumer has with a business. One idea is to create a residual ADR scheme to work alongside existing schemes and deal with any dispute not currently covered by mandatory or voluntary ADR schemes (eg financial and legal



ombudsman). Of course, "ADR" encompasses all types of dispute resolution, not just mediation, but BIS makes clear in the consultation that it is also going to use the consultation as a call for evidence for a much broader reform of the ADR landscape in the UK.

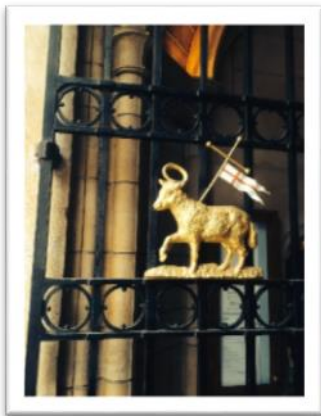
The consultation also looks at the implementation of the Online Dispute Resolution Contact Point to assist with cross border disputes involving a UK consumer or UK business and asks whether it should



be able to assist with domestic cases. The idea is to facilitate communication between the parties and a certified ADR provider in the event of a contractual dispute arising from an online transaction. There will also be certain information requirements for businesses to provide information about ADR providers on their websites and terms and conditions of sale. All businesses selling their goods and services online must provide a link to the ODR platform on their website.

If implemented, the changes suggested by consultation are necessary to implement the Directive are likely to result in a large increase in the use of ADR to resolve disputes between consumers and businesses.

The EU is increasingly pro mediation and this is likely to result in a knock on effect in the UK. A recent EU study (“Rebooting the Mediation Directive”) argues that mediation in civil and commercial matters is still used in less than 1% of the cases in the EU and supports requiring mandatory mediation in certain categories of cases with the ability to opt-out, or consider mandatory mediation information sessions (MIAMs) before litigation proceedings (‘opt-in’ model). Of course, after the recent County Court Consultation, the MOJ rejected the idea of MIAMs in the Civil Courts. The other suggestions included:



- ◆ establishing a mediation advocacy education program for law schools, business schools and other higher educational facilities;
- ◆ develop and implement pilot

projects to encourage the use of civil and commercial mediation;

- ◆ the development of an EU-wide ‘settlement week’ program, aimed at exposing the general public to the benefits of mediation;
- ◆ creating an EU-wide ‘mediation pledge’ for members of certain industries to pledge to use mediation as their dispute resolution process;
- ◆ the designating national mediation champions or ambassadors (defined as public figures who support the use of mediation and educate others about its benefits) in the Member States;
- ◆ the creation of an EU Alternative Dispute Resolution Agency to promote mediation;
- ◆ the creation of a uniform EU Specialist certification for mediators at the EU level.

The Directive is due to be reviewed in 2016 and if these recommendations are adopted, ADR is likely to receive a boost from the EU.

It's Better To Mediate!

Durkin v DSG Retail Limited

The tale of Mr Durkin is a prime example of litigation gone mad, where costs can outweigh the amount in dispute many times over and where early mediation might have benefited both parties.

In 1998, Mr Durkin bought a laptop for £1499 from PC World and was tied into a credit agreement. This was to prove a costly purchase. 16 years and

£250,000 later, Mr Durkin succeeded in claiming £8,000 damages and established a point of principle, namely that banks owe a duty to act with reasonable care when notifying credit reference agencies of a default. The Supreme Court could not overturn the decision not to award £116,000 damages for the loss of opportunity to purchase a property in Belmadena. Mr Durkin argued that he was unable to fund his lifestyle by means of 0% credit cards and had to max out on his Northern Rock mortgage.

Sometimes, according to Mr Durkin, ‘Taking a case



to any court is a huge stress, but taking it to the highest court in the land with all the risks that go with it was the most stressful thing that anyone could voluntarily put themselves through, but sometimes you have to do what is right not what

is easy". Mr Durkin's two children may not thank him for having spent so much time and money on a point of principle. He may not have paid all the costs himself as the Law Society of Scotland had 'funded the court fees which I could not afford', but the damages are likely to be swallowed up by the costs.

'I've got mixed feelings, I suppose,' said Mr Durkin. 'I'm glad that I've helped the greater good with a consumer victory.'" But he added: 'I've got myself into a lot of debt, basically... There's a lot expenses still to be distributed - hopefully I'll get something back, I've put about £250,000 into it.'

From the bank's point of view, they successfully reduced the claim by over £100,000, but will have incurred costs themselves and opened the floodgates to Claimants who default on credit agreements and then find that this has affected their credit rating and are looking for someone to blame. Costs were not dealt with in the Supreme Court decision, and it is unclear whether there were any negotiations or mediation offers made. This was a Scottish case and so the Court may not apply the same principles. However, it is easy to see why it would have made more sense to have mediated this claim at the outset.

Case Update

LAKEHOUSE CONTRACTS LTD V UPR SERVICES LTD (2014)

Mediation is now venturing into new territory, where it was previously inconceivable, such as the arena of insolvency and winding up petitions.

Where a winding-up petition had been wrongly presented because the petition debt was genuinely disputed on substantial grounds, the company was entitled to its costs of resisting the petition on the indemnity basis, but only up to the point at which its own conduct of the litigation became unreasonable; thereafter there should be no order as to costs. The Petitioner also asked the Company to mediate the underlying dispute before the costs of the disputed

petition exceeded the petition debt. The Company refused to agree to mediation. The Petitioner then asked the Company to agree to directions for the hearing of an application to strike out the petition while its undertaking not to advertise continued. The Company continued to refuse mediation unless the petition was withdrawn and its costs paid. At the hearing of the petition the Petitioner consented to it being struck out or withdrawn on the basis that there would be mediation in respect of the underlying dispute. However, the Company refused mediation. This is interesting, as previously a Company would not have to mediate in respect of a winding up petition. Now a petitioner has an additional line of defence to a costs order if the debt is disputed –



offer mediation!

**UNIVERSAL SATSPACE
(NORTH AMERICA) LLC
v KENYA (2013)**

A clause within a mediation agreement which provided that no settlement reached in mediation would be binding unless and until it

had been written and signed by all parties did not operate to prevent the court from taking into account an oral agreement made between the parties at the mediation to sign a written settlement within a certain time period. The oral agreement had given rise to a collateral contract with which the mediation agreement was not concerned. William Wood QC was the mediator in this case, which settled, but on the basis that the parties would sign the settlement agreement within 21 days. The Kenyan government did not sign and argued that there was no settlement as it fell outside the mediation agreement. This case demonstrates that the Court will be reluctant to let a claim continue after it has been settled, even if the agreement is not reduced to writing on the day of the mediation.

**VIVA! CAMPAIGNS LTD (2) VEGETARIAN
SOCIETY OF THE UNITED KINGDOM LTD v
JENNIFER MARIEGOLD SCOTT (COSTS) (2013)**

The court had to consider costs arising from proceedings brought by the claimant residuary legatees (V) against the defendant (S) concerning the validity of a will executed by her brother (M).

In response to the invitation to mediate, V referred to earlier failed mediation, asked S to state a basis on which mediation would produce a settlement, and requested a payment on account of existing costs orders and a contribution to V's mediation costs. The Court found that V's preconditions to mediation were not unreasonable, so as to justify a departure from the general rule as to costs. This is a case where V set out the reasons why it did not want to mediate and so was not penalised in costs. Note to file – set out reasons why you don't want to mediate, to fend

off any costs application.

PGF II SA v OMFS CO 1 Ltd (2013)

See article above. Ignore an offer to mediate at your peril!

**DAVID FROST v WAKE SMITH & TOFIELDS
SOLICITORS (2013)**

A solicitor had not been negligent in failing to obtain a binding agreement at a first mediation meeting, though it would normally be part of a solicitor's duty to advise his client of the nature of the mediation process and of the status of any agreement reached. – This case emphasises the importance of careful drafting of the settlement agreement at a mediation.

**R (on the application of PAUL CRAWFORD) v
NEWCASTLE UPON TYNE UNIVERSITY (2014)**

Can you refuse to mediate if there are other ADR proceedings taking place?

In a High Court decision, the Court has found that if an ombudsman complaint is proceeding, or some other form of ADR, it is not unreasonable to refuse to mediate.

A medical student had issued judicial review proceedings against his university while simultaneously pursuing a complaint to the Independent Adjudicator for Higher Education. The university won the case but the unsuccessful student argued that there should be no order as to costs because of the mediation refusal. In fact, the university's solicitors said that they agreed, in principle, to Alternative Dispute Resolution, but that they needed to take instructions. The Judge found that it had been discourteous of the Defendant not to respond to the Claimant's invitation. However, faced with the Claimant pursuing the ombudsman procedure, he was not persuaded that the Defendant's silence should be characterised as unreasonable and, in itself, sufficed to deprive the Defendant of all its costs and that the university had not been unreasonable in failing to accept the student's invitation to attempt mediation. The adjudication process was effectively a form of Alternative Dispute Resolution, so it was difficult to characterise a failure to engage in a different and

further form of mediation as unreasonable. It is plain from Briggs LJ's judgment in PGF that silence may be unreasonable and lead to costs sanctions even if "outright refusal" would be justified on reasonable

grounds. However, as Briggs LJ recognised, that is not an "invariable rule". The burden is upon the Claimant to show that the Defendant's failure to respond in the face of his invitation to engage in mediation was unreasonable.

Clearly, if the Claimant is pursuing a complaint through an Ombudsman, such as the Legal Ombudsman, the Court is unlikely to penalise a party who refuses to take part in yet another form of ADR. Nonetheless, it will be a brave defendant who refuses to mediate where there is no other form of ADR being pursued.



AB & AB -v- CD Limited - Technology and Construction Court - Mr Justice Edwards-Stuart - [2013] EWHC 1376 (TCC)

When does a mediation finish?

In a TCC decision, the Court considered whether if a mediator continues to assist following the conclusion of the mediation (as is often the case), the mediation terms continue to apply, to include a requirement that a settlement would be legally binding only if it was in writing and signed by, or on behalf of, the parties.

After the mediation, an offer was accepted over the telephone to the mediator. However, when there were discussions about the terms of a Tomlin Order, it became clear that one party thought a binding settlement had been reached whereas the other did not. The Judge concluded that the mediation ended on the day of the mediation and that the mediation agreement did not foresee continuing the mediation by email or telephone. The judge therefore found that a settlement had been reached, because it was not necessary to follow the terms of the mediation agreement. Interestingly, in order to preserve confidentiality, the Judge anonymised the judgment, but did reveal the identity of the mediator who gave evidence.

It quite often happens in practice that if the parties do not settle, the mediator will stay in touch and try to broker a deal. This decision highlights the importance of making sure that the parties are aware of the status of any post mediation discussions and whether the terms of the mediation agreement continue to apply.

promediate

The mediation specialists

www.promediate.co.uk

Our Services:

We offer flexible mediation options such as time limited mediations and telephone mediations, which can be effective in lower value cases.

- ◆ We organise the venue or the conference call.
- ◆ Our mediators have 15 years litigation experience, are fully accredited and have £5M professional indemnity cover.

No hidden charges – we do not charge an arrangement fee, or charge for reading in time or additional time if the mediation overruns for a reasonable period.

