IS ALTERNATIVE DISPUTE RESOLUTION STARTING TO PROVIDE A LEGITIMATE AND WORKABLE ALTERNATIVE TO THE SENIOR COURTS COSTS OFFICE (SCCO)?

The answer is no it is not starting to provide an alternative to the SCCO; it already does so.

There are many notable cases on ADR and the consequences of unreasonable refusal.

The Court of Appeal laid down guidelines in *Halsey v Milton Keynes General NHS Trust*[1] which list the factors to be taken into account in this respect. When the Court exercises its discretion under CPR 44.2, it has to have regard to all the circumstances including the conduct of the parties both before and during the proceedings. "Conduct" includes a refusal to agree to ADR. The factors to be taken into account include: the nature of the dispute; the merits of the case; the extent to which other settlement methods have been attempted; whether the costs of ADR are disproportionately high; whether any delay in setting or attending the ADR would be prejudicial; and whether ADR has a reasonable prospect of success.

More recently he Court of Appeal has firmly endorsed the advice given in the ADR Handbook to the effect that, as a general rule, silence in the face of an invitation to participate in ADR is itself unreasonable, regardless of whether a refusal to engage in ADR might have been justified. There might be rare cases where ADR is so obviously inappropriate that to characterise silence as unreasonable would be pure formalism, or where the failure to respond was a result of a mistake, in which case the onus would be on the recipient of the invitation to make that explanation good. The court stated that the reasons for extending the guidelines set out in *Halsey* were: first, because an investigation of the reasons for refusing to mediate advanced for the first time at a costs hearing, perhaps months or years later, posed forensic difficulties for the court concerning whether those reasons were genuine. Second, a failure to provide reasons for refusal was destructive of the objective of encouraging parties to consider and discuss ADR. Any difficulties or reasonable objection to a particular ADR proposal should be discussed so that the parties could narrow their differences. Third, it would also serve the policy of proportionality. The court held it would be perverse not to regard silence in the face of repeated requests for mediation as anything other than a refusal. A finding of

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1 See *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 WLR 3002.

unreasonable conduct by a refusal to mediate did not produce an automatic result in terms of a costs penalty. The Judge has a broad discretion.[2]

A defendant police commissioner who successfully defended proceedings was found to have refused to engage in the alternative dispute resolution process without adequate justification. The Court found that the claimants could have obtained some level of damages. There were issues of fact to be resolved from which both parties ran the risk of adverse findings. The defence was not so strong as to have justified a refusal to engage in ADR. The commissioner did not make any offers to settle before ADR was suggested and ADR would not have delayed the trial of the action. The commissioner was awarded two thirds of his costs.[3]

In *Garritt-Critchley v Ronnan*[4] the defendants accepted the claimant's Part 36 Offer just before judgment was about to be given following a four day trial. The judge did not criticise the late acceptance of the Part 36 Offer but penalised the defendants in costs because he considered that they had been wrong in consistently refusing to mediate. The defendants had refused to mediate because they were confident of their position and believed that the parties were too far apart. The judge stated that the claim involved a question of fact which was a classic case for mediation and parties did not know whether they were too far apart until they sat down and explored settlement. Mediation also costs less than trial[5]. If the defendants had accepted the claimant's last offer of mediation, the difference in costs might have been almost £100,000. The judge applied *Halsey*, which held that in deciding whether a party had acted unreasonably in refusing ADR, the court should bear in mind the advantages of ADR over the court process and have regard to all the circumstances of the particular case. .[6]

SCCO In *Reid v Buckinghamshire Healthcare NHS Trust* [2015] EWHC B21 Master O'Hare in the SCCO ordered the losing defendant to pay the costs of detailed assessment

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2 *PGF II SA v OMFS Co 1 Ltd* [2013] EWCA Civ 1288.

3 *Laporte v Commissioner of Police of the Metropolis* [2015] EWHC 371 (QB) Turner J.

4 *Garritt-Critchley v Ronnan* [2014] EWHC 1774(Ch) HHJ Wacksman QC.

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5 Unless the mediation fails.

6 In *Reid v Buckinghamshire Healthcare NHS Trust* [2015] EWHC B21 Master O'Hare in the SCCO ordered the losing defendant to pay the costs of detailed assessment from the date they unreasonably refused an offer of mediation. See also *Bristow v Princess Alexandra Hospital NHS Trust* [2015] EWHC B22.

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County Court

In *Bourne v Poznyak* [2015], the successful Defendant was only entitled to recover 50% of their costs from a Claimant following an unreasonable refusal to mediate. Further endorsement from the Judiciary, HHJ Worster stated "At all stages the parties must consider settling this litigation by any means of ADR (including mediation)"

This provides a constant reminder that an invitation for ADR should be carefully considered. Many have felt that this was a grey area on whether ADR is relevant to costs disputes; both inter partes and solicitor client. It seems that it is very relevant. It would be surprising if it were not.

Why consider ADR on costs disputes:

1. **Frustrations with the current process**

- Parties are experiencing increasing frustrations on costs disputes within the courts
- Delays experienced across the Country for both provisional and detailed assessments
- Increased court fees and court closures
- Administrative issues Feedback from clients on administration issues include;
    - - Provisional assessment -files are often misplaced and receiving parties have to copy and resend documents.
    - - Delays when lodging papers (as well as the delay of the hearing date).
    - Inconsistent decisions on costs disputes from regional district judges.

2. **Endorsement from the judiciary – and Europe on ADR**

   Norris J determined that the court's wide jurisdiction under CPR 3.1(2)(m) gave it the power to order Early Neutral Evaluation.

   From 1st October 2015 r3.1(2) (m) has been amended to read: *"take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case."*

The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (2015 No. 542) which came into force in April July 2015, as amended by The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 (2015 No 1392) together implement the provisions of Directive 2013/11/EU of the European Parliament and of the Council of 21st May 2013 on alternative dispute resolution for consumer disputes. Regulation 2(3) of the amending regulations substitutes a new coming into force date for Parts 4 and 5, the effect of which was to postpone the commencement of the trader information requirements until 1st October 2015.

"Consumer" and "trader"

"consumer" means an individual acting for purposes which are wholly or mainly outside that individual's trade, business, craft or profession;

"trader" means a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf.[7]

This includes those providing legal services.

Schedule 1 lists the Competent Authorities: the Financial Conduct Authority; the Financial Ombudsman Service; the Legal Services Board; and the Office for Legal Complaints. Others are being added from time to time,

Consumer information by traders

The Regulations provide:

"19.—(1) Where, under an enactment, rules of a trade association, or term of a contract, a trader is obliged to use an alternative dispute resolution procedure provided by an ADR entity or EU listed body the trader must provide the name and website address of the ADR entity or EU listed body— (a) on the trader's website, if the trader has a website; and (b) in the general terms and conditions of sales contracts or service contracts of the trader, where such general terms and conditions exist. (2) Where a trader has exhausted its internal complaint handling procedure when considering a complaint from a consumer relating to a sales contract or a service contract, the trader must inform the consumer, on a durable

[7] Regulation 3, The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (2015 No. 542)

medium— (a) that the trader cannot settle the complaint with the consumer; (b) of the name and website address of an ADR entity or EU listed body that would be competent to deal with the complaint; and (c) whether the trader is obliged, or prepared, to submit to an alternative dispute resolution procedure operated by an ADR entity or EU listed body. (3) The trader information requirements set out in paragraphs (1) and (2) apply in addition to any information requirements applicable to traders regarding out-of-court redress procedures contained in any other enactment."

"Consumer information by online traders and online marketplaces regarding the ODR platform

19A.—(1) Where under an enactment, rules of a trade association, or term of a contract, an online trader is obliged to use an alternative dispute resolution procedure provided by an ADR entity or EU listed body, the trader must— (a) provide a link to the ODR platform in any offer made to a consumer by email; and (b) inform consumers of— 5 (i) the existence of the ODR platform; and (ii) the possibility of using the ODR platform for resolving disputes. (2) The information in (1)(b) must also be included in the general terms and conditions of online sales contracts and online service contracts of the trader, where such general terms and conditions exist. (3) An online trader must on its website— (i) provide a link to the ODR platform; and (ii) state the online trader's email address. (4) An online marketplace must provide a link to the ODR platform on its website. (5) The online trader requirements set out in paragraphs (1) to (3) apply in addition to the trader information requirements set out in regulation 19. (6) The online trader and online marketplace requirements in paragraphs (1) to (4) apply in addition to any information requirements regarding out-of-court redress procedures contained in any other enactment. (7) In this regulation— "online marketplace" has the meaning given in Article 4(f) of the Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC; "online sales contract" means a sales contract where the trader, or the trader's intermediary, has offered goods on a website or by other electronic means and the consumer has ordered such goods on that website or by other electronic means; "online service contract" means a service contract where the trader, or the trader's intermediary, has offered services on a website or by other electronic means and the consumer has ordered such services on that website or by other electronic means; "online trader" means a trader who intends to enter into online sales contracts or online service contracts with consumers.

The Law Society in its advice dated 12 January 2016 states:

"The Law Society has changed its advice for firms on compliance with UK regulations which transpose the EU Directive on consumer alternative dispute resolution (ADR Directive).

This is in response to the unexpected withdrawal of the Legal Ombudsman's (LeO) application to the Legal Services Board (LSB) to become certified as an ADR approved body for the purposes of the ADR Directive. Although the Legal Ombudsman has withdrawn its application, solicitors must still comply with the government regulations. New requirements will apply from 1 October 2015 in relation to the information solicitors are required to provide to clients at the end of a solicitor's internal complaints process.

In order to be as comprehensive as possible, this advice provides:

1. *a description of the requirements*
2. *suggested text to be included in letters at the end of first-tier complaints, from 1 October 2015*
3. *information on further changes that are likely to be made*
4. *web links to further information*
5. *frequently asked questions (FAQs)"*[8]

In short, from 1 October 2015, solicitors must:

- continue to provide information on the Legal Ombudsman as the statutory complaints scheme for solicitors, and provide information on an additional ADR entity certified under the EU Consumer ADR Directive[9]. Solicitors will be under no obligation to use such a scheme and information need only be provided at the end of the complaints process

Given the clear indications from the Courts that unreasonably refusing ADR is likely to have costs consequences, it is in the interests of those providing legal services to have an appropriate procedure in place and to utilise it.

Parliament has formed an ADR group to promote ADR at every level – Costs ADR are involved in these Parliamentary discussions as costs ADR is considered a key issue as is relevant in all areas of law at every level.

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[8] The full advice can be found at: www.lawsociety.org.uk/support-services/advice/articles/changes-to-client-care-information-and-leo-time-limit/
See also: www.tradingstandards.uk/advice/AlternativeDisputeResolution.cfm

[9] The Department for Business, Innovation and Skills has confirmed that the following ADR entities are currently available to deal with disputes in the legal services sector: Ombudsman Services, ProMediate and Small Claims Mediation.

Stays are now being given in costs proceedings to enable ADR to take place.

Why use ADR on costs disputes and the benefits:

- The courts have said that trial is a last resort only to happen when all other avenues to reach settlement have been explored
- Alleviate pressures on the courts
- Cheaper and quicker than the courts; Resolution of costs disputes of modest value can be achieved within 28 days of chosen ADR method
- High levels of costs expertise retained
- Informal – the earlier you settle, the less will be the costs of the assessment process;
- All dealt with privately the parties may choose their tribunal.
- Delays in sorting out the costs may be a barrier to a continuing business relationship between the parties
- Parties retain control of the process

What methods of ADR are available for costs disputes?

- Many luminaries from the legal costs industry have been trained in various methods of ADR to facilitate an efficient and cost effective solution to resolving legal costs issues. A company called Costs ADR has been set up to bring all ADR methods and costs luminaries together providing a legitimate alternative to the Senior Courts Costs Office (SCCO).

- Costs experts trained in various methods of ADR include recently retired members of the judiciary, renowned costs silks, respected specialist junior counsel and very reputable costs experts, enabling parties to select an appropriate individual to assist in resolving their costs dispute.

1. ADR methods available on costs disputes

- Non-binding methods
    - ***Early Neutral Evaluation***
    - Early Neutral Evaluation (ENE) is carried out by an independent person, who is normally experienced in the particular field of the issue under dispute. That person may be appointed by one or all parties.
        - ENE is intended to be an advisory and evaluative process. ENE can take place within the Court system in which case it is usually carried out by a judge. There is no requirement for proceedings to be in progress, any party may appoint an independent third party to carry out an ENE. It is of course preferable and more conducive to settlement if all the parties can agree to the appointment.

Mediation

Mediation is conducted by an independent third party (who is normally an accredited mediator) who is independent of the parties and whose function it is to try to bring the parties together so that a settlement or compromise may be achieved. It is a confidential process, which can usually be arranged to take place within a reasonably short timescale. Lord Justice Jackson, in Chapter 36 of his Final Report, stated[10]:

"Mediation is not, of course, a universal panacea. The process can be expensive and can on occasions result in failure. The thesis of this chapter is not that mediation should be undertaken in every case, but that mediation has a significantly greater role to play in the civil justice system than is currently recognised."

There are several types of mediation, the most usual being facilitative and evaluative. In facilitative mediation the mediator tries to help the parties reach a position with which they can live. There is often a matter of pride which prevents a party from compromising for fear of appearing weak. The cloak of confidentiality helps in this regard.

[10] Paragraph 3.2

Evaluative mediation requires a rather more robust approach by the mediator. The writer has found that although one starts out on the facilitative track one finds that one ends up going down the evaluative route. Each party ultimately asks: “What do you think would happen on assessment?” or “What do you think it is worth”.

Many mediation agreements contain a clause to the effect that if the parties fail to agree, the mediator may be asked to give a non-binding opinion as to the final outcome.

The Mediator needs to be selected with care as regards expertise, experience etc. to ensure the parties have confidence in the process. The most obvious advantages of mediation are that, provided the parties are able to agree the process, a mediation can be set up quickly rather than having to wait 9 to 12 months for a court hearing. The parties may choose their Mediator. Parties are not permitted to choose the judge where a matter proceeds to litigation. The process is confidential, whereas in the absence of a specific Order, all hearings in court are in public.

- Binding methods

Binding paper assessment (similar to the courts provisional assessment) on bills up to £100,000; Costs ADR as previously mentioned launched a service line, namely Paper Assessment which is similar to the courts provisional assessment. It is common knowledge there are many frustrations around this process from delays to inconsistent decisions (as regional district judges are not always well versed in costs) and administrative issues and CADR has set up a legitimate alternative to resolve these issues privately with Assessors, namely Peter Hurst and Colin Campbell assessing bills more quickly and cheaply than the courts.

Expert Evaluation/Determination

5-34 Expert evaluation may take different forms. This may be an evaluation similar to Early Neutral Evaluation or a Determination. As the name implies one or more neutral experts are appointed by the parties to evaluate or determine the issues between the parties. The evaluation/determination may be agreed to be binding between the parties or merely

advisory, leaving the parties to proceed further if they so decide. Expert evaluation/determination is most commonly employed in cases of a technical nature (e.g. costs). The way in which matters proceed will be governed primarily by the terms of the contract by which the expert is appointed. The parties will usually agree that the determination will be final and binding and this is usually recorded in the contract.

Arbitration.

Arbitration is effectively a trial process outside the Court system. Arbitrations may be domestic or international. They may be conducted under the Arbitration Act 1996 or under the rules of any of the numerous arbitration providers. In many commercial contracts there are clauses providing terms for arbitration should a dispute arise. Arbitrators may be appointed by agreement between the parties or, if no agreement is possible, by the President of the relevant professional body. If the arbitration requires three arbitrators, each side usually nominates one arbitrator and the third will be appointed by a neutral person e.g. the President of the professional body.

The agreement to arbitrate may be made before or after the relevant dispute has arisen. There is a strong public policy in favour of upholding arbitration agreements, which is supported by the idea that an arbitration clause in a contract is separable from the rest of the substantive contract[11] and so continues to apply even if the substantive contract is avoided. Where Court proceedings are commenced in breach of an arbitration agreement, the defendant may apply to the Court to stay those proceedings.[12]

Yes, ADR is now a legitimate alternative to the SCCO.

[11] Arbitration Act 1996, Section 7; and see:
Kanat Assaubayev and Others v Michael Wilson & Partners Limited [2014] EWCA Civ 1491.
[12] Arbitration Act 1996, Section 9.