NON-COURT DISPUTE RESOLUTION

NAVIGATING THE NEW REGIME

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Summary of 2024 changes

- January 2024: the Government rules out making mediation a pre-condition to applying to court
- Rule changes 29 April 2024:
- Parties are now required to set out their views as to NCDR prior to the First Appointment and may be required to update
- The court may now adjourn proceedings without the parties' consent to enable them to engage in NCDR
- However, the court may not - as things stand - make an order compelling parties to attend NCDR
- Failure without good reason to engage in a MIAM or NCDR may be penalised in costs
- MIAMs process is bolstered by removal of mediator's exemption and otherwise
- The new Pre-application Protocol (31 May 2024) highlights the new rule changes and places NCDR centre stage

NCDR - new definition

- New definition in amended FPR 2.3(1):

  'non-court dispute resolution' means methods of resolving a dispute other than through the court process, including but not limited to mediation, arbitration, evaluation by a neutral third party (such as a private Financial Dispute Resolution process) and collaborative law

- This simply reflects expansion in range of NCDR processes and leaves open the inclusion of new processes not yet devised

NCDR – what is and is not

- The new Pre Action Protocol gives more guidance:

11. ***The court may also consider the parties having obtained legal advice via the "single lawyer" or a "one couple, one lawyer" scheme as good evidence of a constructive attempt to obtain advice and avoid unnecessary proceedings****, if they have complied with paragraph 6 above.*

*12****. Although there is a place for constructive negotiation via correspondence between legal representatives, that alone shall not be a sufficient attempt at non-court dispute resolution for the purposes of this Protocol****. Other forms of negotiation between legal representatives, such as round-table meetings, may be considered sufficient depending on when and how they took place.*

NCDR : the court's duty

- The court's basic duty as to NCDR is unchanged, set out in FPR 3.1(1):

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

- This ties in with the duty to actively case-manage set out in FPR 1.4 (also unchanged):

  (1) The court must further the overriding objective by actively managing 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**

The old Pre-Action Protocol

- The old PAP said very little indeed about NCDR
- The introductory guidance said at para 3:

Solicitors should consider at an early stage and keep under review whether it would be appropriate to suggest mediation and/or collaborative law to the clients as an alternative to solicitor negotiation or court based litigation.

… and the new one

- The new PAP is set out, as before, in the Annex to FPR PD 9A
- It is vastly expanded
- The amended PD9A, para 2.1:

2.1 The pre-application protocol annexed to this Practice Direction outlines the steps parties should take to-

- ***seek to resolve their dispute without applying to court, for example via non-court dispute resolution, and***
- *seek and provide information from and to each other before making any application for a financial remedy.*

The court will expect the parties to comply with the terms of the protocol.

The new PAP : scope etc

- Note that:
    - PAP applies to all type and classes of FR case, large or small, needs or sharing, whether representation or not (para 2)
    - Lawyers must give clients a copy and explain it before proceedings issued (para 4)
    - *"To comply with this Protocol the court will usually expect the parties to have done the following: a. attended a MIAM with an authorised mediator, unless a valid exemption applies; b. considered, and unless there is good reason for not doing, proposed and engaged in appropriate non-court dispute resolution*" … (para 6)
- Only the summary is reproduced here, for space reasons. The detail is in paras 10-20.

The new PAP : the Summary

1. The Protocol sets out the key steps the court will expect parties to take in relation to non-court dispute resolution (NCDR), i.e. resolving a dispute other than through the court process, before starting court proceedings …

2. ***Before coming to court, unless there are safety concerns or other good reasons not to do so, the court will expect parties to have attended at least one form of NCDR. Please see paragraphs 10, 11, and 12 of the Protocol for more details.***

3. ***All applicants are required to attend a MIAM before they start court proceedings unless they have a valid exemption****, and all respondents are expected to do so. An authorised mediator will give the parties information about which form of NCDR may be most suitable.*

*4. If court proceedings are started****, a party must set out their position on using NCDR using Form FM5 (which can be accessed here) and send this to the Court and to the other party at least 7 working days before the first hearing or as directed by the court****.*

5. If the parties have not attended a form of NCDR, the court may decline to commence the court timetable or suspend the court timetable so that the parties may attend a form of NCDR. The court will also take into account any failure by a party to attend a MIAM or form of NCDR when considering the question of costs *(together with any other failure to comply with the Protocol, see paragraph 25) and may make an order requiring that party to pay the other party's costs.*

The new PAP : comment

- The old PAP was much ignored: this one will not be!
- It is more detailed than the Rules / PD amendments and parties will all need to be ready to explain to the court, if need be, why not complied with
- The key provision is para 14:

14. Before starting court proceedings, the court will expect parties to have attended at least one form of non-court dispute resolution, unless there are safety concerns or there is another good reason not to do so.

- During the proceedings the new FM5 likely to be the focus of court's attention – but PAP compliance will be important when it comes to costs
- So the onus is on party / parties to justify their position to the court
- PAP strengthens the presumption that the court should adjourn / stay proceedings if NCDR has not been attempted, without good reason

The new PAP : other points

- *Many (if not all) of the same benefits of a court timetable can be achieved within a non-court dispute resolution process such as arbitration where the parties agree that the arbitrator's case management powers are to be similar to those available to a court (para 17)*

- *If the parties are engaged in NCDR an application to court should not be made until the process has concluded, unless there are good reasons, which could include, but would not be limited to, seeking orders from the court to prevent assets from being disposed of or dissipated (para 19).*

- *Where there is a real risk one party may start competing proceedings in another jurisdiction or dissipate assets court it may be justified to start court proceedings before attempting non-court dispute resolution, but the court will still expect parties to attempt non-court dispute resolution to resolve other issues in dispute once the urgent issue which caused the party to start court proceedings has been resolved (para 20).*

New obligation to set out views as to NCDR

- Important new rule 3.3(1A):

  (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, a form setting out their views on using non-court dispute resolution as a means of resolving the matters raised in the proceedings.

- This applies to all FR proceedings to which a MIAM requirement applies, unless DA exemption claimed

Form FM5

- Very important new form FM5 (Statement of position on non-court dispute resolution) (NCDR) gives effect to para 10C of PD 3
- To be filed and exchanged - thus one form by each party - no later than 7 working days prior to First Appointment, or such other period as may be ordered
- In most cases will be 7 days prior to First Appointment
- Court may require it to be updated subsequently
- Note the boxes where you state why NCDR did not succeed or was not attempted
- Care must be taken not to breach WP privilege – and LIPs warned!
- This is an open statement and so can be referred to on costs
- No need for WPSATC *Ungley* order (as used in *Mann v Mann* [2014] EWHC 537 (Fam))

PD 3A (amended)

PD 3A has been amended in line with the rule amendments.

10C

Where this paragraph applies-

(a) each party must file with the court and serve on all other parties a standard form setting out their views on using non-court dispute resolution-

(i) at least 7 days before the first hearing in the proceedings which is held on notice to all parties, or

(ii) within such other period before that hearing as the court may direct; and

(b) if required by the court, each party must file with the court and serve on all other parties an updated version of that standard form -

(i) at least 7 days before a subsequent hearing; or

(ii) within such other period before a subsequent hearing as the court may direct.

The form referred to in this paragraph must be verified by a statement of truth.

New rule : encouragement to engage in NCDR

FPR 3.4. The major change here is that the court may now adjourn to enable the parties to undertake NCDR where the parties do **not** agree. Formerly, their consent was required.

(1) Paragraph (1A) applies when the court considers that non-court dispute resolution is appropriate.

(1A) Where the timetabling of proceedings allows sufficient time for these steps to be taken, 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**.*

The court has wide ancillary powers in particular about updating the court: FPR 3.4(2)-(6)

PD 3A (amended)

10D

- *It may be that there are **gaps in time between hearings which the court considers the parties should use to attend non-court dispute resolution** and the court should make it clear to the parties if this is the case (Rule 3.4). The court also has **general powers to adjourn proceedings, which could be exercised for these same reasons** (Rule 4.1), with the court using its discretion on a case by case basis to determine the appropriate length of any adjournment.*

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

When will NCDR be (in)appropriate?

- FPR 3.3(2):
- In considering whether NCDR is appropriate in a particular case, the court must take into account

  (a) whether a MIAM took place;

  (b) whether a valid MIAM exemption was claimed *[Note : reference to mediator's exemption now deleted*]; and

  (c) whether the parties attempted mediation or another form of non-court dispute resolution and the outcome of that process.

- Obviously, the court will take into account other matters – as set out in case law

Summary so far

The court can thus at First Appointment (or later):

- Send parties back for a MIAM where MIAM requirements not complied with
- Compel filing of FM5 where lacking and require updating
- Encourage NCDR by staying
- Encourage NCDR by extending the court timetable (likely to be the most common procedural step where NCDR is deemed appropriate?)
- Determine that NCDR is not appropriate and make conventional directions

Case law : *Churchill*

- *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416

  CoA has now resolved – in affirmative – the question whether court can compel parties to engage in NCDR without their agreement, in civil proceedings

- *Re X (Financial Remedy: Non-Court Dispute Resolution)* [2024] EWHC 538 (Fam)

  Applies *Churchill* principles to family cases – consensual case

- *NA v LA* [2024] EWFC 113

  Example of court's approach in non-consensual case

Case law : *Churchill*

- *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416

- **The court can lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process provided that the order made 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 [74(ii)]**

- Note: court's powers in civil cases now formalised in the Civil Procedure (Amendment No.3) Rules 2024

Churchill : the relevant factors

- **<u>There are no fixed principles but the relevant (non exhaustive) factors will include</u>**:
- (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. [74(iii)]

How does *Churchill* apply in FR cases?

- The short answer is quite a lot but not fully, as NCDR cannot be mandated and the factors may differ in civil cases
- *Re X (Financial Remedy: Non-Court Dispute Resolution)* [2024] EWHC 538 (Fam) (Gwynneth Knowles J)
- Judgment handed down 8 March 2024 and thus prior to the new FPR rules
- The parties agreed at a PTR to adjourn the FH to enable NCDR to take place
- Although the parties were in agreement, Gwynneth Knowles J gave a short judgment to assist parties and lawyers generally. At [2]:

> 'I consider it might be helpful for those involved in family proceedings, whether concerning money or children, to understand **the court's expectation that a serious effort must be made to resolve their differences before they issue court proceedings and, thereafter, at any stage of the proceedings where this might be appropriate**. Furthermore, I want to signal that, **at all stages of the proceedings, the court will be active in considering whether non-court dispute resolution is suitable**. Changes to the Family Procedure Rules 2010 ("the FPR") which are due to come into effect on 29 April 2024 will give an added impetus to the court's duty in this regard.'

Re X : the court's role explained

The judge said at [16]:

'Non-court dispute resolution is particularly apposite for the resolution of family disputes, whether involving children or finances. Litigation is so often corrosive of trust and scars those who may need to collaborate and co-operate in future to parent children. Furthermore, family resources should not be expended to the betterment of lawyers, however able they are, when, with a proper appreciation of its benefits, the parties' disputes can and should be resolved via non-court dispute resolution. Going forward, **parties to financial remedy and private law children proceedings can expect – at each stage of the proceedings – the court to keep under active review whether non-court dispute resolution is suitable in order to resolve the proceedings. Where this can be done safely, the court is very likely to think this process appropriate especially where the parties and their legal representatives have not engaged meaningfully in any form of non-court dispute resolution before issuing proceedings**.

Re X: application of *Churchill* factors

The judge reviewed the facts of *Re X* against the *Churchill* factors:

18. **If the new FPR rules had been in place, this case would have justified an adjournment to encourage the parties to engage in non-court dispute resolution, applying the factors more apposite to family disputes from the list set out in paragraph 61 of *Churchill v Merthyr Tydfil*.** Thus, **both parties were legally represented and an adjournment would not have prejudiced either party's case for financial relief (or incidentally their respective cases on how their child's time should be divided between them).** In those circumstances, non-court dispute resolution was likely to be effective and appropriate. **Moreover, the costs of non-court dispute resolution were undoubtedly cheaper** than those of litigating to a contested hearing and there was a **realistic prospect that settlement might be reached** given the very narrow difference between the parties' respective open offers. **Any imbalance between the parties as to resources and bargaining power was not so significant that it might be a source of prejudice to the weaker party. Finally, neither party had ever tried non-court dispute resolution and so could give no convincing reason not to engage in that process**.

Re X : application of *Churchill* factors

Thus:

- Adjournment / delay would not prejudice either party
- Costs of NCDR cheaper than litigating to a contested hearing
- Both parties legally represented
- Realistic prospect of settlement
- Any imbalance between the parties not so significant that it might prejudice the weaker party
- Neither party had ever tried NCDR and so could give no convincing reason not to engage in that process

These factors are likely to crop up in many FR cases

NA v LA [2024] EWFC 113

- This case creates no new law, but is the first decision since the April rule / PD amendments

- The hearing was in fact the return date of injunction applications. These were resolved consensually. W had issued Form A and served applications for LSPO/MPS but no FR hearings were then listed

- W objected to NCDR in relation to financial remedies on ground of lack of disclosure.

- Mr Nicholas Allen KC (sitting as a Deputy High Court Judge) reviewed the new rule amendments and case law, and confirmed the state of the law set out above, observing that Part 3 had been hitherto underused

- He pointed out that: there had not been a MIAM; there was nothing in the case that suggested it was not suitable for NCDR – big money but not factually or legally complex: "A paradigm case for the court to exercise its new powers"

- The possibly controversial aspect of the decision is what he said about disclosure:

  "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. Many forms of NCDR also have 'teeth' if there is (say) a reluctant discloser. For example [arbitration …]"

Combined summary of *Churchill* factors

- Whether adjournment will not prejudice either party
- Comparison of costs of NCDR with costs of litigating to a contested hearing [Note that a LSPO may be awarded for purpose of funding NCDR: MCA 1973, s22ZA(10)]
- Whether both parties legally represented
- Whether realistic prospect of settlement
- If any imbalance between the parties is so significant that it might prejudice the weaker party
- Whether either party has ever tried NCDR / had MIAM and so can give a convincing reason not to engage in that process
- Lack of disclosure may not be a ground for declining to adjourn for NCDR
- Big money not a bar but complexity may be

Directions where proceedings are stayed

- The judge gave directions pursuant to FPR 3.4(2), which are a useful template:

"a. the financial proceedings in Form A dated 14th May 2024 shall be stayed with immediate effect;

b. the Form C is not to be processed and no First Appointment is to be listed at the present time;

c. pursuant to r3.4(3) the parties must tell the court (by way of a joint letter sent by email to my ejudiciary address) by 4 pm on 4th July 2024 (i) what engagement (if any) there has been with NCDR; (ii) whether any of the issues in the proceedings have been resolved; and (iii) in light of the foregoing their respective proposals for the way forward; and

d. upon receipt of this letter I shall decide the appropriate way forward."

New rule on costs

- The very important new FPR 28.3(7)(aa)
- Makes failure to attend a MIAM or attend non-court dispute resolution without good reason a form of ‘conduct’ that may warrant a departure from the ‘no order’ presumption:

(7) In deciding what order (if any) to make under paragraph (6), the court must have regard to –

...

(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;

New costs rule : ‘clean slate’ cases

- Where FPR 28.3(7)(aa) does not apply, the new CPR 44.2(5)(e) may do:

…

(*5) The conduct of the parties includes –*

…

(e)whether a party failed to comply with an order for alternative dispute resolution, or unreasonably failed to engage in alternative dispute resolution.

New costs rule : comment

- The court has long had power to penalise in costs a failure to mediate: see e.g. *H v W (Cap on wife's share of bonus payments) (No 2)* [2014] EWHC 2846 (Fam), where the wife's stance towards mediation was held to be unreasonable in several respects, and as a result the husband was awarded costs of the appeal
- See also *Mann* [2014] EWHC 537 (Fam) (above)
- Numerous civil cases: see *Financial Remedies Practice*, Commentary on Part 3 for more details. See e.g., *Gregor Fisken Ltd v Carl* [2021] EWCA Civ 792 (losing party on appeal ordered to pay costs on indemnity basis to reflect court's disapproval of its failure to act on the court's suggestion to mediate when giving PTA); *Northamber PLC v Genee World Ltd & Ors* [2024] EWCA Civ 428 (costs award increased on appeal to reflect failure to respond substantively to offer of mediation).
- But the power is now formally enshrined in the FPR and CPR
- A breach of FPR 28.7 (aa) is thus on the same footing as all other litigation conduct: non compliance with PAP and what is said in the FM5 will provide (part of) the evidence
- Compare the 2020 amendment to FPR PD 28A, para 4.4 – a refusal openly to negotiate reasonably and responsibly will amount to conduct and may result in a costs order
- Will we see costs orders on the same scale for breach of sub-para (aa)?
- Courts likely to be cautious at least initially, save in obvious cases?
- As to timing, decisions on costs likely to be postponed to final hearing

Recap

So, where are we as a result of the rule amendments and the case law?

- The court cannot compel parties to engage in NCDR, unlike in civil cases
- Parties will be expected save for good reason to have attempted NCDR before issuing
- And will be expected to do so post issue, unless there is good reason
- The court may - without their consent – adjourn / stay / timetable proceedings to (effectively) make them do so
- In deciding whether to adjourn / stay / timetable the court will apply the *Churchill* factors
- These will be case specific
- The parties always have the right, ultimately, to 'their day in court'
- But failure to engage in NCDR without good reason may be penalised in costs

How to stay on the right side of the new rules

- Ensure there is a paper trail: discussion of PAP with client and provision of copy
- Explore whether NCDR is appropriate as required by PAP and whether can be undertaken prior to issue
- Complete FM5 with care
- Be clear what any objection is, having regard to *Churchill* / *Re X* factors: can refusal be properly justified?
- E.g., DA; imbalance of power; coercive control; where clear there will be no cooperation from other side
- Disclosure as reason for remaining in the court process: the court may well be sympathetic to argument that NCDR should take place after court ordered disclosure
- May also be cases where substantial disclosure not needed for NCDR to be effective
- Mediation does not have 'teeth', and arbitration 'teeth' ultimately depends on the court's 'teeth'
- Complexity may also be a reason why NCDR inappropriate: *NA v LA*
- Courts less likely to bring pressure to arbitrate than to mediate or participate in PFDR, certainly at First Appointment, unless single issue case
- Always have an eye to costs: will my stance on NCDR stand up to scrutiny when costs being considered?

When advocating NCDR

- Refer other side to PAP, Part 3 rules and rule 28.3(7)(aa)
- Give thought to, and be realistic about, the form of NCDR you propose
- Come to First Appointment with concrete, realistic proposals as to form of NCDR sought, and timescale, and timetabling of proceedings
- Put list of NCDR providers to other side beforehand
- Rely on *NA v LA*
- Be prepared to meet the other side's objections as set out in their FM5

The end

Thank you for listening.

GS

18.3.25