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BEDFORD ROW
CHAMBERS

Mediation and NCDR rules: How can a failure to engage be justified and adverse costs orders for conduct be avoided?

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Rules came into force on 29 April 2024 and PD9A containing the Pre-application Protocol on 31 May 2024

1.4 Court's duty to manage cases

- (2) active case management includes-
- (f) encouraging the parties to use [a non-court dispute resolution] procedure if the court considers that appropriate and facilitating the use of such procedure

FPR r2.3

“...including but not limited to mediation, arbitration, evaluation by a neutral third party (such as a private Financial Dispute Resolution process) and collaborative law.”

Negotiation through correspondence is not enough

PD9A Annex Pre-application protocol

(1) The court must consider, **at every stage in proceedings**, whether non-court dispute resolution is appropriate.

(1A) When the court requires, a party **must** file with the court and serve on all other parties, in the time period specified by the court, *[7 working days before the hearing]* a form *[Form MF5]* **setting out their views on using non-court dispute resolution** as a means of resolving the matters raised in the proceedings.

- (1A) If appropriate, and time allows, the court should **encourage** parties, as it considers appropriate, to—
- (a) obtain information and advice about, and consider using, non-court dispute resolution; and
 - (b) undertake non-court dispute resolution.
- (2) The court may give directions about the matters specified in paragraph (1A) on an application or of its own initiative.

IMPOSED ADJOURNMENTS – AGREEMENT NOT NECESSARY

10A, that while the **FPR** 2010 does not give the court the power to require parties to attend NCDR, *“the court does have a duty to consider, at every stage in the proceedings, whether non-court dispute resolution is appropriate”*;

10B, that the court *“will want to know the parties' views on using non-court dispute resolution as a way of resolving matters”*; and

10D, that the court also has general **powers to adjourn** proceedings (r4.1) which could be exercised to encourage the parties to attend NCDR.

Where the court proposes to exercise its powers of its own initiative,

Rule 4.3(2) (a) it **may** give any person likely to be affected by the order an opportunity to make representations ...”

And if no notice is given, a party may apply to set aside the direction

Rule 4.3(6)(b) within 7 days

10E

- If the court allows time for parties to attend non-court dispute resolution, or adjourns the proceedings specifically for that purpose, any failure of a party, or parties, to then attend non-court dispute resolution will not affect any substantive decision the court makes in the proceedings. However, the court may take the parties' conduct in relation to attending non-court dispute resolution into account when considering whether to make an order for costs in relation to the proceedings: see Part 28 FPR.

- (7) In deciding what order (if any) to make the court must have regard to—
- (a) any failure by a party to comply with these rules, any order of the court or any practice direction which the court considers relevant;
 - (aa) any failure by a party, **without good reason**, to—
 - (i) attend a MIAM (as defined in rule 3.1); or
 - (ii) attend non-court dispute resolution;

- Knowles J

15-year marriage with assets of c.£27m. Parties attended PTR in advance of three-day final financial remedy hearing. They were also about to embark on a three-day final hearing in Children Act proceedings.

FDR and open offers – not sufficient – failure to attend NCDR before issue of proceedings

“...entirely unfathomable”

- Knowles J

Financial remedy costs £581,000 to date and projected to increase by a further £511,400 to end of final hearing.

Final hearing listed for June 2024. The judge postponed directions to take place after mid-March 2024 to allow the parties to attempt NCDR and report back to the judge by mid-March.

The final hearing would not be jeopardized – but attempts at settlement prioritized.

- Nicholas Allen KC echoing comments made by Peel J at an earlier hearing in the same case,

“There is no need for financial disclosure to be given prior to parties engaging in NCDR. NCDR will almost invariably provide for such disclosure to be given as part of the process.”

- Son of a Greek billionaire
- No MIAM
- No notice of proceedings (including the divorce, FLA and preservation orders)
- Applications pending for MPS/LSPO
- No disclosure

Directions given to:

- Stay the financial remedy proceedings (including adjourn FDA)
- Adjourn (May to July) for the parties to report back on efforts to attempt NCDR

CAN NCDR BE AVOIDED?

Are there any circumstances when NCDR can be avoided?

CAN NCDR BE AVOIDED?

MIAM exemptions (and therefore – other forms of NCDR) mainly relate to domestic abuse but also:

- Previous NCDR attendance within 4 months of issue for same or related matter (FPR 3.8(1)(d))
- Bankrupt applicant (FPR 3.8(1)(h))
- FPR 3.8(1)(c)(ii)(ae)
“irretrievable problems in dealing with the dispute (including irretrievable loss of significant evidence)”

- NAKC rejected applicant's claim that there was an irretrievable risk, as the parties had compromised the interim applications for LSPO/MPS and preservation of the family home
- That compromise by H allowed NAKC to impose an adjournment for NCDR – which W was extremely reluctant to engage in without proper disclosure
- Suggestion that H wanted to bulldoze W into settlement discussions without proper disclosure

The main exemption – but will this justify evading NCDR?

Resolution survey and Report:

“Domestic Abuse in financial remedy proceedings”

“...where there are allegations of ongoing domestic abuse, ‘the balance may shift away from any form of NCDR continuing’.

- Where there are inadequate safeguards for victims

- Screens
- Separate entrances / waiting areas
- Remote/hybrid hearings
- Shuttle mediation/negotiation
- Ensuring active and safe negotiation
- Arbitration rather than court

Arbitration Act 1996 s42 “*Enforcement of peremptory orders of tribunal*”, and s.44 “*Court powers in support of Arbitral proceedings*” allow the court to step into the arbitration process to make orders with non-compliant parties

CAN NCDR BE AVOIDED?

What about disingenuous attempts at NCDR?

The Financial Remedies Court Primary Principles (11 January 2022)

[8] Where a private FDR has taken place, the next FRC Judge dealing with the case will ordinarily wish to be satisfied that a thorough FDR exercise has taken place and parties should provide a written explanation to that judge of what has happened so the FRC Judge can be so satisfied. Absent specific enquiry by the FRC Judge, this explanation should not include reference to any without prejudice positions, but should describe the date of the private FDR, the tribunal, the time spent and an assurance that offers were made on each side and an indication given.

See also *DF v YB* [2025] EWFC 76 (B)

Failure to attend NCDR without good reason:

- Ensure safeguards in place
- Provide for voluntary disclosure process within NCDR
- Open letters about conduct / engagement in NCDR
- “Shopping” disingenuous exemptions under MIAM or Form MF5
- Reporting failures to engage in NCDR
- Recitals in orders – recording efforts and evasions
- List for paper consideration
- List for short directions hearing

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