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CIVIL JUSTICE REFORM AND ALTERNATIVE DISPUTE RESOLUTION

**LECTURE BY SIR RUPERT JACKSON: CHARTERED INSTITUTE OF
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1. INTRODUCTION

This lecture. This lecture will explore the relationship between civil justice reform and Alternative Dispute Resolution.

Abbreviations used. The following abbreviations are used:

“ADR” means Alternative Dispute Resolution.

“CEDR” means the Centre for Effective Dispute Resolution.

“CM Council” means the Civil Mediation Council.

“CPR” means Civil Procedure Rules.

“FR” means the Review of Civil Litigation Costs Final Report.

“FR reforms” means the reforms based on that report introduced in 2013.

“GEMME” means Groupement Européen des Magistrats pour la Médiation, also known as the European Association of Judges for Mediation.

“PR” means the Review of Civil Litigation Costs Preliminary Report.

“TPF” means third party funding.

A symbiotic relationship. Civil justice reform and ADR are intertwined. Civil justice reformers from Lord Woolf onwards have pressed the case for bringing ADR within the formal framework of civil procedure, for example by:

- developing pre-action protocols;
- encouraging stays for mediation;
- Including the promotion of ADR within the overriding objective.¹

ADR gains traction from many of the reforms to the litigation process, for example:

- measures to focus disclosure on documents which are central to the dispute;
- steps to control legal costs before the parties switch to ADR.

Flexibility is a common theme. The need to adapt procedures to the circumstances of the particular case is a common theme in both realms. That is the purpose of the ‘tracks’ which Lord Woolf introduced in 1999. It is also the purpose of the array of specialist courts and

¹ See rule 1.4 (2) of the CPR. Sir Gavin Lightman says that this rule gave a “hefty boost” to mediation: *ADR, arbitration, and mediation*, ed Betancourt and Crook, Chartered Institute of Arbitrators, 2014, page 645.

procedures which have sprung up in recent years.² Karl Mackie makes the same point in relation to ADR. He stresses “the importance of finding procedures appropriate to the dispute”.³

Lord Woolf’s Interim Report. Chapter 18 of Lord Woolf’s Interim Report was entitled ‘Alternative Approaches to Dispensing Justice’ and contained a review of all the available forms of ADR. In paragraph 11 he described mediation as follows:

“Mediation is offered by a number of private and voluntary organisations. Unlike other forms of ADR it does not result in a determinative adjudication, but is perhaps best described as a form of facilitated negotiation, where a neutral third party guides the parties to their own solution. Mediation can be used in a wide range of disputes, and in many cases produces an outcome which would not have been possible through the strict application of the law.”

Subsequent growth of ADR. Following those magisterial comments from Lord Woolf, there was a steady growth in the number of cases resolved by mediation and in the number of bodies offering mediation services. Pre-action protocols first appeared in 1999. These encouraged the use of ADR in order to promote settlement before the issue of proceedings. The newly enacted CPR also encouraged the use of ADR. For example, rule 26.4 enabled the court to stay proceedings “while the parties try to settle the case by alternative dispute resolution or other means”. The expansion of ADR in the twenty first century is not unique to England and Wales. It is part of a pan-European, indeed global trend.⁴

The Government pledge. In 2001 the Government set out its pledge on the “*Settlement of government disputes through ADR*”. Government departments undertook, amongst other measures, to consider and use ADR in all suitable cases where the other party accepts it and, where appropriate, to use an independent assessment to reach a possible settlement figure. The Government identified certain types of case which were unsuitable for ADR, such as claims for abuse of power, vexatious litigation or where a legal precedent was required to clarify the law.

Judicial encouragement of ADR. In *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 the Court of Appeal gave guidance on the circumstances in which a successful party would be penalised in costs for unreasonable refusal to mediate. The court identified a number of factors which were relevant to determining whether a refusal to mediate was unreasonable. There have been many judgments since then elaborating on the *Halsey* principles.

King’s College/TCC research project. The Centre of Construction Law and Dispute Resolution at King’s College, London (“King’s College”) carried out a survey of TCC cases which came to a conclusion in the period 1st June 2006 to 31st May 2008. The survey was set up by agreement between King’s College and the TCC judges, following an indication by the judge in charge that empirical data as to the effectiveness of mediation would be helpful.⁵ Two large TCC courts participated, namely the London TCC and the Birmingham TCC.

Conclusions from the research. PR chapter 34 sets out King’s College’s findings. These included:

- 60% of the settlements were achieved through conventional negotiation.
- 35% of the settlements were achieved through mediation.

² Such as the Shorter and Flexible Trials Pilot Scheme under Practice Direction 51N

³ *ADR, arbitration, and mediation*, ed Betancourt and Crook, page 30.

⁴ See *Andrews on Civil Processes* (Intersentia, 2013) volume 1, ‘Court Proceedings’, page 52.

⁵ See (2005) 21 *Construction Law Journal* 265 at 267.

- Within the 35%, the majority of cases would probably have settled anyway but at a later stage; the financial savings from bringing forward those settlements substantially exceeded the costs of the mediations.
- Within the 35% a small number of cases on the cusp probably would not have settled absent the mediation; the costs saving achieved by mediation in those cases was enormous.
- A small number of cases in the survey went to trial after unsuccessful mediations; in some of these case the mediation costs were wasted, but in others they achieved valuable benefits such as narrowing the issues.

Professor Genn's balanced assessment. Professor Dame Hazel Genn, although Dean of UCL's Faculty of Laws, is a social scientist by training. She examines legal processes from that viewpoint. In 2001 she published a favourable appraisal of mediation in the context of county court disputes.⁶ She noted that mediation was capable of promoting settlement in a wide range of civil cases; it worked particularly well in cases where both parties were willing participants and were of roughly equal strength. In her 2008 Hamlyn Lectures,⁷ however, Genn also identified the limitations of mediation and the dangers of misuse.

2. THE 2009 REVIEW OF CIVIL LITIGATION COSTS

Submissions received during the Costs Review. In this area, unlike most others, there was a high degree of consensus amongst the submissions. Most people agreed that ADR in general and mediation in particular were good things and should be encouraged. CEDR stated that in each year there were (on the basis of CEDR's figures) about 2,000 small claims mediations and about 4,000 other mediations. CEDR and other bodies put in powerful submissions advocating mediation on a wider scale. Some enthusiasts proposed compulsory mediation.

Civil Mediation Council. The CM Council is an organisation which promotes mediation in all areas of dispute resolution. In its submission dated 21st July 2009 the CM Council stated that returns from 52 of its provider members reported 6,473 mediations so far that year, which was an increase of 181% over the 2007 baseline. There were 8,204 mediations conducted in 2008 by members. In its submission the CM Council outlined the benefits of mediation in a number of discrete areas, such as Mercantile Court cases, neighbour disputes, chancery litigation etc. It stated that personal injury and clinical negligence practitioners had been particularly resistant to mediation, but even they were now becoming less resistant. The CM Council stated that public awareness of mediation needed to be increased, especially among small and medium sized businesses, insurers, central and local government bodies.

Law Society. The Law Society supported mediation, but sounded a more cautious note. It said: "The Law Society continues to support the use of all forms of ADR in circumstances where it may be assist the parties to come to terms and they are willing to do so. We also support the principle of 'legal proceedings as a last resort only'. However, mediation is not the panacea which some consider it to be and is not appropriate in all cases. Neither should it be made mandatory. Indeed, there are views among practitioners that there is no consistency about which cases are suitable for mediation – some may well be mediated which are more suitable for trial, and vice versa. We consider that firmer guidelines are needed on what is and is not suitable for mediation."

⁶ 'The Central London County Court pilot mediation scheme', published in *ADR, arbitration, and mediation*, ed Betancourt and Crook.

⁷ Published by CUP in 2010, *Judging Civil Justice*

Chapter 36 of the Final Report. FR chapter 36 reached the following principal conclusions:

“3.1 Benefits of ADR not fully appreciated. Having considered the feedback and evidence received during Phase 2, I accept the following propositions:

(i) Both mediation and joint settlement meetings are highly efficacious means of achieving a satisfactory resolution of many disputes, including personal injury claims.

(ii) The benefits of mediation are not appreciated by many smaller businesses. Nor are they appreciated by the general public.

(iii) There is a widespread belief that mediation is not suitable for personal injury cases. This belief is incorrect. Mediation is capable of arriving at a reasonable outcome in many personal injury cases, and bringing satisfaction to the parties in the process. However, it is essential that such mediations are carried out by mediators with specialist experience of personal injuries litigation.

(iv) Although many judges, solicitors and counsel are well aware of the benefits of mediation, some are not.

...

3.6 The pre-action protocols draw attention appropriately to ADR. The rules enable judges to build mediation windows into case management timetables and some court guides draw attention to this facility. Many practitioners and judges make full use of these provisions. What is now needed is a serious campaign (a) to ensure that all litigation lawyers and judges (not just some litigation lawyers and judges) are properly informed about the benefits which ADR can bring and (b) to alert the public and small businesses to the benefits of ADR.

3.7 Fragmentation of information. One of the problems at the moment is that information about ADR is fragmented. In the course of the Costs Review I have received details about a number of providers of mediation from different sources. By way of example, Law Works Mediation Service sent me details of the excellent *pro bono* mediation service which it runs. TML provided similar details to me of its own services. Details of the NMH are available on the HMCS website. CEDR has sent to me a brochure about the excellent mediation services which CEDR offers. Wandsworth Mediation Service has sent to me details of the valuable mediation services which it provides to the community in Wandsworth, either *pro bono* or on a heavily discounted basis. And so forth.

3.8 Need for a single authoritative handbook. There already exist MoJ leaflets and material about ADR. There is also a helpful HMCS mediation “toolkit” in the form of the Civil Court Mediation Service Manual on the Judicial Studies Board (“JSB”) website. In my view there now needs to be a single authoritative handbook, explaining clearly and concisely what ADR is (without either “hype” or jargon) and giving details of all reputable providers of mediation. Because of the competing commercial interests in play, it would be helpful if such a handbook were published by a neutral body. Ideally, this should be done under the aegis of the CJC, if it felt able to accept that role. If possible, the handbook should be an annual publication. The obvious utility of such a work means that it would be self-financing. It needs to have a highly respected editor, perhaps a recently retired senior judge. It needs to become the *vade mecum* of every judge or lawyer dealing with mediation issues. It should be the textbook used in every JSB seminar or Continuing Professional Development (“CPD”) training session. I am not proposing any formal system of accreditation, although that would be an option. However, inclusion of any mediation scheme or organisation in this handbook will be a mark of respectability. The sort of handbook which I have in mind will be a work of equivalent status to the annual publications about civil procedure. Most judges and litigators would have the current edition of the proposed handbook on their bookshelves.”

Recommendations. After discussing the importance of judicial training and public education in this field, FR chapter 36 concluded with two recommendations. These were:

- (i) There should be a serious campaign (a) to ensure that all litigation lawyers and judges are properly informed about the benefits which ADR can bring and (b) to alert the public and small businesses to the benefits of ADR.
- (ii) An authoritative handbook should be prepared, explaining clearly and concisely what ADR is and giving details of all reputable providers of mediation. This should be the standard handbook for use at all JSB seminars and CPD training sessions concerning mediation.

3. IMPLEMENTATION AND SUBSEQUENT DEVELOPMENTS

Preparation of authoritative handbook on ADR. Following the publication of the Final Report Susan Blake, Julie Brown and Stuart Sime set about preparing an authoritative handbook on ADR to comply with the recommendation in FR chapter 36. An editorial board, chaired by Lord Neuberger (President of the Supreme Court) and Lord Clarke (a Supreme Court judge, who had set up the Costs Review when Master of the Rolls), provided support and advice. The Judicial College, the Civil Justice Council and the Civil Mediation Council endorsed the book. Oxford University Press was the publisher. The book was published in April 2013, in order to coincide with the general implementation date for the FR reforms. It was entitled *Jackson ADR Handbook*. The Judicial College issued copies to all judges dealing with civil work.

Growth of ADR since April 2013.⁸ In the three years since April 2013 there has been a substantial increase in the use of ADR, in particular mediation. Courts have more readily granted orders in support of ADR. They have more frequently made costs orders against parties who unreasonably refused to mediate. This cultural change has gone hand in hand with the more intensive focus on case management and costs management, which is a major feature of the FR reforms.

A landmark decision. Many see *PGF II SA v OMFS Co 1 Ltd* [2013] EWCA Civ 1288; [2014] 1 WLR 1386 as a landmark decision. In that case the Court of Appeal held that the defendant's silence in the face of two offers to mediate amounted to an unreasonable refusal to mediate meriting a costs sanction. Briggs LJ gave the leading judgment, with which Maurice Kay and McFarlane LJ agreed. He began by endorsing the Jackson ADR Handbook:

“4. Although Mr. Seitler [the claimant’s counsel] could rely upon on no direct authority for his submission he derived considerable support (as will appear) from the contents and general thrust of the recently published *Jackson ADR Handbook* by Messrs Blake, Brown and Sime, supported by a distinguished editorial advisory board, and endorsed by the Judicial College, the Civil Justice Council and the Civil Mediation Council. The ADR handbook was prepared and published in response to an invitation in Jackson LJ's review of Civil Litigation Costs, see paragraph 3.8 in Chapter 36 of the Final Report. His invitation arose from a conclusion that a culture change was needed among the civil litigation community, so that the widespread benefits of participating in ADR were better recognised.”

Briggs LJ went on to discuss the culture change which was taking place and the increased awareness of the benefits of ADR. Turning to the issue of principle in the case he said:

⁸ See the second edition of the *Jackson ADR Handbook*, chapter 1.

“34. In my judgment, the time has now come for this court firmly to endorse the advice given in Chapter 11.56 of the ADR Handbook, that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds.”

What form do costs sanctions take? If the winning party has unreasonably refused to mediate, then the court can make an appropriate reduction in its award of costs. If the losing party has unreasonably failed to mediate, that approach is not possible. In *Reid v Buckinghamshire Healthcare NHS Trust* (20th October 2015) the court dealt with the matter by ordering the losing party to pay indemnity costs as from the date when it had unreasonably refused to mediate.

EU legislation. Two important EU enactments on ADR were adopted in May 2013 and came into force during 2015 and 2016, namely:

- EU Directive on Consumer ADR (2013/11/EU)
- EU Regulation on consumer ODR (524/2013).

These measures apply to consumer disputes. The ADR Directive requires traders to provide effective, transparent and independent means of alternative dispute resolution and to advertise it to their consumers in a clear and easily accessible way. The ODR Regulation, meanwhile, is concerned with setting up an EU wide ODR Platform which enables complaints against traders to be filed online. The platform takes the details of the complaint and refers them to providers of ADR in the Member State for resolution.

GEMME. GEMME is an association of judges in Europe which seeks to promote the effective use of mediation. Several British judges are active members of GEMME. UK participation will continue after Brexit.

Second edition of the Jackson ADR Handbook. A second edition of the Jackson ADR Handbook is being published by Oxford University Press this year. The second edition describes a number of new ADR initiatives which have emerged since April 2013.

Interaction between ADR and other FR reforms. There are numerous interconnections between the FR reforms. These include:

- (i) During the Costs Review there was strong evidence that the regime of recoverable success fees and recoverable ATE premiums was hindering the work of mediators. There were reports of mediations which failed because the huge recoverable success fees and/or recoverable ATE premiums proved a stumbling block. The abolition of recoverable success fees and recoverable ATE premiums removed this stumbling block. Admittedly this observation is based on anecdotal evidence, but it gains some support from the Mediation Audits discussed below.
- (ii) Because of costs management parties now come to mediations knowing (a) what adverse costs they will pay out if they lose; (b) what costs they will recover if they win; (c) what irrecoverable costs they will have to bear in any event if the case goes to trial. Many mediators say that this is helpful.
- (iii) The promotion of more forms of funding, in particular TPF, was an important element of the FR reforms. Third party funding has grown substantially over the last three years. It supports both litigation, arbitration and ADR.

An explanation of the links. A paperback book⁹ now available seeks to explain how the package of FR reforms are linked with one another and how they are linked with ADR. The graph at appendix A illustrates those links, so far as it is possible to do so on a single sheet of paper. The book is emphatically not an exercise in self-promotion. The purpose of the book is to promote a better understanding of those reforms and, hopefully, better litigation practice.

Seventh Mediation Audit. CEDR publishes a ‘Mediation Audit’ every two years. The Seventh Mediation Audit published on 11th May 2016 states:

“We asked both mediators and lawyers about the Jackson reforms and whether they had had any impact on either the number of cases coming to mediation or the ease/difficulty of settling cases at mediation.

(a) What impact have the Jackson reforms had on the number of cases coming to mediation?

	Mediators		Lawyers	
	2016	2014	2016	2014
Decrease	6%	12%	7%	5%
No difference/too early to tell	54%	70%	50%	70%
Increase	41%	18%	43%	25%

(b) What impact have the Jackson reforms had on the ease/difficulty of settling cases at mediation?

	Mediators		Lawyers	
	2016	2014	2016	2014
Harder	13%	9%	3%	3%
No difference/too early to tell	58%	73%	73%	79%
Easier	29%	18%	24%	17%

So whereas respondents were largely sitting on the fence two years ago – and most still are – those who are prepared to express a view are tending to give the Jackson reforms a positive assessment, although it is clear that there are still mixed views about the double-edged sword of the costs provisions.”

A recent innovation in third party funding. Capital Law, a Cardiff law firm specialising in commercial litigation, has developed a new model for TPF. This is able to support claims for £500,000 and above, depending on the circumstances. The scheme recently secured its first success in a claim resolved by mediation.¹⁰ This new model is important for access to justice, since some conventional funders will not support claims under £1 million.

Online dispute resolution. It is quite possible for software to carry out much of the ADR process without the need for human intervention, particularly for smaller claims or less complex

⁹ *The Reform of Civil Litigation*, published by Sweet & Maxwell, 2016

¹⁰ See *The Brief*, published online by The Times on 2nd August 2016.

civil cases. The Portal for fast track personal injury claims uses such software.¹¹ New and more ambitious forms of online dispute resolution (“ODR”) are now emerging. The Civil Justice Council’s Online Dispute Resolution Advisory Group published an excellent report in February 2015, entitled ‘Online Dispute Resolution for Low Value Civil Claims’. It recommended the establishment of a new internet based court service to assist in resolving such disputes.

Online court. The online court proposed by Briggs LJ is a major new initiative, which will promote access to justice for lower value disputes.¹² Briggs LJ also recommended that a court-based out-of-hours private mediation service be established in County Court hearing centres. This will be along the lines of the former National Mediation Helpline. It is anticipated that the vast majority of claims which are issued in the online court will be resolved through some form of ADR rather than proceed to trial.

Conclusion. ADR is an adjunct to litigation as well as an alternative. The reform movements in both domains are closely linked.

Rupert Jackson

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¹¹ For a description of the process, see *Phillips v Willis* [2016] EWCA Civ 401.

¹² See Briggs LJ’s Interim and Final Reports: <https://www.judiciary.gov.uk/civil-courts-structure-review/civil-courts-structure-review-ccsr-final-report-published/>