

Bridging the gap between alternative dispute resolution and robust adverse costs orders

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Introduction

One of the defining features of the Woolf reforms was its attempt to shift the focus in civil litigation away from the traditional adversarial culture of resolving disputes to one which was centred on a philosophy of party cooperation and, more significantly, on settlement. As Lord Woolf made clear in his 1996 Final Report, ‘the philosophy of litigation should be primarily to encourage early settlement of disputes’.¹ This philosophy transformed the orthodox understanding of the civil litigation process from one that did not require the parties, in any formal sense, to engage in settlement negotiations, to one that embraced settlement as a fundamental and necessary aspect of the civil justice system.

To facilitate settlement, Lord Woolf gave alternative dispute resolution (ADR) an enhanced role within the framework of the Civil Procedure Rules (CPR). The CPR impose a positive duty upon the court to encourage parties to engage in ADR processes as part of its case management powers, and thereby act as a means to further the overriding objective of dealing with cases justly and at proportionate cost.² The CPR also oblige parties to consider and engage in ADR processes both before and during the litigation process.³ However, Lord Woolf went further than this in his efforts to realise a change in litigation culture. He ensured that the courts were equipped with appropriate powers to penalise parties which failed to consider ADR or unreasonably refused to engage with it.⁴ These

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1 The Rt Hon Lord Woolf, *Access to Justice Interim Report* (Lord Chancellor’s Department 1995) ch 2, para 7(a) (Interim Report) and the Rt Hon Lord Woolf, *Access to Justice Final Report* (Lord Chancellor’s Department 1996) (Final Report).

2 CPR 1.4 (2)(e) provides that the case management duties of the court include: ‘encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure’.

3 Before proceedings are issued the parties will be obliged to engage with the pre-action protocols. For a list of the current pre-action protocols see <www.justice.gov.uk/courts/procedure-rules/civil/rules> accessed 7 January 2015.

4 For a discussion of the various methods by which the courts may encourage ADR, see Shirley Shipman, ‘Court Approaches to ADR in the Civil Justice System’ (2006) 15 Civil Justice Quarterly 181.

powers include the making of adverse costs orders against a party which, although successful in their claim or defence, is found to have unreasonably refused to engage in ADR (the 'successful party'). The consequence of such an order being made against a successful party is that the usual costs order,⁵ which requires the unsuccessful party to pay the costs of the successful party, is set aside. Where this occurs, the type of adverse costs order that the courts tend to make is one that restricts the successful party to or deprives it of recovering no more than some or all of its costs from the unsuccessful party. The author refers to these types of costs orders as 'cost deprivation orders' (CDOs).

However, despite the CPR conferring upon the courts the discretion to make a wide range of adverse costs orders, judges, most notably the senior judiciary, have been reluctant to fully utilise those powers. The courts appear to be more comfortable in making CDOs rather than making orders that oblige the successful party to *reimburse* some of the unsuccessful party's costs which that party has incurred because of the failure of the successful party to engage in ADR. The author refers to these types of costs orders as 'paying orders' (POs) because they oblige the successful party to actually make a financial contribution towards the costs of the unsuccessful party.

This article investigates and seeks to shed light upon an area which has not received attention in the current literature: the discrepancy which exists between judicial endorsement of ADR and the failure of the courts to translate or reflect that endorsement through making robust costs orders in the form of POs. It will be argued that this discrepancy has occurred as a consequence of the orthodox yet contradictory understanding among the senior judiciary that ADR, in particular mediation, is not mandatory within the English civil justice system. In this regard the author will seek to provide an alternative perspective of the Court of Appeal's decision in *Halsey v Milton Keynes General NHS Trust*⁶ by considering the effect it has had on the specific issue of the types of adverse costs orders which the courts make and the impact the decision has had upon subsequent judicial reluctance in making POs.

It will be argued that the courts should be more willing to make POs to fulfil two policy objectives. The first is to achieve fairness by reimbursing the unsuccessful party for costs it has had to incur which could have been avoided but for the successful party's failure to engage in ADR⁷ or, at the very least, for failing to engage in ADR which would have had the benefit of narrowing the issues between the parties and allowed the parties to gain a better understanding of the strengths and weaknesses of their arguments in the event that the parties have to revert to the court process. The second objective is to reinforce the policy of requiring parties to seriously consider ADR and, as envisaged by Lord Woolf, preserve the court process as a last resort.⁸

Part 1 of the article will consider Lord Woolf's ADR philosophy within the civil justice system. It will also reflect on the views of the two opposing ADR schools of thought as well as adopting a comparative approach by considering the Scottish approach towards ADR following Lord Gill's reforms to the Scottish civil courts.⁹ Part 2 will explain and analyse the main costs provisions under the CPR and will focus upon the court's powers to

5 CPR 44.2(2)(a).

6 [2004] 1 WLR 3002.

7 *Leicester Circuits Ltd v Coates Brothers plc* [2003] EWCA Civ 333; 2003 WL 1610252. Also see the comments of Lord Justice Jackson, Review of Civil Litigation Costs Final Report (14 January 2010) (Final Report) ch 36, 355–6.

8 Interim Report (n 1) s 1, para 9(a).

9 Report of the Scottish Civil Courts Review <www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-reform> accessed 7 January 2015.

make adverse costs orders in circumstances where the successful party has unreasonably refused to engage in ADR. Part 3 will critically analyse English ADR jurisprudence and Part 4 will advance two alternative approaches to the making of robust adverse costs orders in circumstances where the successful party has unreasonably refused to engage in ADR.

1 The Woolfian ADR philosophy and diverging ADR opinions

The role of ADR within the civil justice system was greatly enhanced as a consequence of the Woolf reforms. One of the principal aims of Lord Woolf's review of the civil justice system was to improve access to justice and reduce the costs of litigation.¹⁰ One of the main causes of these problems was, Lord Woolf observed, the traditional adversarial system of party control and minimum judicial intervention which caused or at the very least permitted the development of excessive delay in the resolution of disputes, increased costs for the parties and drained the courts' finite resources.¹¹ Although some, like Sir Jack Jacob, the doyen of English civil procedure, favoured the adversarial system as enhancing the standing, influence and authority of the judiciary at all levels,¹² Lord Woolf wanted to give effect to an idea that in pre-trial matters the court *should* take charge and manage disputes through the litigation process in order to ensure that litigation is conducted with reasonable speed and is pursued through mechanisms other than the court process.¹³ To address these ailments of the civil process, Lord Woolf sought to eliminate an adversarial approach to the conduct of litigation which allowed parties to freely engage in tactical skirmishing which increased costs and delay and undermined the court's ability to secure substantive justice (or justice on the merits). Further, Lord Woolf wanted the court to promote settlement by exercising its case management powers and thereby reduce costs and delay for the parties, even though that would not lead to a trial or produce a judgment.¹⁴ Thus, Lord Woolf believed that a trial must be avoided wherever possible and must be a last resort and one that would only be necessary if other settlement options had failed.¹⁵

More recently, Briggs LJ in his recent *Chancery Modernisation Review*¹⁶ has gone further in advocating the need for the Chancery courts to move away from the perception that the function of case management is almost entirely to be concerned with the preparation and management of pending proceedings to trial. Rather, courts should manage disputes in the widest possible sense in which 'a trial is statistically unlikely to be its conclusion'.¹⁷ In doing so, the courts should, Briggs LJ has recommended, take a more active role in the encouragement, facilitation and management of dispute resolution in the widest sense, including ADR as part of that process, rather than merely focusing on case preparation for trial.

The central premise upon which civil justice rests is the overriding objective of dealing with cases justly and at proportionate cost.¹⁸ The court is required to further the overriding

10 Woolf, Interim and Final Reports (n 1).

11 Woolf, Interim Report (n 1) ch 4(1).

12 Sir Jack I H Jacob QC, *The Hamlyn Lectures: The Fabric of English Civil Justice* (Stevens 1987) 12.

13 Woolf, Final Report (n 1). See also Lord Woolf's comments in ch 19 of Christopher Campbell-Holt, *Lord Woolf: The Pursuit of Justice* (OUP 2008).

14 CPR 1.4 sets out the court's duty to manage cases. CPR 1.4(2)(e) provides that active case management includes 'encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure'.

15 Final Report (n 1) para 9(a).

16 Lord Justice Briggs, *Chancery Modernisation Review: Final Report* (December 2013).

17 Ibid 67–8.

18 CPR 1.

objective¹⁹ by actively managing cases, which includes encouraging parties to use an ADR procedure if appropriate.²⁰ There are also various obligations on the parties to consider ADR and settlement not only during the litigation process²¹ but also at the pre-action stage of litigation, i.e. before formal proceedings are issued. Before proceedings can be issued, parties are required to engage with relevant pre-action protocols, each of which require the parties to cooperate with each other in the early exchange of information and to consider and engage in settlement discussions. Lord Woolf explained that the protocols were 'intended to build on and increase the benefits of early but well-informed settlements which genuinely satisfy both parties to a dispute'.²² During his review, Sir Rupert Jackson found that the desired aims of the protocols were, on the whole, being achieved.²³

Academic opinion on the significance of ADR within the civil justice system has traditionally been divided. Andrews has praised mediation and its growing status within the English civil justice system. He contends that mediation 'is a pillar of civil justice' and goes so far as to suggest that 'mediation is a valuable substitute for civil proceedings, or at least a possible exit from such proceedings'.²⁴ The increased use of mediation has, in Andrews' opinion, resulted in 'a significant reduction in litigation before the ordinary courts, especially in the High Court'.²⁵ Others have been more critical of ADR. Genn has expressed reservations in the increased promotion and acceptance of mediation by successive governments and the courts as a cheaper and quicker alternative to the court process. In her article 'What is Civil Justice For? Reform, ADR, and Access to Justice',²⁶ Genn, drawing on empirical data,²⁷ counters the 'unchallenged' notion that mediation is a cheaper alternative to the court process when she states:

it is also clear that unsuccessful mediation may increase the costs for parties (estimated at between 1,500 and 2,000 pounds) and this fact raises serious questions for policies that seek to pressure parties to enter mediation unwillingly.²⁸

The idea that cases that are diverted from the courts and into mediation contribute to access to justice is, according to Genn, weak because mediation is specifically non-court-based and, consequently, does not provide the parties with substantive justice. Further, the nature of mediation is such that it focuses primarily on the parties (with the assistance of the mediator) in reaching a settlement. It is not, Genn argues, about substantive justice between the parties. Rather, it is simply about settlement. As Genn puts it: 'The outcome of mediation, therefore, is not about *just* settlement it is *just about settlement*.'²⁹

19 By CPR 1.3 the parties are also obliged to assist the courts in furthering the overriding objective.

20 CPR 1.4(2)(e).

21 For example, CPR 26.4 allows the parties to request a stay from the court in order to attempt settlement.

22 Woolf, Final Report (n 1).

23 Jackson, Final Report (n 7) ch 35, 352–3. For a critical evaluation of the Jackson proposal on the Practice Direction – Pre-action Conduct, see Masood Ahmed, 'An Alternative Approach to Repealing the General Pre-action Protocol' (2013) 32 Civil Justice Quarterly 256.

24 <www.dike.fr/IMG/pdf/Mediation_in_England_by_N_1_.H._Andrews_Cambridge_.pdf> accessed 7 January 2015.

25 Ibid.

26 Hazel Genn, 'What is Civil Justice For? Reform, ADR, and Access to Justice' (2012) 24(1) Yale Journal of Law and the Humanities 397.

27 Hazel Genn, *Twisting Arms: Court Referred and Court Linked Mediation under Judicial Pressure*, Ministry of Justice Research Series 1/07 (MoJ 2007).

28 Ibid.

29 Ibid (emphasis in original).

There is some truth in the argument that a mediation which does not produce a settlement may increase costs for the parties. Disputing parties who have incurred costs in having to engage in an ADR process which has failed to produce a settlement will incur further costs in having to revert to the court process. Or, an unsuccessful ADR may simply be perceived by the parties as a necessary box-ticking exercise which must be completed before final judicial determination. In this regard it is interesting to note the operation of s 10 of the Children and Families Act 2014. That provision makes it mandatory for any party wishing to make a family application³⁰ to attend a family mediation, information and assessment meeting. At this meeting the parties are provided with information regarding the mediation of family applications, ways in which such matters may be resolved other than through the courts, and to assess whether the particular matter is suitable for mediation.³¹ The obligation on the parties to engage in a process to effectively 'assess' whether mediation is appropriate may be seen by some as unnecessarily increasing costs and causing unnecessary delays to a process which is likely to revert to the courts in any event.

Fiss, a long-standing and ardent opponent of privatised adjudication, has compared settlement with plea-bargaining in the criminal law field. Fiss argues that settlement is:

the civil analogue of plea bargaining: consent is often coerced; the bargain may be struck by someone without authority . . . Like plea bargaining, settlement is capitulation to the condition of mass society and should be neither encouraged nor praised.³²

Fiss's analysis oversimplifies the nature and operation of ADR processes such as negotiation and mediation and their relationship with court adjudication. It paints a distorted picture where parties are forced to settle without any freedom of thought or right to object or walk away from the ADR process before a binding agreement is concluded. This does not fit well, for example, when one considers that sophisticated commercial parties, such as large multinational construction corporations, will often be represented by large and specialist commercial law firms who will have the skills and knowledge to engage in ADR processes and to advise their clients as to whether to continue with the process and, indeed, whether to enter into a settlement agreement. Further, negotiation and mediation are, by their very nature, consensual. The parties are at liberty to propose and enter into mediation. They are at liberty to broker an agreement but are equally free to remove themselves from the process before an agreement is concluded. A further concern with Fiss's argument is that it fails to reflect the changing norms within modern civil justice systems which incorporate ADR as an acceptable and valuable dispute resolution process which commercial parties, in particular, have agreed to incorporate within their written transactions as the preferred option to formal court adjudication.³³ Finally, Genn's contention that mediation is 'just about settlement' is also an oversimplification of the mediation models which currently exist. Genn's argument fails to take account of those ADR mechanisms such as judicial mediation which are common and popular in other common law jurisdictions, such as Canada, and which can, with the assistance of a judge who takes on the role of the mediator, offer the parties a greater understanding of the

30 S 10(3) Children and Families Act 2014 defines 'relevant family application' as 'an application that (a) is made to the court in, or to initiate, family proceedings; and (b) is of a description specified in Family Procedure Rules'.

31 Children and Families Act 2014, s 10(3).

32 Owen Fiss, 'Against Settlement' (1984) Yale Law Journal 1073. See also Owen Fiss, *The Law as It Could Be* (New York University Press 2003).

33 See *Flight Training International Inc v International Fire Training Equipment Ltd* [2004] EWHC 721 (Comm); [2004] 2 All ER (Comm) 568 in which the parties had agreed to incorporate an ADR clause into their contract and which was upheld and enforced by Cresswell J.

merits and weaknesses of their cases rather than serving simply as a settlement forum in which the parties are forced to settle.³⁴

ADR has not been accepted in other jurisdictions as enthusiastically as it has been accepted in England.³⁵ In this regard it is interesting to note the comments of Lord Gill in his review of the Scottish civil courts.³⁶ Although recognising positive elements of mediation as an effective ADR mechanism, Lord Gill adopted a more cautious approach when reflecting upon mediation's role in civil justice. For Lord Gill, the emphasis remained firmly on the need to provide access to justice through the court system. Mediation is perceived as 'supplementing an effective court system, rather than being alternative to it'.³⁷ Lord Gill's observations and attitude towards ADR stand in stark contrast to the evolving approach that has been adopted by the judiciary and the government in England, which is to view ADR as occupying an increasingly significant role within the civil justice landscape.³⁸ Agreeing with Genn's contentions that we should not be indiscriminately attempting to drive cases away from the civil courts or compelling them, unwillingly, to enter into an additional process,³⁹ Lord Gill placed importance upon an efficient court system as providing the primary means of resolving civil disputes.⁴⁰

There is no doubt that an efficient court system is the cornerstone of all civil justice systems. The principle that the courts are required to deliver justice is an obvious but fundamental one. In a system governed by law, the court's function is to uphold the law. In the civil context this means principally providing remedies for wrongs. In doing this, the *court* is required to ensure that substantive justice is achieved and substantive justice is, to borrow from Bentham, concerned with the court correctly applying right law to true facts.⁴¹ However, Lord Gill's assessment of the relationship between the court process and ADR is, like Fiss's arguments, too simplistic in that it fails to take account of the evolving role and significance of ADR and its interrelationship with litigation. Aside from the economic advantages associated with ADR, it also has the benefit of narrowing the legal and factual issues between the parties if a settlement is not reached. The narrowing of issues is particularly effective after the parties have filed and served their statements of claim because it will provide the parties with a further opportunity to analyse the strengths and weaknesses of their respective cases with the assistance of a neutral third party (if, for example, mediation or conciliation is used) and to weigh the risks of continuing to litigate the matter to trial. This is especially true of early neutral evaluation in which the parties benefit from obtaining an assessment of the facts and legal issues by a third-party neutral which then serves as the basis of further negotiations and the likelihood of future

34 See, for example, the favourable comments of the Canadian Chief Justice Warren K Winkler, 'Some Reflections on Judicial Mediation: Reality or Fantasy?', University of Western Ontario, Faculty of Law, Distinguished Speakers Series <www.ontariocourts.ca/coa/en/ps/speeches/reflections_judicial_mediation.htm> accessed 11 March 2015.

35 See the discussion of ADR jurisprudence in Part 3 of this article.

36 Report of the Scottish Civil Courts Review <www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-reform> 170 accessed 7 January 2015.

37 For example, Sir Bernard Rix, 'The Interface of Mediation and Litigation' (2014) 80(1) *Arbitration* 21.

38 See also similar comments by Lord Neuberger, 'Equity, ADR, Arbitration and the Law: Different Dimensions of Justice', 19 May 2010, Fourth Keating Lecture, Lincoln's Inn <www.civilmediation.org/downloads-get?id=98> accessed 7 January 2015.

39 Hazel Genn, *The Hamlyn Lectures 2008: Judging Civil Justice* (CUP 2008).

40 Report of the Scottish Civil Courts Review <www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-reform> accessed 7 January 2015.

41 Jeremy Bentham, *Rationale of Judicial Evidence* in J Bowring (ed), *The Works of Jeremy Bentham* vol 6 (Edinburgh William Tait 1843).

settlement or it may assist the parties in avoiding unnecessary stages in the litigation process. The benefit of ADR as an 'issues-narrowing mechanism' may have a direct and relevant relationship with the court process if the matter does not settle, which is to assist the court and the parties to manage the case more effectively and efficiently. Therefore, ADR and the court process are distinctly interlinked and complement each other in the resolution of disputes. The court system must be efficient and ADR provides an important mechanism in assisting the parties and the courts to be efficient.

2 Court assessment of costs and adverse costs orders under the CPR⁴²

In order to understand the relationship between the obligation on the parties to engage in ADR and the courts' powers to make adverse costs orders, we must appreciate some basic principles on costs.

There are two main principles that dictate which party should pay the costs of the proceedings. The first is that the costs payable by one party to another are at the discretion of the court; there is no automatic right to the recovery of costs.⁴³ The second principle is that the unsuccessful party will usually be ordered to pay the costs of the successful party; sometimes referred to as the usual costs order.⁴⁴ However, the court may decide not to make a usual costs order because, for example, the successful party's behaviour was unreasonable during the litigation process. In these circumstances, the court may decide to make an adverse costs order by restricting the amount of costs that the successful party may recover from the unsuccessful party. In deciding which adverse costs order to make, the court will have regard to a number of factors including the conduct of all the parties.⁴⁵ CPR 44.2(5)(a) elaborates that the 'conduct of the parties' includes conduct before, as well as during, the proceedings, in particular the extent to which the parties complied with the pre-action protocols. CPR 44.4(3) goes on to list a number of factors that the court must consider when assessing the *amount of costs* that must be paid. As with CPR 44.2(5)(a), CPR 44.4(3) includes having regard to the conduct of all the parties, including the efforts made, if any, before and during the proceedings in order to try to resolve the dispute.⁴⁶

The next relevant provision is CPR 44.2(6) which sets out the adverse costs orders that can be made in substitute to the usual costs order. Those orders include an order that a party pays:

- (a) a proportion of another party's costs;
- (b) a stated amount in respect of another party's costs;
- (c) costs from or until a certain date only;
- (d) costs incurred before proceedings have begun;
- (e) costs relating to particular steps taken in the proceedings;
- (f) costs relating only to a distinct part of the proceedings; and
- (g) interest on costs from or until a certain date, including a date before judgment.

42 Although costs are also assessed and awarded when applications are made during the litigation process, the analysis here is concerned with costs orders which are awarded after proceedings are concluded because the majority of the ADR jurisprudence concerning adverse costs orders involves the courts assessing costs at the end of trial and after carrying out an assessment of the behaviour of the parties before and after the litigation process.

43 Senior Courts Act 1981, s 51 and CPR 44.3(1).

44 Also known as 'costs follow the event'.

45 CPR 44.2(4)(a).

46 CPR 44.4(3)(ii).

The courts are given further powers under CPR 44.11(b) to make alternative costs orders where the conduct of one of the parties is found to be improper or unreasonable. If such conduct is found then, pursuant to CPR 44.11(2)(b), the court may order the party at fault or that party's legal representative to pay costs which that party or legal representative has caused any other party to incur.

CPR 44.2(6) has the effect of reflecting a court's displeasure about the conduct of the successful party. The courts' powers under CPR 44.2(6) also enable the courts to scrutinise behaviour before the parties formally engage the court process. As Lord Phillips commented, the rule 'radically changes the costs position'.⁴⁷ It does so because it permits the court to use liability in costs as a sanction against a party which unreasonably refuses to attempt ADR before the action begins. Furthermore, outside of the ADR sphere, the Court of Appeal in *Denton v HT White Ltd*⁴⁸ has strongly advocated the need for courts to adopt a more robust approach in making adverse costs orders when hearing applications for relief from sanctions pursuant to CPR 3.9.⁴⁹ Following *Denton*, it is expected that a party not in default of procedural requirements (party A) will cooperate with his counterparty (party B) who has breached his procedural obligations so that an application by party B to the courts for relief from sanctions will not be necessary. Where party A refuses to cooperate and, instead, adopts a tactical approach so as to benefit from party B's default, then party A can expect the courts to make a robust adverse costs orders against him under CPR 44.2(6). It is this approach, as will be considered later, which provides a new impetus for robust costs sanctions to be applied where the parties are required to consider ADR.

A final point to note is that the costs orders under CPR 44.2(6) (and if the party at fault is the successful party under CPR 44.11(2)(b)) relate specifically to the obligation of a successful party to pay at least some of the unsuccessful party's costs: POs. The rationale for having POs seems fair where an unsuccessful party has had to incur additional costs or time but for the successful party's failure to engage in ADR. However, as will be discussed in Part 3, the courts have been unwilling or reluctant to make POs against a successful party which has unreasonably refused ADR.

3 ADR jurisprudence and adverse costs orders: a critical assessment

This part will focus upon a number of significant Court of Appeal authorities, each of which concerns ADR. It will critically evaluate the relationship between judicial endorsement and reinforcement of ADR policy and reveal the extent to which this has been reflected in the types of adverse costs orders that the courts have eventually made. First we must consider those early post-Woolf authorities which were significant in not only adopting a pro-ADR stance but which also established the first jurisprudential connections between the court's role in encouraging ADR, the parties' obligations to consider and engage with ADR and the power of the courts to make adverse cost orders where the parties failed to engage with ADR.

The emergence of jurisprudence concerning the role of ADR (in particular mediation) in litigation became clearer shortly after the enactment of the CPR. These authorities

⁴⁷ Lord Phillips in *Halsey* (n 6).

⁴⁸ [2014] EWCA Civ 906.

⁴⁹ CPR 3.9 (Relief from sanctions) provides: '(i) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need – (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders.'

heralded a strong pro-ADR stance by the senior judiciary. In *Dyson v Leeds City Council*,⁵⁰ Ward LJ encouraged the parties to engage in ADR, which, he observed, was consistent with the overriding objective and the court's duty to manage cases. Also, in *Cowl v Plymouth City Council*,⁵¹ Lord Woolf MR was of the view that the courts should make appropriate use of their 'ample powers' under the CPR to ensure that the parties try to resolve the dispute. He went on to indicate that the courts could require the parties to provide an explanation of the steps they had taken to try to settle the matter.⁵²

The rhetoric for the need for parties to seriously consider and engage with ADR processes was taken a step further by Brooke LJ in the leading case of *Dunnett v Railtrack plc*.⁵³ In that case the Court of Appeal dealt with the issue of the defendant's unreasonable refusal to consider mediation. The defendant had been successful in defending an appeal by the claimant and sought its costs of the appeal, but had previously rejected an invitation by the claimant to seek a settlement through mediation. On appeal, the defendant, Railtrack, argued that it was not willing to engage in mediation as it was not willing to offer more than what it had previously offered by way of settlement. Brooke LJ did not hesitate in rejecting the defendant's arguments and refused to award its costs. He observed that the defendant had been wrong in rejecting mediation out of hand even though it did not consider that it would bring about a settlement of the matter. In Brooke LJ's opinion, this was a misunderstanding of the purpose of ADR. He emphasised the need for the courts to further the overriding objective through active case management, which included encouraging the parties to consider ADR procedures and for the parties to also further the overriding objective in this respect. In disallowing the defendant's costs, he concluded with a stern warning to lawyers who failed to consider and engage in ADR processes:

It is to be hoped that any publicity given to this part of the judgment of the court will draw the attention of lawyers to their duties to further the overriding objective in the way that is set out in CPR Pt 1 and to the possibility that, if they turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequences.⁵⁴

Brooke LJ's judgment raises a number of points. The court adopted a favourable attitude towards settlement through ADR. Brooke LJ eloquently advocated the positive elements of ADR and, in particular, the skills and benefits of mediators in resolving disputes and their unique ability to achieve outcomes that may be beyond the scope of the court and lawyers. Further, although the court did not provide specific guidelines as to the assessment of unreasonableness, it adopted a strong policy approach in promoting ADR with the real threat of punishing a party in costs for failing to not only consider ADR but, more significantly, engage in it. Brooke LJ also mentions 'turn[ing] down out of hand the chance of ADR'.⁵⁵ It follows from this that regardless of whether a party considers ADR to be appropriate will be wholly irrelevant. Brooke LJ seems to indicate that if a court suggests ADR then the parties must consider ADR. Both observations are reinforced by Brooke LJ's concluding remark that is a threat of 'uncomfortable costs consequences' for parties who refuse ADR.

50 [2000] CP Rep 42, [16].

51 [2002] 1 WLR 803.

52 Ibid [3] (Lord Woolf MR).

53 [2002] EWCA Civ 303.

54 Ibid [15] (Brooke LJ).

55 Ibid [15] (Brooke LJ).

The earlier authorities illustrate the development of a pro-ADR judicial stance; one that was reinforced by the senior judiciary's advocacy for the need to make adverse costs orders in appropriate circumstances.⁵⁶ Therefore, the ground for the emerging ADR jurisprudence was fertile for subsequent decisions of the courts to further expand, develop and strengthen the link between judicial endorsement of ADR with effective and robust adverse costs orders that went beyond simply making CDOs. However, subsequent cases appeared to undermine the pro-ADR policy which consequently led to a clear discrepancy between the courts' endorsement of ADR on the one hand and on the other its failure to give proper effect to that endorsement though the making of appropriate and robust adverse costs orders. This is well illustrated by the controversial case of *Halsey*.

A great deal of criticism has been made in respect of the Court of Appeal's decision in *Halsey*. Some commentators, including members of the judiciary,⁵⁷ have criticised *Halsey* because of the guidelines given by the court as to when a party that has refused mediation will be perceived as unreasonable by the courts.⁵⁸ Others find *Halsey* unfair because it places a heavy burden on the party which contends that the other has unreasonably refused mediation to prove unreasonableness.⁵⁹ In fact, Ward LJ, who presided over the Court of Appeal in *Halsey*, recently recanted the court's decision when he said that it was time to review the *Halsey* principles that to oblige unwilling parties to refer their dispute to mediation would impose an unacceptable obstruction on their right of access to the courts.⁶⁰ The discussion here will focus on two interrelated issues. First, it will focus upon the Court of Appeal's contradictory understanding that the courts cannot compel parties to engage in mediation; that it breaches Article 6 of the European Convention on Human Rights (ECHR) which provides the right to a fair and public hearing. This, it is argued, places unnecessary obstacles in the development of ADR jurisprudence and illustrates reluctance on behalf of the courts to match their encouragement of ADR with robust cost orders. The second issue specifically relates to the court's approach to adverse costs orders.

Halsey concerned two personal injury cases that were heard together in the Court of Appeal. The critical issue was whether the defendants should be penalised in costs for refusing mediation. In both cases the claimants and the court had recommended mediation. The trial judges refused to take into account the defendants' refusal to mediate when assessing costs. The Court of Appeal upheld the decisions at first instance and held that the defendants should not be deprived of any of their costs on the ground that they had refused to accept the claimants' invitations to agree to mediation.⁶¹

Giving the judgment of the court, Dyson LJ explained in detail the duty of the courts under the CPR to encourage the parties to engage in ADR, the types of court-based mediation schemes which are available and recognised the virtues of mediation in relevant court guides.⁶² However, on the question of whether the court has the power to order parties to submit their disputes to mediation against their will, Dyson LJ held that

56 For example, *Hurst v Leeming* [2001] EWHC 1051 (Ch); *Dyson v Leeds City Council* [2000] CP Rep 42; *Dunnett v Railtrack* (n 53); *McCook v Lobo and Others* [2002] EWCA Civ 1760; *Leicester Circuits* (n 7).

57 For example, Sir Gavin Lightman, 'Mediation: An Approximation to Justice' (2007) 73 *Arbitration* 400; Sir Anthony Colman, 'Mediation and ADR: A Judicial Perspective' (2007) 73 *Arbitration* 403; and more recently Rix (n 37).

58 For a discussion of the *Halsey* guidelines, see Shirley Shipman, 'Court Approaches to ADR in the Civil Justice System' (2006) 25 *Civil Justice Quarterly* 181.

59 Lightman (n 57).

60 *Wight v Michael Wright (Supplies Ltd)* [2013] EWCA Civ 498.

61 *Halsey* (n 6) [50] (Dyson LJ).

62 For example, the Chancery Guide and the Admiralty and Commercial Court Guide.

for a court to require unwilling parties to mediate would breach Article 6 of the ECHR. His Lordship stated:

It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court.⁶³

Dyson LJ also held that, for a court to exercise its discretion on costs and impose an adverse costs order against a successful party, the burden is upon the party seeking the imposition of an adverse costs order to establish that the successful party acted unreasonably. The burden is not on the successful party to prove that its refusal to mediate was reasonable.⁶⁴

Dyson LJ went on to recognise that the form of encouragement by the courts may be ‘robust’. The strongest form of encouragement would take the form of an ADR order made in the Admiralty and Commercial Court.⁶⁵ Any party that fails to take part in ADR after a court order has been made or refuses to consider whether ADR is suitable will, Dyson LJ warned, be at risk of having an adverse costs order being made against it.

A number of observations can be made in respect of Dyson LJ’s judgment. First, his Lordship makes brief reference to the earlier ADR cases of *Cowl* and *Dunnett* but fails to recognise that both authorities strongly favoured ADR and advocated the obligations of the parties to engage in ADR processes. A further difficulty with the court’s judgment in *Halsey* relates to the notion that the courts cannot compel the parties to engage in ADR. The failure to recognise that this power exists, albeit impliedly through the threat of adverse costs orders, places a further obstacle in the way of ADR and the full realisation by the court of its powers to penalise a party through a range of costs orders including by way of POs. Dyson LJ fails to reconcile his opinion (although *obiter dicta*) that a court cannot compel mediation with Blackburn J’s comments in *Shirayam Shokusan Company Ltd v Danovo Ltd*⁶⁶ and the approach taken by Arden J in *Guinle v Kirreb, Kinstreet Ltd*⁶⁷ in which the court made an ADR order despite one of the parties being unwilling to take part in ADR. Also, in *Phillip Garritt-Critchley*,⁶⁸ the district judge made an Ungley Order which required the parties not only to engage in mediation but also to provide witness statements to explain why a party refused to attend mediation. This act in ordering mediation and requiring sealed witness statements to be provided to the court is clear evidence of the courts’ willingness to compel parties to engage in mediation regardless of the parties’ opinions. Clearly, the Court of Appeal is not bound by the decision of the lower courts, however, Dyson LJ failed to consider two cases that dealt directly with one of the central issues in *Halsey* – can the courts compel unwilling parties to mediate? Despite Dyson LJ’s *obiter* comments, *Shirayama* and *Guinle*, both High Court authorities, remain the law, albeit not followed in practice.

There also appears to be a paradox within Dyson LJ’s reasoning as to the issue of encouragement of ADR by the courts. He purports to support his argument that the courts may encourage ADR in the form of, for example, an ADR order in the Commercial Court or an Ungley Order. If Dyson LJ contends that parties cannot be compelled to mediate, then his notion of court encouragement of ADR is contradictory. When one considers the wording of both the above orders it is clear that there exists an element of compulsion. The

63 *Halsey* (n 6) [9] (Dyson LJ).

64 *Ibid* [13] (Dyson LJ).

65 In the form set out in Appendix 7 to the Admiralty and Commercial Court Guide.

66 [2003] EWHC 3306 (Ch).

67 [2000] CP Rep 62.

68 *Phillip Garritt-Critchley v Ronnan* [2014] EWHC 1774 (Ch).

ADR order in the Commercial Court requires the parties to engage in ADR but also goes further and, in the event that the parties are unsuccessful in resolving their dispute through ADR, places a burden on the parties to provide reasons as to why the matter could not be settled. Therefore, it is argued that the concept of 'encouragement' of ADR by the courts is a term that is unclear and misleading in the light of the *Halsey* jurisprudence. What appears from *Halsey* is the court's desire to actively encourage ADR while at the same instance compelling parties to consider, engage and even settle their dispute with the threat of adverse costs consequences as the driving force in directing the court's approach.

Dyson LJ considered whether the court should make an adverse costs order against a successful public body on the grounds that it refused to agree to ADR. It was argued by the claimants that public bodies should be held to their ADR pledge following the High Court decision of *Royal Bank of Canada v Secretary of State for Defence*⁶⁹ in which the court stated that the ADR pledge should be given 'great weight'. Dyson LJ, who held that the judge in *Royal Bank of Canada* had been wrong to attach such weight to the ADR pledge, rejected this argument. The pledge, Dyson LJ explained, was no more than an undertaking that ADR would be considered and used in all suitable cases. If the case is not suitable for ADR, then a refusal to agree to ADR does not breach the pledge. There is logic in Dyson LJ's analysis of the ADR pledge. The pledge does not have the force of law; it is not a statutory requirement for public bodies to engage in ADR. But the issue is this: Dyson LJ appears to go to the opposite extreme when arguing that the ADR pledge was not relevant. Yes, to say that it must be given 'great weight' is to also go too far. But where a party invites a public body to mediation and does so within the context of a strong pro-ADR atmosphere, then the ADR pledge should have been taken into account when assessing the 'conduct' of the parties.

One of the main criticisms of *Halsey* is that it was fundamentally wrong on the issue that the court could not compel the parties to engage in mediation as it breached Article 6 of the ECHR. Sir Gavin Lightman⁷⁰ has convincingly argued that the court appeared to have been unfamiliar with the mediation process and to have confused an order for mediation with an order for arbitration or some other order which places a permanent stay on proceedings. An order for mediation does not interfere with the right to a trial: at most it merely imposes a short delay to afford an opportunity for settlement and indeed the order for mediation may not even do that, for the order for mediation may require or allow the parties to proceed with preparation for trial. Sir Gavin went on to state that the Court of Appeal appears to have been unaware that the practice of ordering parties to proceed to mediation regardless of their wishes was prevalent elsewhere throughout the Commonwealth, the USA and other jurisdictions.⁷¹

Further, the European Court of Justice's ruling in *Alasini v Telecom Italia SpA*⁷² has made clear that the Italian law in question which required customers to engage in a form of compulsory mediation before they could bring legal proceedings did not breach Article 6. The Italian law, in the opinion of the Advocate General Kokott, pursued legitimate objectives in the general interest in the quicker and less expensive resolution of disputes. The measure of requiring parties to engage in settlement discussions before commencing court proceedings was proportionate because no less restrictive alternative existed to the implementation of a mandatory procedure since the introduction of an out-of-court settlement procedure which is merely optional is not as efficient a means of achieving those

69 [2003] EWHC 1841 (Ch).

70 Lightman (n 57).

71 For example, in Canada and Australia.

72 *Alasini v Telecom Italia SpA* (joined cases C-317-320/08) [2010] 3 CMLR 17 ECJ.

objectives. The Italian law did not seek to replace court proceedings and therefore access to the court was not denied but, at worst, delayed by 30 days.

Finally, although the Court of Appeal referred to the basic costs rules and the factors the courts will consider when assessing whether to make adverse costs orders, the court failed to provide guidance or comments upon the range of adverse costs orders that are at the disposal of the court. The claimants in both cases raised the argument that the defendants should be deprived of their costs and that was the order at the heart of the appeal. However, given the significance of the case and the precedent it was to set for future cases concerning ADR and the powers of the courts to make adverse costs orders, the Court of Appeal appeared to have fallen short in providing guidance on that issue. This shortcoming in *Halsey* is clearly illustrated when we come to analyse Briggs LJ's judgment in *PGF II SA v OMFS Company 1 Ltd*.⁷³

The restraining force of *Halsey* upon judicial discretion to make appropriate adverse costs orders can be seen in *Burbell v Bullard*.⁷⁴ In that case Ward LJ expressed himself in the following way when commenting on the sums involved: 'A judgment of £5000 will have been procured at a cost to the parties of about £185,000. Is that not horrific?'⁷⁵ This was, he said, 'par excellence the kind of dispute which, as the recorder found, lends itself to ADR'.⁷⁶ He also found that the defendant's refusal to mediate had been unreasonable but, because the invitation to mediate pre-dated *Halsey*, Ward LJ did not impose cost sanctions even though he was of the view that the 'court should mark its disapproval of the defendants' conduct by imposing some costs sanction'.

In his Final Report, Sir Rupert also took the opportunity to expressly reject the notion of compulsory mediation when he said: 'In spite of the considerable benefits which mediation brings in appropriate cases, I do not believe that parties should ever be compelled to mediate.'⁷⁷ But despite this explicit rejection of compulsory mediation, his Lordship provided guidance as to the steps which courts could take to 'encourage' parties to participate in mediation, which included penalising the parties in costs. However, Sir Rupert's view on compulsory mediation or compelling parties to engage in mediation and subsequent guidance on encouraging mediation seems, like Dyson LJ's judgment in *Halsey*, to create a paradoxical approach towards compulsory mediation. It is this paradox which, coupled with the decision in *Halsey*, currently exists in English civil justice. On the one hand, the courts' official approach to mediation is that it should not be made compulsory but, on the other hand, judicial and extrajudicial statements indicate that there exists a form of compulsory mediation within the English civil justice system. Indeed, Lord Woolf alluded to the possibility of revisiting the idea of compulsory mediation when discussing his Interim Report in Hong Kong. Lord Woolf noted that, although he had not gone so far as to recommend compulsory mediation in the English system, he was 'encouraged to think that that is something which I should look at again'.⁷⁸

Although subsequent Court of Appeal authorities continued to uphold the general pro-ADR policy, it is submitted that a closer examination of the facts of some of those cases indicates a lack of progress in expanding the wider range of costs orders even though the facts would justify such orders being made. This can be seen in the case of *Rolf v De*

73 [2014] 1 WLR 1386.

74 [2005] EWCA Civ 358.

75 Ibid [23] (Ward LJ).

76 Ibid [41] (Ward LJ).

77 Jackson, Final Report (n 7), ch 36, 355-356.

78 The Rt Hon the Lord Woolf, 'A New Approach to Civil Justice', 1996, Hong Kong Lecture.

Guerin.⁷⁹ In that case the claimant had made various invitations to the defendant to enter settlement discussions and, later, mediation which the defendant rejected. On appeal, when asked by the court why he had been unwilling to mediate, the defendant stated that if he had participated in mediation then he would have had to accept 'his guilt' and that he would not have been able to demonstrate to a mediator what the claimant's husband was like, as this could only be done at trial. In any event, he wanted his 'day in court'. Rix LJ did not hesitate in dismissing these reasons and found that the defendant's refusal to mediate was unreasonable behaviour for the purposes of CPR 44(5) and, as a consequence, the court was entitled to exercise its discretion and make no order as to costs.⁸⁰

Although Rix LJ acknowledged that the courts have been unwilling to compel parties to mediate, his Lordship reinforced the trend that parties will be expected to consider and engage in mediation, and a refusal to do so will be considered as unreasonable behaviour which will justify the making of an adverse costs order against the defaulting party. Any reason for refusing mediation must be strong and grounded in the facts and law for it to withstand judicial scrutiny – any reason which is slightly weak will be dismissed by the courts and will amount to legitimate 'circumstances' in making an adverse costs order.

Rix LJ appears to take the approach that has developed through the jurisprudence in the area of ADR and mediation. His judgment confirms that, although mediation may not always produce a solution or a satisfactory solution for the parties, the court will expect parties to engage in mediation as a matter of course. A further observation relates to the costs order Rix LJ made. It was an order of no costs, that is, the successful defendant was deprived of claiming his costs. Upon closer examination of the facts it could be argued that the defendant's unreasonable conduct in pursuing the matter in order to have his 'day in court' rather than accept two offers to mediate by the claimant caused the claimant to unnecessarily remain in the litigation process and to incur costs as well as the time and resources of two courts. Indeed, Rix LJ made the point that there was a reasonable prospect that the mediation would have been successful. The court also noted that the claimant had also behaved unreasonably but, the fact remains, the claimant discharged her ADR obligations as required by the CPR and ADR jurisprudence. The defendant did not and there was a possibility that the matter would have settled without the need for the parties and the courts to incur further costs: a more robust costs order was required.

Some of the failures of *Halsey* concerning adverse costs orders and the reluctance of the courts to exercise their powers in making POs can be seen in *PGF*. The claimant, at an early stage in the litigation process, wrote to the defendant requesting that it participate in mediation and, four months later, the claimant sent a second letter inviting the defendant to ADR. However, the defendant failed to respond to these invitations and instead made a Part 36 offer without providing an explanation as to the basis of that offer.

The matter eventually settled, with the claimant accepting the defendant's Part 36 offer. Although the ordinary consequence of the claimant's acceptance of the defendant's Part 36 offer was that it would have to pay the defendant's costs for the relevant period unless the court ordered otherwise,⁸¹ the claimant gave notice that it would seek an order for costs in its favour. At the costs hearing the claimant argued, *inter alia*, that the defendant was unreasonable to have refused to participate in ADR. The ADR point succeeded in part, in the sense that, while depriving the defendant of its costs for the relevant period, the judge did not accept the claimant's submission that it should also be paid its costs for that period.

79 [2011] CP Rep 24.

80 *Ibid* [41] (Rix LJ).

81 CPR 36.10(4) and (5).

Gross LJ gave permission to the defendant to appeal and the claimant to cross-appeal the ADR point on the ground that the application of *Halsey* to the facts might be of potentially wide importance.

Giving the leading judgment, Briggs LJ emphasised the importance of the role and success of ADR in settling civil disputes, especially after the Jackson reforms. Briggs LJ also noted that ADR conferred cost benefits to the parties and to court resources.⁸² More significantly, Briggs LJ formally endorsed the advice given in the *Jackson ADR Handbook*⁸³ that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless of 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.

The defendant also contended that the judge, having concluded that an offer of mediation had been unreasonably refused, mechanically deprived the defendant of the whole of its entitlement against the claimant during the relevant period without weighing up all other relevant factors. The claimant, on the other hand, argued that the judge should have ordered the defendant to pay the claimant's costs in respect of the relevant period. Briggs LJ, agreeing with the defendant's arguments, observed that a finding of unreasonable conduct did not automatically result in a costs penalty. It is simply an aspect of the parties' conduct that needs to be addressed in a wider balancing exercise. It followed from *Halsey* and other cases that the proper response would be to disallow some or all of the successful party's costs. Briggs LJ also noted that *Halsey* did not recognise that the court might go further and order the otherwise successful party to pay all or part of the unsuccessful party's costs. Although Briggs LJ recognised that the court must, in principle, have this power, it would only be exercised in the most serious and flagrant failures to engage with ADR.⁸⁴ Therefore, the claimant's cross appeal was also dismissed.

Briggs LJ's judgment focuses upon the circumstances where a party refuses to respond to 'repeated' invitations to engage in ADR and this creates uncertainty. A better approach would have been for the Court of Appeal to have held that silence in the face of *any* invitation to engage in ADR would be considered as unreasonable and would justify the defaulting party being penalised in costs. Secondly, Briggs LJ suggested that it would be highly unusual for the costs sanction to take the form of requiring the party refusing mediation (i.e. the successful party) to pay some or all of the other party's costs: 'a sanction that draconian should be reserved for only the most serious and flagrant failures to engage with ADR'.⁸⁵ This approach is surely too cautious. It would be better if the court had acknowledged that an appropriate costs sanction is that a party in default of invitations to engage in ADR will be liable to pay the other's costs by way of a PO. Briggs LJ's observations that *Halsey* did not recognise that the unreasonable party may be ordered to pay the costs of the other party represents a missed opportunity in clarifying and reinforcing this area of law. Although *Halsey* did not deal with this issue, it did not prevent the Court of Appeal from exercising its powers, which Briggs LJ concedes the court would have, to make such an order on the facts of the case.

82 *PGF* (n 73) [24]–[30] (Briggs LJ).

83 Susan Blake, Julie Browne and Stuart Sime, *The Jackson ADR Handbook* (OUP 2013).

84 *PGF* (n 73) [51]–[52] (Briggs LJ).

85 *Ibid* [52] (Briggs LJ).

4 An alternative approach

This article has revealed the discrepancy that exists between judicial endorsement of ADR and the senior judiciary's reluctance to reflect that through the making of POs. The Court of Appeal's decision in *Halsey* undermines the evolution of adverse costs orders and continues to restrain judicial acceptance of its powers to compel parties to engage in ADR and to punish successful parties by way of POs. If the judiciary is committed to effect a change in litigation culture as envisaged by Lord Woolf, then that should be reflected through the making of appropriate robust costs orders (in circumstances which justify such orders being made) rather than simply paying lip-service to the general importance and benefits of ADR.

Judicial approaches to adverse costs orders against a successful party do not take account of the financial loss caused to the unsuccessful party. This is unfair and fails to strike an appropriate balance between the obligation of the parties to consider ADR and the need to reimburse a party that has complied with its obligation but which is now out of pocket as a result of the other party's default. This is not to say that every ADR process would have been successful and, therefore, would have saved the unsuccessful party litigation costs. However, one may reasonably argue that, had the parties engaged in ADR, then there is a strong likelihood that they would either have settled during the ADR process or at some point after it. Indeed, this is a line of argument the courts have raised in a number of significant ADR cases. In *Leicester Circuits Ltd v Coates Brothers plc*,⁸⁶ for instance, the Court of Appeal disapproved of the defendant's decision to withdraw from a mediation that the parties had arranged and rejected its argument that it would have been pointless to participate in it. Judge LJ was strongly of the conviction that, although it could not be assumed that the mediation would have succeeded, 'there [was] a prospect that it would have done if it had been allowed to proceed'.⁸⁷ More recently, Judge Waksman QC in *Phillip Garritt-Critchley v Roman*⁸⁸ granted an indemnity costs order against the defendants for unreasonably refusing to engage in mediation. He rejected the defendant's contention that the claim did not provide any middle ground between the parties and that the defendants were confident that an agreement could not be reached by engaging in the mediation process: 'To consider that mediation is not worth it because the sides are opposed on a binary issue, I'm afraid seems to me to be misconceived.'⁸⁹ It was only by sitting down and exploring settlement that the parties could really ascertain 'how far apart they really were.'⁹⁰

How, then, can the gap between judicial encouragement and promotion of ADR be filled so that the courts, in appropriate cases, can utilise the full range of adverse costs orders including making a PO where a successful party has unreasonably refused to engage in ADR? It is submitted that two options may be considered to bring about a change. The first option demands the formal acknowledgment by the judiciary that it has the power to compel parties to engage in ADR: *Halsey* needs to be reappraised judicially and its approach rejected. The power to compel parties to engage in ADR would only be restricted to the point at which the courts order the parties to explore settlement through an appropriate ADR process; it would not, however, extend to compelling parties to actually settle their dispute through ADR. The exercise of this power would be underpinned by the obligation of the courts (and the parties) to further the overriding objective and the need for the

86 *Leicester Circuits* (n 7).

87 *Ibid* [27] (Judge LJ).

88 *Phillip Garritt-Critchley* (n 68)

89 *Ibid* [14] (Judge Waksman QC).

90 *Ibid* [22] (Judge Waksman QC).

courts to provide *proportionate* justice. Where the first option may prove to be too radical, then a second option may be considered. It rests on the need for the courts to make better use of their existing powers on costs and be more willing to make a PO where there has been an unreasonable refusal to engage in ADR. It is submitted that this option is reinforced by the Court of Appeal's recent approach on the issue of procedural non-compliance and relief from sanctions as formulated in the Court of Appeal authorities of *Mitchell v News Group Newspapers Ltd*⁹¹ and *Denton*,⁹² which have provided a new impetus for costs sanctions to be applied where ADR is concerned. Let us consider the two options in greater detail.

The first option is the most radical. It is radical because it demands a departure from the orthodox position in English civil procedure that ADR is not and should not be made compulsory. However, that orthodox position is untenable. Despite the formal rejection by senior members of the judiciary of the idea of court-compelled ADR, there is, as discussed in Part 3, evidence that the courts do compel parties to engage in settlement processes and that the parties run the risk of suffering by way of adverse costs orders where they have failed to engage in ADR or have unreasonably refused to engage in ADR. And this is well illustrated by the *Phillip Garritt-Critchley* case in which the district judge made an order in the following terms: 'the court considers the overriding objective would be served by the parties seeking to resolve the claim by mediation'.⁹³

The courts' powers to compel parties to engage in ADR must be underpinned and guided by the overriding objective of dealing with cases justly and at proportionate cost. Although the courts have, in some cases, utilised the overriding objective in ordering that parties should consider ADR, the courts must make greater use of the overriding objective in seeking to provide the parties with *proportionate justice*. And the parties would also be required to assist the court in furthering the overriding objective as required under CPR 1.3. To understand and fully appreciate the concept of proportionate justice and how it relates to the first option, a more detailed analysis of the overriding objective is called for.

The overriding objective is the bedrock of the civil justice system. It underpins the CPR and guides the courts in the management of civil disputes and dispensing justice. When introduced by Lord Woolf, the overriding objective was revolutionary in transforming the concept of 'justice' from one which was primarily concerned with seeking to achieve substantive justice (or justice on the merits) between the parties to a broader concept of justice.⁹⁴ The courts could no longer simply be concerned with achieving substantive justice; this now had to be balanced with other considerations. As Lord Woolf MR explained: 'The achievement of the right result needs to be balanced against the expenditure of the time and money needed to achieve that result.'⁹⁵ Lord Woolf MR also spoke of the need to have proportionate justice and this meant that no more than proportionate costs should be expended on individual cases – the courts had to consider the rights of other litigants to have access to justice.⁹⁶ This was taken further under the Jackson reforms, which amended the Woolfian overriding objective to give express recognition to the principle of

91 [2013] EWCA Civ 1537.

92 *Denton* (n 48).

93 *Phillip Garritt-Critchley* (n 68) [6] (Judge Waksman QC).

94 The pre-Jackson overriding objective under CPR 1.1(1) stated: 'These rules are a new procedural code with the Overriding Objective of enabling the court to deal with cases justly.'

95 Woolf, Interim Report (n 1) ch 4, para. 6.

96 See Lord Woolf MR's comments in *Beachley Property Ltd v Edgar* [1997] PNLR 197.

proportionality within CPR 1.1(1)⁹⁷ and the obligation on the parties to comply with rules, practice directions and court orders.

Therefore, the overriding objective is concerned with the need to achieve proportionate justice as opposed to simply seeking to achieve substantive justice between the parties. The courts must consider the rights of other litigants to have access to justice. Sorabji explains that the policy aims of time and cost are intended to support the achievement of the wider public policy aim of ensuring that the limited resources allocated by the state to the justice system can be distributed fairly amongst all who rely on the state to vindicate and enforce their rights and obligations.⁹⁸ Thus, Sorabji argues, the new theory of justice is concerned with securing *distributive* justice rather than justice on the individual merits of the case. As a consequence, litigants are provided with a system of judicial resolution of disputes that ultimately seeks to achieve proportionate justice.

Applying the overriding objective, the courts must seek to further the principle of proportionality when considering whether a particular dispute is suitable for ADR. It may be that the facts and issues of a particular case are such that justify it being resolved through mediation rather than incurring court resources in allowing the matter to be pursued through the court process. By doing this, the courts will be effectively applying and furthering the overriding objective in ensuring that the parties are provided with proportionate justice.

The second option has two elements:

1. the need for the removal of artificially high and unrealistic thresholds that restrict the making of POs and greater use by the courts of their cost powers;
2. to reinforce element 1 above, amending the costs rules to make clear that, when assessing costs, the courts will have regard to ADR as an important cost-saving mechanism for the parties and the court.

There must be a fundamental change in judicial attitudes and approaches to the making of adverse costs orders and the removal of artificially high thresholds in making POs. Although Briggs LJ in *PGF* suggested that the courts possessed the powers to make POs against successful parties, his Lordship immediately restricted this by setting a high threshold of ‘flagrant breaches’ which, if met, would justify an order being made. However, this test is vague, artificial and contradictory. It is unclear as to what is actually meant by ‘serious and flagrant breaches’. The fact that the Court of Appeal did not expand on the circumstances where the test would apply (whether by way of non-exhaustive examples or by providing factors which the courts would take into account when applying the test) does not assist in the theoretical understanding of the test and its practical application. It is contradictory because, as argued, repeated invitations can reasonably be interpreted as a ‘serious and flagrant breach’ of the parties’ duties to consider and engage in ADR and therefore would justify the making of a PO against the successful party. Further, the test does not sit well with the policy of ADR consistently advocated by the courts. If, as Dyson LJ stated in *Halsey*, the most robust form of encouragement would be an ADR order, then surely, where a successful party had refused ADR unreasonably after such an order had been made, that conduct in itself should justify the making of an equally robust costs order in the form of a PO. Although Dyson LJ did not, as Briggs LJ rightfully observed in *PGF*, discuss POs in *Halsey*, the court in *PGF* was in a position to not only formally acknowledge

⁹⁷ For an interesting discussion of the concept of proportionality, see J Sorabji, ‘Prospects for Proportionality: Jackson Implementation’ (2013) 32(2) *Civil Justice Quarterly* 213.

⁹⁸ John Sorabji, *The Woolf and Jackson Reforms: A Critical Analysis* (CUP 2014).

that the courts have the powers to make POs, it should also have made such an order, which was justified on the facts. This would have bridged the gap that currently exists between strong judicial endorsement of ADR and the making of cost orders that reflect and reinforce that endorsement.

It may be argued by some that Briggs LJ's (overly) cautious approach is justified on the grounds that POs are too heavy handed, too draconian and, in any case, the courts are able to make CDOs which serve the purpose of penalising a successful party in costs. However, this argument unduly restricts the court's discretion and its powers to exercise the full range of adverse costs orders. The powers to make a range of adverse costs orders have been provided to the courts by the CPR and are there to be utilised and should be utilised in appropriate cases. This approach is supported by the Court of Appeal's robust stance concerning circumstances in which a party has failed to cooperate with its counterpart which has breached a process requirement and is forced to make an application for relief from sanction under CPR 3.9.

The landmark cases of *Mitchell MP and News Group Newspapers*⁹⁹ and *Denton* dealt with the issue of the approach the courts should adopt where a party has failed to comply with process requirements and then makes an application for relief from sanctions. In both cases the court advocated the need to adopt a more robust and less forgiving stance when considering applications for relief from sanctions. In particular, in *Denton* the court advocated the need to adopt robust judicial approaches in making adverse costs orders to penalise a party that failed to behave reasonably in agreeing to extensions of time or that unreasonably opposed applications for relief from sanctions.¹⁰⁰ This behaviour, the court noted, ran counter to the duty of the parties to further the overriding objective. Giving a joint judgment of the court, Lord Dyson MR and Vos LJ made clear the need for the courts to make heavy costs sanctions which went beyond simply requiring the unreasonable party to pay the cost of the application when they stated:

[T]he court will be more ready in the future to penalise opportunism. The duty of care owed by a legal representative to his client takes account of the fact that litigants are required to help the court to further the overriding objective . . . Heavy costs sanctions should, therefore, be imposed on parties who behave unreasonably in refusing to agree extensions of time or unreasonably oppose applications for relief from sanctions.¹⁰¹

The court also held that an unreasonable party would not only be required to pay the costs of the application for relief but it may also be required to suffer further cost sanctions (by way of a CDO) at the end of the proceedings even though it may be the successful party. Although the Court in *Denton* spoke of CDOs being made against the successful party, the principle that a more disciplinarian approach be adopted, which requires the making of 'heavy costs sanctions', is one that lends support to the argument that the courts should also adopt an equally robust approach to costs when dealing with ADR. This would include the courts making costs orders which have the aim of reimbursing the unsuccessful party for costs it has incurred because of the successful party's unreasonable behaviour in refusing to engage in ADR.

The second element of the second option requires the rules on costs to be amended so that they make clear that the court will have regard to factors which *could have saved the parties and the court costs* when considering whether to make adverse costs orders. Having such a

99 *Mitchell* (n 91).

100 CPR 3.9 deals with applications for relief from sanctions.

101 *Denton* (n 46) [43] (Lord Dyson MR and Vos LJ).

provision has the benefit of providing the courts with a general power to take into account any relevant steps the parties could have taken (but failed to take) during the litigation process that could have saved the parties and the courts cost and time. This provision would further justify the courts making POs in circumstances where the successful party could have engaged in ADR but failure to do so has meant that both parties have had to incur further costs in the matter continuing to be pursued through the court process. The following approach could be adopted from the Singaporean civil justice system.

Although ADR is not mandatory in Singapore, the Subordinate Courts have implemented a 'presumption of ADR' for civil matters. This expressly endorsed the early use of ADR. The effect of the presumption is that cases filed in the Subordinate Courts are *automatically* referred to the most appropriate mode of ADR unless any or all of the parties opt out of ADR.¹⁰² Although the parties may opt out, they risk being punished in costs at a later stage. Order 59 rule 5(1)(c) of the Rules of Court¹⁰³ prescribes the types of orders that can be made:

The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account the parties' conduct in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution.

The courts have further extensive powers to penalise a party in costs for misconduct or neglect under Order 59 rule 7, which would include a party's failure to engage in ADR. Order 59 rule 7 states:

- (1) Where it appears to the Court in any proceedings that anything has been done, or that any omission has been made, unreasonably or improperly by or on behalf of any party, the Court may order that the costs of that party in respect of the act or omission, as the case may be, shall not be allowed and that any costs occasioned by it to *any other party shall be paid by him to that other party*.¹⁰⁴
- (2) Without prejudice to the generality of paragraph (1), the Court shall for the purpose of that paragraph have regard in particular to the following matters:
 - (a) *the omission to do anything the doing of which would have been calculated to save costs*.¹⁰⁵

The Singaporean system is interesting because its costs regime is better linked to its strong commitment to the parties' obligation to engage in ADR. The 'presumption of ADR' referral system acts as a form of quasi-compulsory mediation in that an automatic referral will be made but the parties still have the freedom to opt out, albeit at the risk of a costs order being made against them at a later stage. The Singaporean approach also goes further than the English approach in that it formally recognises the courts' role in serving society with a 'variety of processes for timely resolution of disputes'. This radically alters the traditional perception of the role of the courts from one in which courts are perceived as

¹⁰² Subordinate Courts Practice Direction Amendment No 2 of 2012. Relevant amendments were also made to the pre-action protocols for non-injury motor accident, medical negligence and personal injury claims to ensure that the schemes would be in alignment with the guidelines for a 'presumption of ADR'. The 2012 presumption of ADR was followed with the passing of the State Courts Practice Directions Amendment No 4 of 2014 <<https://app.statecourts.gov.sg/Data/Files/file/cdr/PD%20Amendment%20No%204%20of%202014.pdf>>. These amendments expand the presumption to apply to cases that are called for pre-trial conferences four months after the writ is filed. Amendment No 4 took effect in August 2014.

¹⁰³ Supreme Court of Judicature Act (chapter 322, s 80), Rules of Court, R5 GN No S 71/1996, revised edn 2014 (21 March 2014).

¹⁰⁴ Emphasis added.

¹⁰⁵ Emphasis added.

principally concerned with dealing with litigation to one which views their role in a more dynamic way, as a service provider of other methods of dispute resolution. By contrast, Zuckerman has contended that the function of the civil court is to deliver a public service for the enforcement of rights rather than merely a dispute resolution process.¹⁰⁶ Unlike the Singaporean system, which speaks of the courts providing a ‘variety’ of processes for the resolution of disputes, Zuckerman warns of the danger of regarding courts as one form of dispute resolution when he states: ‘to regard court adjudication as simply one of many forms of private dispute resolution is to debase its constitutional function in a system governed by the rule of law . . . Court adjudication is the process which provides citizens with remedies for wrongs that they have suffered.’¹⁰⁷

Order 59 rule 5(1)(c) reflects Singapore’s strong ADR commitment because it makes specific reference to mediation and ADR generally. The equivalent provision under the English costs regime, CPR 44.4 (3)(ii), rather than expressly mentioning a particular type of ADR procedure, simply refers to the parties’ conduct in ‘trying to resolve the dispute’.

Despite these differences, the Singaporean cost regime does bear some similarities to the English system. Order 59 rule 7(1) includes what appears to be POs, which oblige a party found to have caused another party to incur unnecessary costs to reimburse those costs. But Order 59 rule 7(2) goes further than the English system. Order 59 rule 7(2) provides guidance on Order 59 rule 7(1) by setting out factors the court can take into account when exercising its discretion and these include the failure of a party to do anything that *would have saved costs*. As discussed, ADR procedures are generally perceived as cost-saving mechanisms when compared with the court process and therefore it would follow from the wording of Order 59 rule 7(2) that a failure to engage in ADR would be considered as saving costs. An equivalent provision to Order 59 rule 7(2) is missing under the CPR which, if included, would make clear to all who engage in the civil justice system that the courts will consider potential cost-saving steps, such as ADR, that could have saved costs when the court considers making costs orders. Indeed, a provision which incorporates the principle of causation, similar to Order 59 rule 7(1), thereby links the failure of one party to engage with ADR with the financial loss suffered to the other party (including the adverse impact this may have on finite court resources). Some support for this proposition can be taken from the Court of Appeal decision in *Arkin v Borcard*.¹⁰⁸ That case concerned an impecunious claimant and the issue was whether the successful defendants could recover their costs from a third-party funder of the claimant. Confirming that the defendants could pursue the third party, Lord Phillips was of the view that causation was a significant factor in justifying a costs order against a non-party. His Lordship explained:

Causation is also often a vital factor in leading a court to make a costs order against a non-party. If the non-party is wholly or partly responsible for the fact that litigation has taken place, justice may demand that he indemnify the successful party for the costs that he has incurred.¹⁰⁹

It is argued that a direct link between a party’s failure to engage with ADR and the financial loss suffered to the other party (which may be the unsuccessful party) will reinforce and clarify the court’s wide-ranging costs powers.

This article has revealed a paradoxical situation which currently exists within ADR jurisprudence: the discrepancy between strong and enthusiastic judicial endorsement of

106 Adrian Zuckerman, *Civil Procedure Principles of Practice* (Sweet & Maxwell 2013).

107 *Ibid* 1.6.

108 *Arkin v Borcard* [2005] EWCA Civ 655.

109 *Ibid* [24] (Lord Phillips MR).

ADR but a failure on behalf of the senior judiciary to reflect this by making appropriate adverse costs orders, especially POs. There is a need for a change in judicial attitudes towards compulsory mediation, more effective utilisation of the overriding objective and greater use by the courts of their costs powers when dealing with ADR within the civil justice system.

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The merits factor in assessing an unreasonable refusal of ADR: a critique and a proposal¹

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[Hurst v Leeming \[2002\] EWHC 1051 \(Ch\); \[2003\] 1 Lloyd's Rep. 379 \(Ch D\)](#)

[Dunnett v Railtrack Plc \[2002\] EWCA Civ 303; \[2002\] 1 W.L.R. 2434 \(CA \(Civ Div\)\)](#)

Golden Eagle International (Group) Ltd v GR Investment Holdings Ltd [2010] 3 H.K.L.R.D. 273 (CFI (HK))

[Swain Mason v Mills & Reeve \[2012\] EWCA Civ 498; \[2012\] S.T.C. 1760 \(CA \(Civ Div\)\)](#)

[Northrop Grumman Mission Systems Europe Ltd v BAE Systems \(Al Diriyah C4I\) Ltd \[2014\] EWHC 3148 \(TCC\); \[2015\] 3 All E.R. 782 \(QBD \(TCC\)\)](#)

***J.B.L. 646** As state funding of the civil justice system continues to erode, there is unprecedented pressure on the courts to ration their limited resources in managing the high volume of civil and commercial disputes coming before them.² It is not surprising, therefore, that members of the senior judiciary have been enthusiastic in advocating the increasingly important role and benefits of alternative dispute resolution processes³ (ADR), in particular mediation, as an adjunct to the formal adjudicative court process.⁴ As Lord Neuberger MR made clear in his (cautious)⁵ support for ADR:

"It is an important adjunct to, with potentially strongly beneficial effect, on our civil justice system and can be highly effective in securing a relatively cheap and expeditious, and often imaginative, resolution of civil disputes. ***J.B.L. 647**"⁶

In 2015,⁷ his Lordship went further by alluding to the idea of extending the compulsory MIAM (mediation information and assessment meetings) under the [Children and Families Act 2014](#)⁸ to certain, smaller civil cases; an idea which had previously been advocated by Lord Faulks, the Minister for Civil Justice.⁹ More recently Briggs LJ in his Civil Court Structure Review (CCSR) has recommended the greater integration of ADR within his proposed Online Court.¹⁰

The government is also becoming increasingly vocal of the need to promote more conciliatory forms of dispute resolution. In a joint report published in September 2016, "Transforming our Justice System", the Ministry of Justice and senior judiciary explained the new approach to dispute resolution which would assist ordinary people. This would involve a focusing on a number of ADR options including negotiation, conciliation and mediation.

The benefits of ADR over the traditional litigation process have been echoed throughout the ADR jurisprudence and extra-judicial pronouncements,¹¹ as well as being consistently reinforced by policy-makers.¹² As well as saving time and cost, a successful ADR outcome may assist commercial parties to maintain their trading relationship and this may lead to higher rates of satisfaction and greater levels of compliance with outcomes.¹³ Yet a failed ADR, an ADR process which has not resulted in a settlement, may compound litigation costs because the parties must then incur further costs of engaging with the court process. A further issue of controversy, which will be considered in the second part, has been whether mandatory ADR (for example, introduced in Canada, the US and

Italy) adversely impacts on the right to a fair trial as protected by art.6 of the European Convention of Human Rights.

Despite the increased focus on ADR, certain aspects of the Court of Appeal's judgment in *Halsey v Milton Keynes General NHS*,¹⁴ the landmark case on ADR, blunts the pro-ADR messages that began to emerge in the early jurisprudence which developed shortly after the implementation of Lord Woolf MR's reforms to the civil justice system.¹⁵ One particular aspect of the *Halsey* decision which undermines the ADR obligations of litigating parties is the guidance given on the approach the courts should adopt when assessing whether a successful party has behaved unreasonably in refusing ADR (the refusing party). If unreasonable refusal can be shown, then a court is at liberty to exercise its discretion on the issue of costs and penalise the refusing party accordingly (for example, by depriving the **J.B.L. 648* successful party of a portion of his costs which he would otherwise be entitled to).¹⁶ The Court of Appeal in *Halsey* accepted the Law Society's¹⁷ six non-exclusive factors which the courts should consider when determining an unreasonable refusal of ADR.¹⁸ The second of those factors is whether the refusing party *reasonably believed* that he has a strong case when rejecting ADR (the merits factor). If that party can demonstrate a reasonable belief in the merits of his case then he will not be found to have behaved unreasonably and, consequently, will escape being penalised in costs. The policy rationale underpinning the merits factor is that the party proposing mediation could use the threat of costs sanctions to obtain a nuisance-value offer and force a settlement in a case lacking merit.¹⁹

In formulating the merits factor, the court in *Halsey* reversed the principle established in the earlier decision of *Hurst v Leeming*,²⁰ in which Lightman J stated that a litigating party's belief in the merits of his case *would not* be sufficient justification for refusing mediation. However, even though the *Hurst* principle was reversed in *Halsey*, this article reveals that a review of the jurisprudence surrounding the merits factor indicates the emergence of two distinct judicial approaches to its application. The first approach is consistent with the *Hasley* decision in that it follows and applies the test of reasonable belief, a test which sets a relatively low threshold for a refusing party to satisfy. The second approach, however, departs from the *Halsey*-type approach and is consistent with that advocated in *Hurst*.²¹ The policy rationale which appears to justify the *Hurst*-type approach is grounded on the practical benefits of ADR in resolving civil disputes.

Given the existence of these diverging judicial approaches to the interpretation and application of the merits factor, a number of immediate questions arise. To what extent are these diverging judicial approaches "fit for purpose" in assessing whether there has been an unreasonable refusal of ADR? Do these approaches strike a fair balance between an informed and justified decision by the refusing party to turn down ADR on the one hand and the need to penalise a refusing party in costs for unreasonably refusing ADR on the other? And are the policy reasons underpinning both approaches (the need to guard against unmeritorious claims and the emphasis upon the potential benefits of engaging with ADR) justifiable, and do they hold weight?

This article critically reviews the merits factor and analyses the two diverging judicial approaches. It will be argued that the *Halsey* approach of "reasonable belief" not only sets an artificially low threshold which most refusing parties are capable of satisfying, but the policy rationale upon which the merits factor rests is unsound because it places disproportionate emphasis upon the potential dangers posed to a refusing party in having to make a nuisance payment. The focus on the need to protect "vulnerable" public bodies from being potentially forced into a settlement has the effect of potentially allowing those organisations to invoke the **J.B.L. 649* merits factor in their defence to an otherwise justifiable costs penalty. This article will assert that the *Hurst*-type approach also has a number of shortcomings. It is too dismissive of the potential relevance of the merits factor in circumstances in which a refusing party may be justified in turning down ADR, and places disproportionate emphasis upon the practical benefits of ADR in resolving the dispute between the parties. It will be argued that a reformulation of the merits factor is necessary.

The first part of this article provides the theoretical underpinnings to judicial approaches towards ADR within the English civil justice system. The second part will critically analyse the merits factor and its underlying policy rationale. The third part examines the jurisprudence surrounding the merits factor and will explore the application of the *Halsey* approach and the emergence of a *Hurst*-type approach. The third part will also adopt a comparative perspective by considering judicial approaches to the merits factor in Hong Kong. Finally, the fourth part concludes by reflecting upon the potential for reform.

Judicial perceptions of ADR within the English civil justice system

Lord Woolf provided ADR with an enhanced role within the court rules and, as a consequence, ushered in a more formal and structured approach to the promotion and encouragement of consensual settlement within the English civil justice system. However, Lord Woolf's philosophy of encouraging the early settlement of civil disputes was not novel. The authors of the Heilbron-Hodge Report,²² who were commissioned to investigate the implementation of previous civil justice reforms,²³ had already sown the seeds for Lord Woolf's reforms on the issue of settlement and ADR some three years prior to the Woolf reforms. It was the Heilbron-Hodge report which first advocated the need for a radical change in approach to civil justice. It did so by breaking away from the approaches taken by previous, failed, reforms which had concentrated primarily upon recommending structural changes to the system. Unlike previous reforms, the Heilbron-Hodge Report focused on recommending a change in litigation *culture*. In doing so the authors of the Report proposed an alternative aim of the justice system, from a system which existed for the vindication and enforcement of rights to one which also encouraged the early settlement of disputes.²⁴ But this did not mean that the encouragement of early settlement would somehow rank in priority or indeed equally to the need for the civil justice system to provide substantive justice (by which we mean the application of right law to the true facts).²⁵ The overarching aim of the civil justice system would remain, according to the Heilbron-Hodge report, the dispensation of substantive justice as it had done since the reforms introduced by the [Judicature Act 1873](#) and [1875](#). **J.B.L. 650*²⁶

The Heilbron-Hodge Report's recommendations, that a change in the method in which litigation should be conducted, was swiftly embraced and taken further by Lord Woolf. Consistent with his predecessors, he did not advocate that early settlement should in any way replace the principal aim of the justice system; it did not seek to replace or diminish the constitutional role of the courts in providing substantive justice, although now the purpose of civil justice was not simply to achieve substantive justice. According to Lord Woolf, the aim of the civil justice system included an equal commitment to procedural justice.²⁷ Procedural justice dictates that substantive justice can only be dispensed by the use of *proportionate* court and litigation resources and within a reasonable time. The defining feature of the new Woolfian procedural landscape was the overriding objective of enabling the courts to deal with cases justly.²⁸ As Sorabji remarks, the Woolfian overriding objective was truly innovative because it introduced a new concept of justice which was "committed to proportionality rather than ... an unalloyed commitment to the achievement of what Woolf described as substantive justice ...".²⁹

Despite his enthusiasm for ADR, Lord Woolf did not recommend that ADR be made compulsory.³⁰ This was so because of the strongly held belief that citizens should never be denied their right to access the courts, nor should obstacles be placed in their way which might endanger that right. All are considered to be equal before the law and all should be allowed equal access to the law. As Lord Diplock put it in [Bremer Vulcan v South India Shipping Corp Ltd](#),³¹ "every citizen has a constitutional right to access". The Heilbron-Hodge Report expressed it in the following manner:

"[F]undamental to the basic precepts of any civilised society that no section of the community should be excluded from their just entitlement to equality before the law, whether or not circumstances necessitate their using the courts"³²

In a similar vein but from a human rights perspective, Lord Dyson's obiter comments in [Halsey](#) ruled out the possibility that the court has jurisdiction to compel parties to engage in ADR: "to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court."³³ Such an obstruction would contravene art.6 of the European Convention on Human Rights. However, this aspect of [Halsey](#) has been widely criticised for a number of reasons, and primarily for its incompatibility with the European Court of Justice decision in [Alassinin v Telecom Italia SpA](#). In that case, the ECJ held that a statutory obligation requiring the claimant to attempt ADR as a condition precedent to bring a claim in an Italian court was compatible **J.B.L. 651* with European law, and therefore with art.6 of the ECHR.³⁴ Indeed, more recently, Lord Dyson MR expressed his agreement with the ECJ decision in [Alassini](#) but contended that compulsory mediation was less efficient than voluntary mediation—compulsory mediation would add to the costs of the dispute.³⁵

The message of caution in respect of ADR and the need to contain its expansion within the civil justice system has been voiced by Lord Neuberger. His Lordship has forcefully argued that ADR, a system which provides private benefits to individuals, is not, nor should it be, considered as a branch of the government. Although ADR has a part to play in the civil justice system it cannot provide the

formal adjudicative role in administering equity and the law. That can only be provided by the courts. ADR exists and provides private justice because it exists within the framework of law and its formal adjudication without which "there would be mere epiphenomena".³⁶

Nevertheless, Lord Woolf's efforts in formally incorporating the encouragement of ADR within the [Civil Procedure Rules](#) greatly enhanced the role and importance of consensual settlement through ADR. ADR would no longer remain on the periphery of the civil justice landscape. It would now occupy a central role within Lord Woolf's new procedural "landscape" of judicial case management. Parties would be required, by virtue of specific provisions of the [CPR](#), to seriously consider engagement with ADR both before and after proceedings are issued.³⁷ Lord Woolf made this clear in his *Final Report* when he explained that

"the court will encourage the use of ADR at case management conferences and pretrial reviews, and will take into account whether the parties have unreasonably refused to try ADR or behaved unreasonably in the course of ADR".³⁸

And where parties had failed to discharge their "ADR obligations", the courts were given powers to penalise those parties through the making of adverse costs orders.³⁹

The three major civil justice reforms which followed the Woolf reforms, the Jackson Review of Civil Litigation Costs, the Briggs Chancery Modernisation Review,⁴⁰ and more recently the Briggs CCSR also reinforced the importance of ADR. Consistent with Lord Woolf's philosophy that litigation should be concerned with the encouragement of early settlement,⁴¹ Briggs LJ in his Chancery Modernisation Review Final Report⁴² recommended a culture change in the Chancery Division's management of disputes so that courts managed disputes in the widest possible sense, which would include not only the determination and enforcement of rights via court adjudication but also through the consensual **J.B.L. 652* settlement of disputes.⁴³ Remaining consistent with his philosophy of introducing a culture change, Briggs LJ in his CCSR stated that stage two of his proposed Online Court is "mainly directed to making conciliation a culturally normal part of the civil court process rather than, as it is, at present, a purely optional and extraneous process".⁴⁴

There is a final important yet increasingly controversial ADR point to consider before proceeding to an analysis of the merits factor, and that is the status of tiered ADR clauses⁴⁵ (i.e. clauses requiring the parties to undertake one or more forms of ADR (typically negotiation or mediation) before commencing formal litigation or arbitration proceedings.). These types of clauses are becoming increasingly common in commercial contracts. Although it has been established that ADR clauses are legally binding,⁴⁶ the recent High Court decision in [Emirates Trading v Prime Mineral Exports](#)⁴⁷ has gone further in holding that a dispute resolution clause requiring the parties to seek to resolve a dispute by "friendly discussions" within a limited time period and in good faith before the dispute could be referred to arbitration was enforceable. The decision marks a clear departure from the general principle in English law that an agreement to negotiate is unenforceable.⁴⁸ The judge, Teare J, placed reliance on the use of the word "shall" in the clause, which he found to have created a mandatory, legally binding condition. In the judge's opinion such a binding requirement was consistent with public policy to give effect to dispute resolution clauses which require the parties to seek to resolve disputes before resorting to arbitration or litigation. However, the decision has been criticised on a number of grounds, including the potential adverse impact it may have (if followed in subsequent cases) on the practice of arbitration.⁴⁹ The decision can also be criticised for going too far and at the cost of certainty in requiring parties to comply with tiered ADR clauses before reverting to arbitration or the court process, and this can be seen by comparing [Emirates Trading](#) with the decision in [Cable & Wireless Plc v IBM UK Ltd](#). In [Cable & Wireless](#) the court upheld an ADR clause in which the parties had agreed to negotiate in "good faith" and to resolve their dispute through a method recommended by a specific ADR provider. This was all sufficiently certain to make the clause enforceable. By contrast, the wording used in the tiered clause in [Emirates Trading](#) was too uncertain, but despite this Teare J appeared to have over-emphasised the policy of promoting settlement over the need to require parties to engage in ADR, but then to have the right to revert to the court or arbitral process.

Despite the consistent judicial support and encouragement of ADR, the landmark ADR case of [Halsey](#) has been perceived by some as raising unnecessary obstacles in the development and further integration of ADR within the civil justice system. **J.B.L. 653*⁵⁰

The merits factor—a critique

The previous section provided the background to the increased recognition and integration of ADR processes within the civil justice system. It presented the development of an increased judicial awareness of the nature of ADR and the potential benefits it could bring to the courts and the litigating parties. However, the Court of Appeal's decision in [Halsey](#) is a restraining force on the continued development of ADR within the civil justice system. One aspect of that restraining force is the merits factor, which, in its current form, is no longer a viable criterion to assess a party's unreasonable refusal to engage in ADR. This part will critically analyse the merits factor as it was dealt with in the [Hurst](#) decision, its "modification" by the Court of Appeal in [Halsey](#). It will also critically consider the underlying policy rationale for its existence and consider judicial approaches to the merits factor in Hong Kong.

Hurst, Halsey and the merits factor

[Hurst](#) was one of the earliest ADR decisions following the Woolf reforms. It concerned an action brought by the claimant against his barrister for professional negligence. The claimant and defendant both applied for summary judgment. At the hearing of the summary judgment application, the claimant conceded that his claim was without merit but he contended that the defendant was not entitled to recover his costs in the usual manner because he had refused the claimant's suggestion to proceed to mediation. Lightman J dismissed the claimant's application and made a number of significant comments in his judgment regarding the role and growing significance of ADR within the civil justice process. According to Lightman J, although mediation was not compulsory, ADR was "at the heart of today's civil justice system",⁵¹ and any failure by the parties to give proper attention to it would result in adverse cost consequences. He dismissed the relevance of the party's belief in the merits of his case when it came to assessing whether the refusing party had been justified in rejecting mediation. Lightman J said:

"The fact that a party believes that he has a watertight case again *is no justification* for refusing mediation. That is the frame of mind of so many litigants."⁵²

Although accepting that a party may refuse mediation if there was no real prospect of success, Lightman J stressed that a refusal would be "a high risk course to take". He placed particular emphasis upon the practical benefits of mediation when making an objective assessment of the prospects of mediation:

*"[T]he starting point must surely be the fact that the mediation process itself can and does often bring about a more sensible and more conciliatory attitude on the part of the parties than might otherwise be expected to prevail before the mediation, and may produce a recognition of the strengths and weaknesses *J.B.L. 654 by each party of his own case and of that of his opponent, and a willingness to accept the give and take essential to a successful mediation. What appears to be incapable of mediation before the mediation process begins often proves capable of satisfactory resolution later."*⁵³

It was only on the exceptional facts of the case in [Hurst](#) that the defendant was found not to have behaved unreasonably in refusing mediation. This was so because the claimant had lost all of his previous actions against the defendant and other parties and was, as the judge put it, "a person obsessed with the injustice which he considers has had been perpetrated on him and is incapable of a balanced evaluation of the facts".⁵⁴

Lightman J's dictum made clear that whether a party's belief that he had a watertight case was reasonable or not was no justification for refusing mediation. Lightman J's dictum is not only consistent with the pro-ADR stance adopted by the senior judiciary shortly after the Woolf reforms, but it appeared to go further by explicitly dismissing the relevance of a party's belief in assessing an unreasonable refusal: what is significant is the need to give proper consideration to ADR regardless of whether a party's belief in the strengths of his case was reasonable or not. As a consequence, Lightman J elevated the requirement to give proper attention to ADR above and beyond any other factors which may justify a refusal, and this approach is consistent with his earlier bold and rather unorthodox pronouncement that ADR was at the heart of the civil justice system. Another interesting feature is the formulation of the policy rationale to justify his approach to the merits factor. That policy is based entirely on the potential practical benefits of mediation and its potential in resolving the dispute between the parties. Where ADR provides a realistic prospect of success but is not pursued, then, as Lightman J makes clear, "there is a real possibility that adverse consequences may be attracted",⁵⁵ one of which is to penalise the refusing party in costs. The basic logic goes that had the

refusing party considered ADR and engaged with it, then the parties would have benefited in a number of ways, including the possible settlement of the case.

[Halsey](#) concerned two personal injury cases that were heard together in the Court of Appeal. In both cases the claimant had, in the course of proceedings, invited the defendants to mediate their dispute and in both cases the defendants had refused but went on to win at first instance. The first instance judges awarded costs to the defendants despite the fact that the defendants refused to mediate earlier on in the proceedings. The claimants appealed on the issue of costs. The critical question for the Court of Appeal was this: when should the court impose a costs sanction against a successful litigant on the grounds that he has refused to take part in an ADR process?

Dyson LJ (as he then was), giving the leading judgment of the court, upheld the decisions at first instance and dismissed the claimants' appeals. His Lordship was of the opinion that the defendants should not be deprived of any of their costs on the ground that they had refused to accept the claimants' invitations to agree to mediation. The general rule that costs follow the event (i.e. the loser pays the ***J.B.L. 655** winner's costs) should not be departed from unless it is shown that the successful party acted unreasonably in refusing to agree to ADR. He went on to explain that, in assessing an unreasonable refusal, the court will consider all of the circumstances of the case including the following six non-exclusive factors:

1.
the nature of the dispute;
2.
the merits of the case;
3.
whether other settlement methods have been attempted;
4.
whether the costs of mediation would be disproportionately high;
5.
whether any delay in setting up and attending ADR would have been prejudicial;
6.
whether the ADR process has a reasonable prospect of success.

Dyson LJ explained the relevance of the merits factor:

"The fact that a party *reasonably believes* that he has a strong case is relevant to the question whether he has acted reasonably in refusing ADR. If the position were otherwise, there would be considerable scope for a claimant to use the threat of costs sanctions to extract a settlement from the defendant even where the claim is without merit. Courts should be particularly astute to this danger. Large organisations, especially public bodies, are vulnerable to pressure from claimants who, having weak cases, invite mediation as a tactical ploy. They calculate that such a defendant may at least make a nuisance-value offer to buy off the cost of a mediation and the risk of being penalised in costs for refusing a mediation even if ultimately successful ... In [Hurst v Leeming \[2003\] 1 Lloyd's Rep 379, 381](#) Lightman J said: 'The fact that a party believes that he has a watertight case again is no justification for refusing mediation. That is the frame of mind of so many litigants.' In our judgment, this statement should be qualified. The fact that a party *unreasonably* believes that his case is

watertight is no justification for refusing mediation. But the fact that a party *reasonably believes* that he has a watertight case may well be sufficient justification for a refusal to mediate." ⁵⁶

The test of "reasonable belief"

The merits factor and its underlying policy raise a number of concerns which cast serious doubts as to whether, in its present form, it should continue to be a factor which the courts may consider when determining an unreasonable refusal. One of the principal weaknesses of the merits factor is that it does not accord with the realities of litigation; that is to say, it fails to appreciate that the vast majority of those who commence and defend proceedings do have at least a *reasonable belief* that they have a watertight case, otherwise why would they incur the substantial cost and time of engaging with the court process? Thus, the threshold set by the merits factor of reasonable belief in a watertight case is artificially low and can easily be met by most litigants who may escape cost penalties which would otherwise apply. Further, the policy rationale appears to overstate the potential risk of a party being forced into an ADR procedure and having to make a nuisance payment. As such it fails to appreciate the very nature of ADR procedures, as being **J.B.L. 656* consensual processes from which either party is free to withdraw from before a settlement is concluded: there is no compulsion to settle. These concerns will now be considered in detail.

Dyson LJ's "qualification" of Lightman J's dicta in the earlier case of *Hurst* had the effect of reversing the principle that a litigating party's belief in the merits of his case *would not* be sufficient justification for refusing mediation. The diverging approaches towards the merits factor as propounded by Dyson LJ and Lightman J is illustrative of the opposing judicial attitudes towards the extent to which litigating parties must consider ADR. As noted previously, Lightman J's approach dismissed any consideration of a party's belief that his case is watertight: parties should consider ADR. Further, Lightman J's approach to the merits factor was consistent with the approach advocated by the Court of Appeal in the case of *Dunnett v Railtrack*,⁵⁷ which was decided not long before *Hurst*.⁵⁸ However, the Court in *Halsey* failed to deal with Lightman J's dictum in the light of the decision in *Dunnett*, a case which placed greater emphasis on the parties' obligation to pay careful attention and to consider ADR as an option in settling their dispute rather than simply dismissing it on the basis of the parties' belief in the merits of their respective cases.

In *Dunnett* the Court of Appeal dealt with the issue of the defendant's unreasonable refusal to consider mediation. The defendant had been successful in defending an appeal by the claimant and sought its costs of the appeal, but had previously rejected an invitation by the claimant to seek a settlement through mediation, an invitation which had also been recommended by the judge granting permission to appeal. In the Court of Appeal, the defendant argued that it did not engage in mediation because it was not willing to offer more than what it had previously offered the claimant by way of settlement. Brooke LJ rejected the defendant's arguments and penalised it by refusing to award its costs. He observed that the defendant had been wrong in rejecting mediation out of hand even though it did not consider that it would bring about a settlement of the matter. In Brooke LJ's opinion, this was a misunderstanding of the purpose of ADR. He emphasised the need for the courts to further the overriding objective through active case management, which included encouraging the parties to consider ADR procedures and for the parties to also further the overriding objective in this respect. In disallowing the defendant's costs, he concluded with this warning:

"It is to be hoped that any publicity given to this part of the judgment of the court will draw the attention of lawyers to their duties to further the overriding objective in the way that is set out in [CPR Pt 1](#) and to the possibility that, *if they turn down out of hand* the chance of alternative dispute resolution when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequences." ⁵⁹

Brooke LJ's reference to an invitation of ADR being turned down "out of hand" indicates that litigating parties would, at least after *Dunnett*, be required to carefully consider ADR, regardless of their views on the merits of their case. Therefore, **J.B.L. 657* although *Railtrack*, the defendant, had been successful on the merits at first instance and therefore would have been justified in its confidence in success on appeal, it was still obliged to give careful consideration to ADR. Thus, Lightman J's subsequent dictum in *Hurst* is consistent with the approach taken by the Court of Appeal in *Dunnett*: although a party may consider it has a watertight case, he must continue to give proper consideration to ADR and its potential in resolving the dispute.

It is also submitted that the merits factor threshold is questionable in light of the Court of Appeal's

recent judgment in [PGF II SA v OMFS Co1 Ltd](#).⁶⁰ In that case the court formally endorsed the advice given in the *ADR Handbook*⁶¹ that silence in the face of invitations to participate in ADR is, as a general rule, unreasonable. Briggs LJ, giving the leading judgment of the court, held that

"this case sends out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR, *even if they have reasons which might justify a refusal*, or the undertaking of some other form of ADR, or ADR at some other time in the litigation. To allow the present appeal would, as it seems to me, blunt that message."⁶²

The decision is significant because it formally extends the [Halsey](#) guidelines by recognising that a party cannot simply consider a call to ADR and remain silent; if he did, then this would be deemed as an unreasonable refusal and would justify that party being penalised in costs.⁶³ It follows that a party *must* actively engage with a call to ADR and to respond in a constructive manner to that call. Silence in the face of a call to engage in ADR is counter to the very nature of ADR, which is perceived as a mechanism which breaks down the adversarial barriers between litigating parties and one which promotes an atmosphere of co-operation which may assist the parties in settling their dispute. Although in the previous case of [Rolf v De Gerin](#)⁶⁴ Rix LJ made reference to the claimant's offer of mediation being "spurned" by the defendant (the defendant had failed to provide any reasons for rejecting mediation), which was unreasonable, [PGF](#) was the first case in which the Court of Appeal *officially* recognised that silence to a call to ADR *will be* considered as unreasonable behaviour and will attract adverse costs consequences.

The decision in [PGF](#) is also significant for other reasons. Briggs LJ places a strict obligation on the parties to consider ADR. His Lordship made clear that a party who has been invited to engage in ADR will be expected to *seriously engage* with that invitation regardless of whether that party has valid, justifiable reasons to refuse the invitation. By endorsing the principle that silence can amount to unreasonable refusal, Briggs LJ placed the burden on the "silent" party to ensure that he has adequately discharged his ADR obligations. Here parallels can be drawn **J.B.L. 658* between Briggs LJ's decision in [PGF](#) on the issue of silence and the approach adopted by the courts in [Dunnett](#) and [Hurst](#) on the issue of a party's belief in the merits of his case. [Dunnett](#) and [Hurst](#) were consistent in making clear that a party was under a strict obligation to pay proper attention to ADR, this obligation being rationalised on the grounds that the practical benefits meant that a dispute could be resolved with the assistance of a neutral third party. Similarly, [PGF](#) places a strict obligation on the silent party to positively engage with an ADR invitation regardless of any reasons to the contrary, which would include the silent party's conviction that he has a watertight case.

Policy rationale of the merits factor

The policy rationale which underpins the merits factor—the policy of avoiding a party being forced into a settlement by unmeritorious claims—is weak. The idea that a party, whether it be a public body, an individual or a corporation, is in need of being protected from potential unmeritorious claims gives the misleading impression that a party proposing ADR will, in all cases, be seeking a financial settlement. Although it is true to say that the majority of civil disputes that engage ADR, whether it be negotiation, mediation or any other type of ADR process, will involve some form of financial payment in resolving the dispute, this is not true of all cases. It may be that a claimant simply wishes for an apology or he may be satisfied with a settlement such as the restoration of trading relations which does not necessarily involve the payment of money by way of settlement.

Brooke LJ in [Dunnett](#) highlighted the wider benefits which mediation could offer the parties when he said:

"A mediator may be able to provide solutions which are beyond the powers of the court to provide. Occasions are known to the court in claims against the police, which can give rise to as much passion as a claim of this kind where a claimant's precious horses are killed on a railway line, by which an apology from a very senior police officer is all that the claimant is really seeking and the money side of the matter falls away."⁶⁵

Further, the policy rationale fails to appreciate the very nature and function of ADR processes such as mediation and negotiation, the most common forms of ADR procedures that are utilised in civil disputes. Those procedures are non-adjudicative and purely consensual, and as such the disputing parties are at liberty to engage in those procedures. If the parties decide to refer their dispute to an ADR procedure, then they are free to withdraw from that procedure at any time before a final

settlement is concluded. Thus, the (misleading) impression given by the merits factor policy is that "vulnerable" parties will be forced to engage with ADR *and to settle*, by making a monetary payment, to an unmeritorious claimant. *J.B.L. 659

The merits factor in Hong Kong

Shortly after the implementation of the Woolf Reforms, Hong Kong conducted an extensive investigation into its civil justice system and drew on some of the practices in England, including ADR. The Chief Justice of Hong Kong established the Working Party on Civil Justice Reform which was, similarly to Lord Woolf's terms of reference, tasked with reviewing "the civil rules and procedure of the High Court and to recommend changes thereto with a view to ensuring and improving access to justice at reasonable cost and speed".⁶⁶ The recommendations of the Working Party were finally published in the Civil Justice Reforms Final Report in 2004. As part of its proposals for reform, it recommended continued judicial encouragement of ADR with the use of costs sanctions for an unreasonable refusal to engage with ADR.⁶⁷ In 2010 a new court rule on mediation, Practice Direction 31,⁶⁸ was introduced, which applies to all civil proceedings in the Court of First Instance and the District Court. The Hong Kong courts have referred to *Halsey* when considering Practice Direction 31 and, although *Halsey* is not binding on the courts in Hong Kong,⁶⁹ it continues to remain relevant when the courts are required to consider the issue of potential cost sanctions in circumstances where there may have been an unreasonable refusal to consider ADR.⁷⁰

The merits factor was considered by the High Court of Hong Kong in the case of *Golden Eagle International (Group) Ltd v GR Investment Holdings Ltd*.⁷¹ In that case the defendant had, on two occasions, refused to engage in mediation. Eventually the parties agreed on the judgment sum and costs in favour of the claimant. The agreed sum was higher than the sum which the claimant had previously offered the defendant to settle the matter, and this led to the claimant applying to the court for enhanced interest on the damages and costs on an indemnity basis. The defendant contended, inter alia, that it had refused to engage with mediation because it reasonably believed that it had a strong case and that it had based its decision on commercial considerations. The court rejected the defendant's arguments. Having cited the relevant passage from Dyson LJ's judgment in *Halsey*, Lam J doubted whether the policy rationale of the merits factor would be relevant to Hong Kong cases. Lam J argued that the costs sanction was only applicable if a party refuses to mediate. There was no costs sanction if the parties cannot reach settlement after making a reasonable effort in mediation. The judge went on to note that, pursuant to Practice Direction 31, a party may avoid being penalised in costs after they have participated in mediation up to the agreed minimum level of participation. Further, the costs involved in such participation in Hong Kong would usually not be high enough to encourage such *J.B.L. 660 nuisance claims. Finally, Lam J observed that in Hong Kong the costs of mediation can be included as part of the legal costs and recoverable by the successful party if the mediation were unfruitful.⁷²

In the subsequent case of *Goodtry Investments Ltd v Easily Development Ltd*,⁷³ Tracy Chan J followed Lam J's reasoning in *Golden Eagle* in rejecting the claimant's contention that it did not participate in mediation because it had a strong case. He found that liability was not a "clear cut matter" and therefore he was not convinced that the claimant had a good reason to refuse mediation.

There are two interrelated issues which should be noted when comparing the Hong Kong approach to the English approach to the merits factor. First, the Hong Kong approach is similar to the *Hurst*-type approach in that it is dismissive of a refusing party's arguments in rejecting ADR, even though there may exist strong reasons, including commercial considerations, for that rejection. Secondly, although Practice Direction 31 of the Hong Kong court rules *encourages* ADR, judicial approaches in both *Golden Eagle* and *Goodtry Investments* appear to adopt a strict and rigid approach to ADR and one which fails to appreciate the potential wasted costs to the parties in circumstances in which it was reasonable to refuse to engage with ADR.

The jurisprudence—diverging judicial approaches

This part critically considers the development of the jurisprudence surrounding the merits factor. As will be shown, an analysis of the jurisprudence reveals the emergence of two distinct judicial approaches to the application of the merits factor. First, the jurisprudence which developed immediately after *Halsey* demonstrates a consistent judicial approach to the application of the merits factor. The second pattern which emerges from more recent jurisprudence indicates judicial

willingness to adopt an approach which is similar to that advocated by Lightman J in [Hurst](#) by dismissing a party's belief in the strengths of his case (even though the facts may justify the party's belief) and placing greater emphasis on the practical benefits of ADR and the potential it offers in resolving disputes when assessing an unreasonable refusal.

It will be recalled that in [Dunnett](#) Brooke LJ made an order which deprived Railtrack of its costs of the appeal owing to its unreasonable behaviour in refusing to engage with mediation. The court penalised Railtrack despite the fact that the claimant had twice lost on the merits. In arguing that Railtrack should have taken part in mediation, Brooke LJ emphasised the beneficial role a mediator could play in resolving a matter when he stated that

"skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve ... But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that *the mediator is able to achieve a result by which the parties shake hands *J.B.L. 661 at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live**".⁷⁴

Therefore, regardless of the party's belief in the strengths of its case, the policy of early settlement, as advocated by Lord Woolf and the Heilbron-Hodge Report before him, and the need to properly consider mediation, which *could* bring about a resolution of the matter, took precedence over a party's belief in the merits of his claim. And, as discussed earlier, Lightman J's dictum in [Hurst](#) in dismissing the relevance of a party's belief in the strengths of his case is in line with the approach in [Dunnett](#). Stressing the benefits which mediation presented to the parties in resolving their disputes, Brooke LJ went on to explain that Railtrack's belief in the strengths of its case appeared to show

"a misunderstanding of the purpose of alternative dispute resolution. Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve".⁷⁵

It should be noted that there have been occasions, shortly after the Woolf reforms took effect, in which the courts have decided *not* to penalise a refusing party in costs for failing to engage with ADR. However, the facts of those cases are unusual and distinguishable. They indicate that the party proposing mediation had acted in an intimidatory and aggressive manner and that this was a major factor which had led the courts in finding that the refusing party had not acted unreasonably.

The first case is [Société Internationale de Télécommunications Aeronautiques SC v Wyatt Co \(UK\) Ltd.](#)⁷⁶ In that case the defendants had settled with the claimant and then sought a contribution from its subcontractor via a [Pt 20](#) claim which failed. On the issue of costs the defendants contended that the subcontractor ought to be deprived of its costs for declining to participate in mediation on three occasions before the case came to trial. The defendants relied on [Dunnett](#) and [Hurst](#) in support of its arguments. The judge, Park J, dismissed the defendant's submissions and, having carefully dissected the correspondence which had passed between the parties on the issue of mediation, set out five detailed reasons which justified the subcontractors' refusal to engage in mediation. Of particular importance was Park J's finding that the defendants were only interested in mediation in order to obtain a large financial contribution, and that they had failed to show that they would be interested in resolving the dispute. The manner in which the defendants were inviting the subcontractors to mediation was, as Park J put it, "disagreeable and off-putting", and this distinguished this case from [Dunnett](#) and [Hurst](#).

In [Allen v Jones](#),⁷⁷ a dispute over a right of way, the court awarded a successful defendant's costs in full. The judge found that the claim had been without merits and there was no issue of conduct or question that the defendant's decision was anything other than proportionate. In such cases, the judge held, the failure to submit to a request for mediation by the unsuccessful party ought not, as a matter of principle, of itself result in the successful party being deprived of the normal order for costs. Although [Allen](#) may be viewed as a [Halsey](#)-type case in that it **J.B.L. 662* places weight in favour of a successful party relying on the merits factor, one aspect of the judgment makes particularly interesting reading, and that is the conduct of the party proposing mediation. In [Allen](#) the judge found that the claimant's correspondence in which mediation was proposed was "highly intimidatory" and, relevant to the court's assessment of costs under the [CPR](#), "its intimidatory nature and the fact that the claimants did not seek mediation before issuing proceedings calls into question in my mind whether the change in attitude ... was genuine rather than tactical".⁷⁸

A divergence from the pro-ADR judicial stance can be seen to emerge shortly after [Halsey](#) and the impact of the decision on judicial approaches to the application of the merits factor. The courts appear

to adopt a more relaxed position in respect of the merits factor, with the consequence that a refusing party can escape cost sanctions on the grounds that, adopting a wider interpretation of the merits factor, he has a reasonable belief in the strengths of his case. This is well illustrated by the Court of Appeal case of [Reed Executive Plc v Reed Business Information Ltd](#).⁷⁹ The defendant had been successful in its appeal and the claimants applied for 70 per cent of their costs at first instance and in the Court of Appeal on the basis that the defendant had unreasonably refused ADR. The court dismissed the claimant's application and found that the defendant had not acted unreasonably in refusing ADR because it had a reasonable belief in the strengths of his arguments. Jacob LJ, giving the leading judgment, emphasised the significance of the merits factor in reaching his decision when he said:

"Far from being unreasonable I think it was entirely reasonable for RBI to pursue the appeal. They had at least a reasonable (and as it turned out justified) belief in their prospects. For all I know they had been advised they had a very good or even watertight case. They had ongoing disputes in other jurisdictions to consider. It may be that an ADR process would have worked, but the prospects did not look good given the wide disparity between the parties. Moreover the case was full of novel points ... this would have made it much trickier to formulate any deal."⁸⁰

Although Jacob LJ took account of the prospect of success of mediation, he particularly focused on the merits factor. However, on the issue of the court's application of the merits factor, the decision in [Reed](#) is unsound for a number of reasons. The first is an obvious one: the court's decision indicates a failure to appreciate the practical benefits of involving a trained mediator to resolve complex disputes to the satisfaction of the parties. It too readily assumes that cases with novel points, complex issues and where parties are too far apart are not suitable for ADR. The benefits of ADR over the adjudicative court process have been discussed earlier in this article.⁸¹

These benefits were recognised and reiterated by a number of important Court of Appeal authorities. In [Cowl v Plymouth City Council](#),⁸² a case involving a dispute between a public body and an individual, Lord Woolf MR stressed that disputing **J.B.L. 663* parties must be conscious of the contribution ADR can make to resolving disputes in a manner which both meets the needs of the parties and the public, and saves time, expense and stress. If litigation is necessary, then, Lord Woolf MR argued, the courts should deter the parties from adopting an unnecessarily confrontational approach to the litigation. Further, in [Burchell v Bullard](#),⁸³ Ward LJ did not hesitate in expressing his strong opposition to the contention that the defendant had a strong case and that, in any event, the issues were far too complex to be resolved through mediation. The defendants had only escaped from not being penalised in costs because their unreasonable refusal of mediation had pre-dated [Halsey](#). Ward LJ nevertheless expressed his disapproval of the defendants' arguments in the following manner:

"[T]he merits of the case favoured mediation. *The defendants behaved unreasonably in believing, if they did, that their case was so watertight that they need not engage in attempts to settle.* They were counterclaiming almost as much to remedy some defective work as they had contracted to pay for the whole of the stipulated work. *There was clearly room for give and take. The stated reason for refusing mediation that the matter was too complex for mediation is plain nonsense*".⁸⁴

More recently, the courts have been, in some instances, generous in giving weight to the merits factor. In [ADS Aerospace Ltd v EMS Global Tracking Ltd](#),⁸⁵ the court, when applying the [Halsey](#) factors, found that the defendant had not behaved unreasonably in refusing the claimant's invitation to mediate. The claimant's \$16 million claim, which was for breach and repudiation of an agreement between the parties for the exclusive distribution of satellite tracking devices for aeroplanes or helicopters, was dismissed. The court was required to decide on the issue of costs.

The parties provided the court with information about what was going on behind the scenes with regard to trying to settle the case. The defendant's solicitors had proposed that the parties engage in settlement discussions, but the claimant wanted to wait until the exchange of witness statements. The defendant later offered to settle the claim on a without-prejudice basis but the claimant failed to provide a response and later, during a telephone discussion with the defendant, the claimant did not demonstrate any intention to settle the matter. Later, the claimant rejected the settlement offer which had been made and suggested that the parties engage in mediation. The defendant wrote back and referred to the previous history and stated that: it did not feel that mediation would be worthwhile and that both parties were now aware of each other's case; the time and cost of mediation would be wasted; and that the claimant was not likely to accept less than \$16 million.

Despite this, the defendant indicated that it would consider any reasonable offer which the claimant might make on a without-prejudice basis. The claimant replied by stating that there was a reasonable prospect of settling the claim and that a skilled mediator would be capable of settling the matter. The defendant wrote back reiterating its previous position that a formal mediation was not necessary, especially given the fact that it was now three weeks before the commencement **J.B.L. 664* of the trial. The claimant then offered to settle the matter and repeated its invitation for the parties to engage in mediation. The defendant replied with a counter-offer which was substantially less than the claimant's offer. Neither of the offers was accepted and the matter proceeded to trial.

The claimant accepted that prima facie the defendant is entitled to its costs, but said that the defendant acted unreasonably in refusing its request to attempt to settle the dispute in mediation. The defendant said that it acted reasonably in all the circumstances. Akenhead J agreed with the defendant. In applying the *Halsey* factors, Akenhead J held that the defendant did not act unreasonably in believing that it had a very strong case both on liability, causation and quantum. There were very real difficulties apparent in the claimant's case on repudiation and the damages claim was demonstrably overstated (worth no more than about \$400,000 rather than the \$16 million claimed). Akenhead J was of the opinion that:

"It might be said that a good mediator would have been able to 'work on' the Claimant to accept what would in effect be a nuisance offer but, in the context of this case, with the sensible solicitors and counsel (who the Claimant did engage in this case), I have no doubt that without prejudice discussions would probably have achieved the same result or at least got to the same stage." ⁸⁶

Swain Mason v Mills & Reeves (A Firm) ⁸⁷ involved a protracted professional negligence dispute against solicitors which eventually failed. However, the unsuccessful claimants had, in fact, succeeded on a number of issues. Therefore, on the issue of costs the trial judge awarded the successful defendant 50 per cent of its costs. Although the judge had made reference to the defendant's failure to engage in mediation which had been suggested by the claimant during the proceedings, he failed to mention the extent to which this had impacted on his assessment of costs. The defendant appealed. The second ground of appeal, which is of relevance to this article, concerned the judge's discretion in awarding costs. The defendant contended that the judge had wrongly found that it had acted unreasonably in refusing mediation. Davies LJ, giving the leading judgment of the court, emphasised that where a party reasonably believes that he has a watertight case, that may well be sufficient justification for a refusal to mediate. Turning to the claimant's arguments that it had succeeded in some of its arguments and therefore the defendant could not be considered as having a "clean sweep" of the issues, Davies LJ simply stated that it was rare for a party to win on every point. His Lordship overturned the trial judge's estimate of where the reasonableness and unreasonableness of the defendants' refusal to mediate lay and increased the defendant's award of costs by 60 per cent.

Davies LJ's decision in *Swain Mason* is highly questionable. On the facts of the case the unsuccessful claimant had actually succeeded in some of its points and therefore the defendant did not have a watertight case. This meant that the defendant did not have a strong enough case to justify refusing to engage in mediation. Davies LJ's consideration of this issue failed to appreciate that this case would have been suitable for mediation because there were strengths and weaknesses in both parties' cases. This argument is consistent with a number of significant authorities. In **J.B.L. 665 Leicester Circuits Ltd v Coates Brothers Plc*, ⁸⁸ for instance, the Court of Appeal disapproved of the defendant's decision to withdraw from a mediation that the parties had arranged and rejected its argument that it would have been pointless to participate in it. Judge LJ was strongly of the conviction that, although it could not be assumed that the mediation would have succeeded, "there [was] a prospect that it would have done if it had been allowed to proceed". More recently, H.H. Judge Waksman QC in *Phillip Garritt-Critchley v Ronnan* ⁸⁹ granted an indemnity costs order against the defendants for unreasonably refusing to engage in mediation. He rejected the defendant's contention that the claim did not provide any middle ground between the parties and that the defendants were confident that an agreement could not be reached by engaging in the mediation process: "To consider that mediation is not worth it because the sides are opposed on a binary issue, I'm afraid seems to me to be misconceived." It was only by sitting down and exploring a settlement that the parties could really ascertain how far apart they really were.

Recently, a pro-*Hurst* approach to the merits factor has emerged, an approach which diverts from that of *Halsey* and takes as its focus the (overly) optimistic view that the matter would have settled if the parties had engaged with ADR. Thus, this pro-*Hurst* approach reverts to the exercise of dismissing out of hand the potential relevance of a party's belief in the strengths of his own case. Take, for example,

the recent Technology and Construction case of [Northrop Grumman v BAE Systems](#),⁹⁰ which came before Ramsey J.

[Northrop](#) concerned [Pt 8](#) proceedings in the court upheld BAE's contention that on a true construction of a licence agreement, BAE was entitled to terminate that agreement for convenience. In relation to costs, NGM accepted the principle that BAE was entitled to its costs to be assessed on a standard basis if not agreed, but contended that those costs should be reduced by 50 per cent by reason of BAE's unreasonable refusal to mediate the dispute.

BAE had previously, through the exchange of "without prejudice save as to costs" correspondence, offered to settle on the basis of no payment, with each party bearing their own costs. This offer was rejected by NGM, which referred to its offers of mediation.

In support of its contentions, NGM submitted, inter alia, that the dispute was suitable for mediation and the fact that the dispute involved matters of contractual construction did not make it unsuitable for mediation. The emphasis on, and the perceived benefits of, ADR had strengthened over the years and there was no objective reason why construction issues should not be amenable to mediation so that a skilled mediator could "hold up a mirror" to the parties respective arguments, and identify the risks and merits involved as in any other case. More importantly, NGM submitted that it is the reasonableness of a party's belief that it has a strong case which is of importance. NGM submitted that this was a case where the merits weighed in favour of ADR. Finally, NGM argued that the cost of litigation in the matter outweighed any costs which would have been incurred in engaging in mediation. ***J.B.L. 666**

BAE argued that it was a sophisticated commercial client with in-house counsel who considered mediation and its likelihood of achieving settlement, saving time, costs and obviating risks and the possibility that a skilled mediator could achieve a solution. In relation to the [Halsey](#) factors, BAE contended that NGM's case involved a relatively short point of contract interpretation on which a claim totalling more than £3 million depended. In relation to the merits of the case, BAE submitted that it reasonably concluded that this was not a borderline case. BAE and its external lawyers considered that BAE was correct as a matter of law and also had commercial merits of not paying for licences it did not require. It felt that by suggesting mediation, NGM were attempting to put pressure on them to settle a claim for which NGM had no prospect of success. However, Ramsey J held that, in itself, this was insufficient, and placed emphasis upon the practical benefits offered by mediation when he said:

"The authors of the *Jackson ADR Handbook* properly, in my view, draw attention at paragraph 11.13 to the fact that this seems to ignore the *positive effect that mediation can have in resolving disputes even if the claims have no merit*. As they state, a mediator can bring a new independent perspective to the parties if *using evaluative techniques* and not every mediation ends in payment to a claimant... *[On] the merits of the case, I consider that BAE's reasonable view that it had a strong case is a factor which provides some but limited justification for not mediating.*"⁹¹

This was, Ramsey J stated, a case which was appropriate for mediation and where mediation had reasonable prospects of success. Was it unreasonable for BAE, which considered it had a strong case, to reject NGM's offer to mediate? Ramsey J concluded that it was:

"Where a party to a dispute, which there are reasonable prospects of successfully resolving by mediation, rejects mediation on grounds which are not strong enough to justify not mediating, then that conduct will generally be unreasonable. I consider that to be the position here."⁹²

However, BAE's "without prejudice save as to costs" letter was a relevant factor to be taken into account, and this was an offer which NGM was not successful in bettering. NGM's conduct in not accepting that offer was similarly a matter to be taken into account. Ramsey J reasoned that a refusal to mediate means that the parties have lost the opportunity of resolving the case without there being a hearing. A failure to accept the offer had equally meant that the parties had lost the opportunity of resolving the case without a hearing. He took the view that, while mediation at an earlier stage might have avoided costs, if BAE had mediated even at a later stage its conduct would not have been unreasonable.

The decision in [Northrop](#) stands in contrast to that in [Swain Mason](#). In [Swain Mason](#) the claimant had succeeded in some of its arguments but was unsuccessful in persuading the Court of Appeal that its offer to mediate should be given consideration in depriving the defendant of some of its costs. In fact, the court increased the defendant's costs recoverability by 10 per cent. [Northrop](#) takes the ***J.B.L. 667** opposite approach, akin to that advocated by Lightman J in [Hurst](#), an approach which pays little

or no regard to the merits factor but focuses on the parties' strict ADR obligations. And the policy upon which this approach rests is the same as the policy developed by the courts in [Dunnett](#), [Hurst](#) and related cases, a policy which takes as its focus the potential practical benefits offered by ADR in resolving disputes. It assumes that had a dispute been referred to ADR then it would have settled.

Proposal and conclusion

This article has revealed a number of concerns in respect of the merits factors. The test of reasonable belief is far too lenient towards the refusing party, with the potential of enabling that party to escape being penalised in costs. The underlying policy rationale is also questionable. It appears to exaggerate the potential threat to refusing parties in the face of unmeritorious claims. It incorrectly assumes that a claimant will, in all cases referred to ADR, be seeking only a financial settlement. And the focus on "vulnerable" public bodies needing some form of enhanced protection is flawed and illustrates a misunderstanding of the legal and practical nature of ADR procedures and the rights of the parties before and during engagement with those ADR processes.

The [Hurst](#)-type approach and, similarly, the Hong Kong approach, of disregarding any consideration of the merits factor and the potential relevance it may have in the court's assessment of an unreasonable refusal, also has its shortcomings. The justification for the [Hurst](#) approach in giving weight to the practical benefits of ADR without adequately considering the possible relevance of the merits factor is unacceptable. It too readily dismisses the potential importance of a party's belief that he may have a watertight case and too readily assumes that ADR *would have* produced a resolution of the dispute.

Thus there is a clear need to strike a balance between the obligations of litigating parties to properly consider ADR as a potential means of resolving their disputes (thereby saving themselves and the court valuable time and cost) and the need for courts to consider and, in appropriate circumstances, give due weight to the merits factor when assessing an unreasonable refusal of ADR. This need is particularly significant in the light of Briggs LJ's proposed Online Court which further integrates ADR within the civil justice process and attempts to make ADR a cultural norm.⁹³ To achieve this balance, the merits factor and judicial approaches to its application must be reformed in three fundamental respects. First, explicit reference to the merits factor within the [Halsey](#) guidelines should be removed and should form part of the "all the circumstances of the case" element of the guidelines. Secondly, the merits factor should be modified so that the threshold of "reasonable belief" is replaced with a higher threshold of "strong belief". Finally, the "protection" offered to "vulnerable" public bodies should be removed.

The first element to reform would involve removing the merits factor from the list of [Halsey](#) factors but allowing the courts the discretion, when assessing an unreasonable refusal, to consider it as part of the "all the circumstances of the case" element of the [Halsey](#) guidelines. This change should be led by the Court **J.B.L. 668* of Appeal providing guidance and leadership in any future case on ADR and the interpretation and application of the [Halsey](#) factors. The effect of this approach would be that the merits factor would continue to be relevant to the issue of unreasonable refusal but in a less explicit manner than it is currently. This would mean that where there is a case in which a successful party has maintained a genuine and *strong belief* in the merits of his arguments against a very weak or unmeritorious claim, then the courts may still take that factor into account when assessing an unreasonable refusal. This would also mean that unmeritorious claims and those cases in which the party proposing ADR has done so in an intimidatory or aggressive manner (as was the case in [Société Internationale de Télécommunications Aéronautiques](#) and [Allen](#)) will be factors which the courts should take into account as part of assessing "all the circumstances of the case".

The first element has a number of benefits. Completely removing explicit reference to the merits factor would mean that it would no longer be a focal point for a refusing party and the courts when dealing with the issue of an unreasonable refusal. It will ensure that litigating parties do not attempt to invoke the merits factor by trying to meet a low threshold of "reasonable belief" to avoid having to consider and engage with ADR.

As well as removing explicit reference to it, the second element to reform of the merits factor would be to modify the test of "reasonable belief". The current threshold fails to accord with the realities of litigation, that parties who have engaged the adversarial process have, in the vast majority of cases, done so because they possess at least a reasonable belief that they have a watertight case. Therefore, to avoid the majority of refusing parties from meeting a low threshold, the test of

"reasonable belief" should be modified by replacing it with a higher test of "strong belief". Thus, a party seeking to rely on the merits factor would be obliged to meet a higher threshold in satisfying a court that its refusal to go to ADR was reasonable. Further, by maintaining a higher threshold of "strong belief", judicial approaches to the interpretation and application of the merits factor will be modified so that a narrower and more restricted approach is adopted when assessing an unreasonable refusal to ADR rather than the wider, more lenient approach which currently exists and has been taken up by the courts in cases such as [Reed](#) and [Swain Mason](#).

Finally, an alternative approach should be taken when dealing with the merits factor and cases involving public bodies. The policy of protecting public bodies from unmeritorious claims has, as discussed earlier, the effect of indirectly permitting those parties in litigation to easily invoke and rely upon the merits factor and thereby avoid their obligations to properly consider ADR. To avoid this outcome, public bodies should not be afforded "protection" as provided by the current policy underpinning the merits factor. This is particularly so given the fact that cases involving public bodies incur public funds when participating in the litigation process. By their very nature, public funds should be conserved for the provision vital services to the public and to improve those services. Litigation is expensive and the complex and time-consuming adversarial system compounds the issue of expense. Support for this approach can be taken from [Cowl](#), in which Lord Woolf MR stressed the need for public money to be saved through engagement with ADR and the avoidance of litigation: ***J.B.L. 669**

"The importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible. Particularly in the case of these disputes *both sides must by now be acutely conscious of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves time, expense and stress.*" ⁹⁴

Removing any exceptions for public bodies would place them on an equal footing with other litigants who would have to demonstrate a strong belief that they have a watertight case. This approach would also be in line with the Government's commitments for its departments to resolve disputes through ADR.⁹⁵ In 2011 the Coalition Government renewed its "ADR Pledge" of 2001 with the publication of its "ADR Commitment", which requires

"government departments and agencies to be proactive in the management of disputes, and to use effective, proportionate and appropriate forms of dispute resolution to avoid expensive legal costs or court actions ... This includes adopting appropriate dispute resolution clauses in all relevant government contracts".⁹⁶

Both the [Hurst](#) - and [Halsey](#) -type approaches to the merits factor are unsatisfactory and both rest on weak policy grounds. As such, they pull in opposite directions on the ADR spectrum: dismissing any justification for refusing ADR on the one hand and setting a low threshold for refusing ADR on the other. It is only when the merits factor is fundamentally reformed that the courts can apply it in a more consistent and a fairer manner.

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J.B.L. 2016, 8, 646-669

1. I am very grateful to Dr John Sorabji and Professors Janet Ulph and Robert Merkin for their helpful and interesting comments on earlier drafts of this article. The usual disclaimer applies.
2. In June 2015, in his maiden speech as Justice Secretary, Michael Gove announced the planned closure of courts in an attempt to save costs and streamline the system; see <http://www.lawgazette.co.uk/news/gove-admits-more-courts-will-close-in-efficiency-drive/5049558.article>. For a detailed an interesting discussion of the effect of austerity-induced public spending cuts on the English civil justice system see J. Sorabji, "Austerity's Effect on English Civil Justice" (2015) 4 E.L.R. 159–173.
3. For example Briggs LJ spoke of the limited court resources now available in resolving disputes through formal adjudication and the need for parties to consider ADR in [PGF II SA v OMFS Co 1 Ltd \[2013\] EWCA Civ 1288; \[2014\] 1 W.L.R. 1386](#). At [27] of his judgment, Briggs LJ held that "the constraints which now affect the provision of state

resources for the conduct of civil litigation (and which appear likely to do so for the foreseeable future) call for an ever-increasing focus on means of ensuring that court time, both for trial and for case management, is proportionately directed towards those disputes which really need it, with an ever-increasing responsibility thrown on the parties to civil litigation to engage in ADR ...".

4. Sir Rupert Jackson in his review of civil litigation costs explained the importance of ADR when he stated: "ADR is relevant to the present Costs Review in two ways. First, ADR (and in particular mediation) is a tool which can be used to reduce costs. At the present time disputing parties do not always make sufficient use of that tool. Secondly, an appropriately structured costs regime will encourage the use of ADR." *Sir Rupert Jackson, Review of Civil Litigation Costs Final Report (14 January 2010), Ch.36, p.355*. See also Sir Rupert's recent book, *The Reform of Civil Litigation* (London: Sweet & Maxwell, 2016) and the comments of B. Rix, "The Interface of Mediation and Litigation" (2014) 80 *Arbitration* 21.
5. See the discussion of Lord Neuberger's opinions in the first part of this article.
6. *Lord Neuberger, "Equity, ADR, Arbitration and the Law: Different Dimensions of Justice", Fourth Keating Lecture, Lincoln's Inn (19 May 2010); Lord Neuberger, "Has Mediation Had Its Day?", Gordon Slynn Memorial Lecture (10 November 2010)*. Also see the comments of Lord Phillips of Worth Matravers, "Alternative Dispute Resolution: an English Viewpoint" (2008) 74 *Arbitration* 406; Lord Clarke, "The Future of Civil Mediation" (2008) 74 *Arbitration* 419; and G. Lightman, "Mediation: An Approximation to Justice" (28 June 2007), S.J. Berwin, http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/berwins_mediation.pdf [Accessed 11 August 2015].
7. *Lord Neuberger, "A View from on High", Civil Mediation Conference 2015 (12 May 2015)*, <https://www.supremecourt.uk/docs/speech-150512-civil-mediation-conference-2015.pdf> [Accessed 10 October 2016].
8. [Children and Families Act 2014 s.10. Section 10](#) makes it mandatory for any party wishing to make a family application to attend a family mediation, information and assessment meeting. At this meeting the parties are provided with information regarding the mediation of family applications, ways in which such matters may be resolved other than through the courts, and to assess whether the particular matter is suitable for mediation.
9. See *Lord Faulks, "Mediation and Government" (19 June 2014)*, <https://www.gov.uk/government/speeches/mediation-and-government> [Accessed 10 October 2016].
10. Briggs LJ, *Civil Court Structure Review: Interim Report (2015)*, Judiciary of England and Wales; Briggs LJ, *Civil Court Structure Review: Final Report (2016)*, Judiciary of England and Wales.
11. *Jackson, Review of Civil Litigation Costs Final Report (14 January 2010), Ch.36, p.355*; and see the Briggs Review, discussed later. Also, see later for a detailed discussion of the jurisprudence.
12. *Lord Faulks, "Mediation and Government" (19 June 2014)*, <https://www.gov.uk/government/speeches/mediation-and-government> [Accessed 10 October 2016].
13. *N. Vidmar, "Procedural Justice and Alternative Dispute Resolution" in K. Rohl and S. Machura (eds), Procedural Justice (Aldershot: Ashgate, 1997), pp.121–136*.
14. [Halsey v Milton Keynes General NHS \[2004\] EWCA Civ 576; \[2004\] 1 W.L.R. 3002](#).
15. *Lord Woolf, Access to Justice Interim Report (Lord Chancellor's Department, 1995) (Interim Report)*; and *Lord Woolf, Access to Justice Final Report (Lord Chancellor's Department, 1996), (Final Report)*.
16. There are two main principles which dictate which party should pay the costs of the proceedings. The first is that the costs payable by one party to another are at the discretion of the court; there is no automatic right to the recoverability of costs ([Senior Courts Act 1981 s.51](#) and [CPR 44.3\(1\)](#)). The second principle is that the unsuccessful party will usually be ordered to pay the costs of the successful party; sometimes referred to as the usual costs order (also known as "costs follow the event").
17. The Law Society had intervened as an interested party and provided detailed submissions to the court.
18. Costs are dealt with under the [Civil Procedure Rules Pt 44](#).
19. [Halsey v Milton Keynes General \[2004\] EWCA Civ 576; \[2004\] 1 W.L.R. 3002](#) at [18] (Dyson LJ).
20. [Hurst v Leeming \[2002\] C.P. Rep. 59 Ch D](#).
21. Such as [Dunnett v Railtrack \[2002\] EWCA Civ 303; \[2002\] 1 W.L.R. 2434](#).
22. *H. Heilbron and H. Hodge, "Civil Justice on Trial—A Case for Change", Joint Report of the Bar Council and Law Society (1993)*.
23. In particular the implementation of the recommendations of the *Civil Justice Review—The Report of the Review Body on Civil Justice (1988), Cmd 394*.
24. For a detailed and interesting account of the history of previous civil justice reforms, see *J. Sorabji, English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis (Cambridge: Cambridge University Press, 2014)*.

25. *J. Bentham, Rationale of Judicial Evidence in Bowring (ed.), The Works of Jeremy Bentham, Vol.6 (Edinburgh: William Tait, 1843), pp.212–213.*
26. [Judicature Act 1873](#); [Judicature Act 1875 Sch.1](#); SI (unnumbered) of 1883; SI 2145/1962; and [SI 1776/1965](#).
27. *Lord Woolf, Interim Report (1995).*
28. The pre-Jackson Overriding Objective under [Civil Procedure r.1.1 \(1\)](#) stated: "These rules are a new procedural code with the Overriding Objective of enabling the court to deal with cases justly."
29. Sorabji, "The Road to New Street Station: Fact, Fiction and the Overriding Objective" (2012) 86 *European Business Law Review* 77.
30. Although it is interesting to note that Lord Woolf alluded to the possibility of revisiting the idea of compulsory mediation when discussing his reforms in Hong Kong in 1996. Lord Woolf noted that, although he had not gone so far as to recommend compulsory mediation in the English system, he was "encouraged to think that that is something which I should look at again": *Lord Woolf, "A New Approach to Civil Justice", Hong Kong lecture (1996).*
31. [Bremer Vulcan v South India Shipping Corp Ltd \[1981\] A.C. 909 HL](#) at 917.
32. *Heilbron and Hodge, "Civil Justice on Trial" (1993), paras 4–5.*
33. [Halsey v Milton Keynes General \[2004\] EWCA Civ 576; \[2004\] 1 W.L.R. 3002](#) at [9] per Dyson LJ.
34. [Rosalba Alassini v Telecom Italia SpA \(C-317/08, C-318/08, C-319/08, C-320/08\) EU:C:2010:146; \[2010\] 3 C.M.L.R. 17](#) at [37].
35. *Lord Dyson's Key Note Speech (delivered by Brian Speers) at the Belfast Mediation Conference (9 May 2014), "Halsey 10 Years On—the Decision Revisited", reported in The Writ, The Journal of the Law Society of Northern Ireland (May/June 2014), <http://www.lawsoc-ni.org/publications/the-writ-magazine/> [Accessed 11 August 2015].*
36. *Lord Neuberger, "Equity, ADR, Arbitration and the Law" (19 May 2010).*
37. At the pre-action stage as well as part of their general duty to further the overriding objective.
38. *Lord Woolf, Final Report (1996).*
39. [CPR 44.2](#) sets out the court's powers to make costs orders and the types of orders it can make.
40. Available at <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CMR/cmr-final-report-dec2013.pdf> [Accessed October 31, 2016].
41. *Lord Woolf, Interim Report (1995), Ch.2, para.7(a).*
42. *Lord Justice Briggs, Chancery Modernisation Review: Final Report (December 2013).*
43. Lord Justice Briggs, *Chancery Modernisation Review: Final Report* (December 2013), p.68, para.5.11.
44. *Interim Report* p.78, fn.10.
45. Also known as "stepped" or "escalation" clauses.
46. [Cable & Wireless Plc v IBM UK Ltd \[2002\] EWHC 2059 \(Comm\); \[2002\] 2 All E.R. \(Comm\) 1041](#); followed subsequently in [Holloway v Chancery Mead Ltd \[2007\] EWHC 2495 \(TCC\); \[2008\] 1 All E.R. \(Comm\) 653](#).
47. [Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd \[2014\] EWHC 2104 \(Comm\); \[2014\] 2 Lloyd's Rep. 457](#).
48. [Walford v Miles \[1992\] 2 A.C. 128 HL](#).
49. For an in-depth analysis of the case, see Louis Flannery and Robert Merkin, "Emirates Trading, good faith, and pre-arbitral ADR clauses: a jurisdictional precondition?" (2015) 31 *Arbitration International* 63.
50. In arguing that mediation can provide an approximation to justice for those who cannot afford the cost and risk of litigation, Sir Gavin Lightman was critical of the [Halsey](#) decision on the issue that the courts cannot compel a party to mediation and the Court of Appeal's decision that the burden was on the unsuccessful party (who had invited the successful party to mediation) to show that the refusal was unreasonable. See *Lightman, "Mediation: An Approximation to Justice" (28 June 2007), S.J. Berwin*, http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/berwins_mediation.pdf [Accessed 11 August 2015]. See also *H. Genn, Judging Civil Justice (Cambridge: Cambridge University Press, 2010), p.101.*
51. [Hurst \[2002\] C.P. Rep. 59](#) at [9].

52. [Hurst \[2002\] C.P. Rep. 59](#) at [9] (emphasis added).
53. [Hurst \[2002\] C.P. Rep. 59](#) at [10] (emphasis added).
54. [Hurst \[2002\] C.P. Rep. 59](#) at [10].
55. [Hurst \[2002\] C.P. Rep. 59](#) at [8].
56. [Halsey v Milton Keynes General \[2004\] EWCA Civ 576; \[2004\] 1 W.L.R. 3002](#) at [16] (emphasis added).
57. [Dunnett \[2002\] EWCA Civ 303; \[2002\] 1 W.L.R. 2434](#).
58. In fact, a few months before.
59. [Dunnett \[2002\] EWCA Civ 303; \[2002\] 1 W.L.R. 2434](#) at [15] (Brookes LJ).
60. [PGF II v OMFS \[2013\] EWCA Civ 1288; \[2014\] 1 W.L.R. 1386](#). For a discussion of various aspects of this case see M. Ahmed, "Silence in the Face of Invitations to Mediate" (2014) 73 C.L.J. 35; G. Meggitt, "PGF II SA v OMFS Co and Compulsory Mediation" (2014) 33 C.J.Q. 335; P. Taylor, "Failing to Respond to an Invitation to Mediate (2014) 80 Arbitration 470; Rix, "The Interface of Mediation and Litigation" (2014) 80 Arbitration 21; J. McQuater, "The Future of Part 36 (Part 8)" (2015) 1 J.P.I.L. 49; and E. Suter, "Unreasonable Refusal to Mediate and Costs" (2015) 81 Arbitration 2.
61. S. Blake, J. Browne and S. Sime, *The Jackson ADR Handbook* (Oxford: Oxford University Press, 2013).
62. [PGF II v OMFS \[2013\] EWCA Civ 1288; \[2014\] 1 W.L.R. 1386](#) at [56] (Briggs LJ) (emphasis added).
63. See Meggitt, "PGF II SA v OMFS Co and Compulsory Mediation" (2014) 33 C.J.Q. 335 for a discussion of whether the decision in [PGF](#) means that mediation is compulsory in England.
64. [Rolf v De Guerin \[2011\] EWCA Civ 78; \[2011\] C.P. Rep. 24](#).
65. [PGF II v OMFS \[2013\] EWCA Civ 1288; \[2014\] 1 W.L.R. 1386](#) at [14] (Briggs LJ).
66. *Civil Justice Reform: Final Report Chief Justice's Working Party on Civil Justice Reform (2004)*, section I, para. 1. On 21 November 2001, the Working Party published an Interim Report and Consultative Paper containing 80 proposals for consultation. The recommendations for reform were published in the Final Report.
67. *Civil Justice Reform: Final Report Chief Justice's Working Party on Civil Justice Reform (2004)*. The recommendations in the Final Report were broadly implemented by the HK Civil Justice (Miscellaneous Amendments) Ordinance 2008 and reflected in the Rules of the High Court (Amendment) Rules 2008 and the District Court (Amendment) Rules 2008.
68. Available at http://www.judiciary.gov.hk/en/legal_ref/prac_directn.htm [Accessed 10 October 2016].
69. [Halsey](#) was decided after the handover of sovereignty from the UK to the People's Republic of China in July 1997. For a comparative discussion of [Halsey](#), see A. Koo, "Halsey Ten Years On" (2015) 34 C.J.Q. 77.
70. *Golden Eagle International (Group) Ltd v GR Investment Holdings Ltd [2010] 3 HKLRD 273; [2010] 5 HKC 317*.
71. *Golden Eagle v GR Investment Holdings [2010] 3 HKLRD 273; [2010] 5 HKC 317*.
72. *Chun Wo Construction & Engineering Co Ltd v China Win Engineering, HCCT 37 of 2006 (12 June 2008)*.
73. *Goodtry Investments Ltd v Easily Development Ltd, DCCJ 3346 of 2011*.
74. [Dunnett \[2002\] EWCA Civ 303; \[2002\] 1 W.L.R. 2434](#) at [14] (emphasis added).
75. [Dunnett \[2002\] EWCA Civ 303; \[2002\] 1 W.L.R. 2434](#) at [14].
76. [Société Internationale de Télécommunications Aéronautiques SC v Wyatt Co \(UK\) Ltd \[2002\] EWHC 2401 \(Ch\); \(2003\) 147 S.J.L.B. 27](#).
77. [Allen v Jones \[2004\] EWHC 1189 \(QB\)](#).
78. [Allen v Jones \[2004\] EWHC 1189 \(QB\)](#) at [33].
79. [Reed Executive Plc v Reed Business Information Ltd \[2004\] EWCA \(Civ\) 887; \[2004\] 1 W.L.R. 3026](#).
80. [Reed Executive v Reed Business Information \[2004\] EWCA \(Civ\) 887; \[2004\] 1 W.L.R. 3026](#) at [46].
81. See "Introduction" above.
82. [R. \(on the application of Cowl\) v Plymouth City Council \[2001\] EWCA Civ 1935; \[2002\] 1 W.L.R. 803](#).

83. [Burchell v Bullard \[2005\] EWCA Civ 358; \[2005\] C.P. Rep. 36.](#)
84. [Burchell v Bullard \[2005\] EWCA Civ 358; \[2005\] C.P. Rep. 36](#) at [41] (emphasis added).
85. [ADS Aerospace Ltd v EMS Global Tracking Ltd \[2012\] EWHC 2904 \(TCC\); 145 Con. L.R. 29.](#)
86. [ADS Aerospace v EMS Global Tracking \[2012\] EWHC 2904 \(TCC\); 145 Con. L.R. 29](#) at [8].
87. [Swain Mason v Mills & Reeves \(A Firm\) \[2012\] EWCA Civ 498; \[2012\] S.T.C. 1760.](#)
88. [Leicester Circuits Ltd v Coates Brothers Plc \[2003\] EWCA Civ 290.](#)
89. [Phillip Garritt-Critchley v Ronnan \[2014\] EWHC 1774 \(Ch\); \[2015\] 3 Costs L.R. 453.](#)
90. [Northrop Grumman v BAE Systems \[2014\] EWHC 3148 \(TCC\); \[2015\] 3 All E.R. 782.](#)
91. [Northrop Grumman \[2014\] EWHC 3148 \(TCC\); \[2015\] 3 All E.R. 782](#) at [59]–[60]. (emphasis added).
92. [Northrop Grumman \[2014\] EWHC 3148 \(TCC\); \[2015\] 3 All E.R. 782](#) at [72].
93. See fn.10.
94. [Cowl v Plymouth City Council \[2001\] EWCA Civ 1935; \[2002\] 1 W.L.R. 803](#) at [1] (emphasis added).
95. In 2001, the Government introduced the ADR Pledge, which was a significant step forward in terms of support for ADR as it made a commitment that all government departments and their agencies would use alternative forms of dispute resolution, where appropriate and with the consent of the other party in dispute; see Ministry of Justice, "Solving disputes in the county courts: creating a simpler, quicker and more proportionate system. A consultation on reforming civil justice in England and Wales" (2011). See also the comments of the then Justice Minister and Attorney General in support of the government's "pro-active" approach to ADR: <https://www.gov.uk/government/news/djanogly-more-efficient-dispute-resolution-needed>.
96. See <http://www.justice.gov.uk/courts/mediation/dispute-resolution-commitment>.

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Mediation: the need for a united, clear and consistent judicial voice: *Thakkar v Patel* [2017] EWCA Civ 117; *Gore v Naheed* [2017] EWCA Civ 369

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Subject: Civil procedure . **Other related subjects:** Dispute resolution.

Keywords: Costs; Mediation; Refusal; Unreasonable conduct

Cases:

[Thakkar v Patel](#) [2017] EWCA Civ 117; [2017] 2 Costs L.R. 233 (CA (Civ Div))

[Gore v Naheed](#) [2017] EWCA Civ 369; [2017] 3 Costs L.R. 509 (CA (Civ Div))

[PGF II SA v OMFS Co 1 Ltd](#) [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386 (CA (Civ Div))

*C.J.Q. 13 Abstract

This note critically considers two recent Court of Appeal decisions which are illustrative of the contradictory jurisprudence that is developing on the issue of the extent to which litigating parties are obliged to consider and engage with mediation. The continued failure to grapple with this issue undermines the Court of Appeal's duties and responsibilities in providing judicial leadership and guidance on the development of civil procedure. Given the increased focus and significance of ADR's role within the civil justice system, particularly in light of the recent Civil Courts Structure Review, this note calls for a united, clear and consistent judicial voice on the parties' ADR obligations.

Introduction

The Woolf reforms and the civil justice reforms that followed it¹ rejected the idea of making mediation, the most favoured ADR procedure,² compulsory within the civil justice system. Although those reforms spoke consistently of the practical and economic virtues of mediation,³ they were equally consistent in rejecting the idea of compelling parties to mediate their disputes: to compel litigating parties to engage with mediation would undermine their constitutional right to access the courts. Every citizen, as Lord Diplock put it in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* "has a constitutional right to access".⁴ However, ADR jurisprudence reveals diverging and, at times, paradoxical judicial approaches and attitudes on the extent of the parties' ADR obligations. *Halsey v Milton Keynes General NHS Trust*,⁵ the leading but controversial authority on ADR, remained consistent with the position taken by successive judicial reforms in rejecting the notion of compulsory mediation, instead advocating the need for the courts to "encourage" the parties to engage with mediation.⁶ The most powerful form of encouragement noted by Dyson LJ in *Halsey* was the making of ADR *C.J.Q. 14 orders⁷ and Ungley orders.⁸ Any party who failed to take part in ADR after a court order has been made or who refused to consider whether ADR was suitable would, Dyson LJ warned, be at risk of having an adverse costs order being made against him,⁹ which the author has previously argued is in itself a form of implied compulsory mediation.¹⁰ Other members of the judiciary have recognised the court's discretion to compel disputing parties to engage with mediation and have, in some instances, exercised that discretion.¹¹

A further difficulty within the ADR jurisprudence is the merits principle established in *Halsey*. That principle dictates that a party who has refused to mediate his dispute may not be found to have acted unreasonably if that party holds a "reasonable belief" in the merits of the case.¹² This principle has also created a body of divergent case law.¹³

It is against this background that this note analyses two recent Court of Appeal decisions: *Thakkar v Patel*¹⁴ and *Gore v Naheed*.¹⁵

The cases and analysis

[Thakkar](#) was an appeal against a costs order which came before Jackson LJ and Briggs LJ (as he then was). One of the principal issues in the appeal was the defendants' failure to engage with the claimants' invitation to mediate. Both had requested a stay for ADR on their respective allocation questionnaires and both parties had expressed a willingness to try to mediate. The claimants made arrangement for a mediation and identified possible mediators for consideration by the defendants. The defendants, by contrast, were slow to respond to the claimants' letters and, as Jackson LJ put it, "raised all sorts of difficulties."¹⁶ Eventually, the claimants wrote to the defendants setting out the history of their attempts to arrange a mediation and stated that they no longer had confidence that a mediation could be arranged given the defendants' failure to co-operate. ***C.J.Q. 15**

The matter proceeded to trial at which the claimants were awarded £44,933.52 on their claim and the defendants were awarded £16,750 on their counterclaim. Turning to the issue of costs, the judge examined the parties' conduct during the litigation process and, in particular, in relation to the claimants' invitation to mediation. He found that the claimants' had been more proactive in their attempts in arranging a mediation whereas the defendants were "less keen to participate".¹⁷ The judge went on to say that there were real prospects of settlement if a mediation had taken place. After weighing up all the circumstances, the judge ordered the defendants to pay 75 per cent of the claimants' costs of the claim. The defendants appealed on the ground that the judge had erred in the exercise of his discretion concerning costs.

On the mediation issue, Jackson LJ noted that the claimants had taken proactive steps to set up a mediation. Although recognising the fact that the defendants had not refused to mediate outright, they had "dragged their feet and delayed for so long that the claimants lost confidence in the process".¹⁸ Jackson LJ agreed with the judge's finding that there was a real chance that the matter would have settled had it gone to a mediation and he provided five reasons for agreeing with the judge's conclusions. First, the dispute was a commercial one which was purely about money. Secondly, the differences between the parties' respective settlement offers (of approximately £10,000) were very close. Thirdly, the costs of the litigation were vastly greater than the sums in issue. Fourthly, bilateral negotiations between the parties had been unsuccessful. Finally, a skilled mediator would have assisted the parties by pointing to the small gap between their respective positions and the huge future costs of the litigation. Given those circumstances, Jackson LJ stated that he "would be astonished if a skilled mediator failed to bring the parties to a sensible settlement".¹⁹

Jackson LJ went on to cite [PGF II SA v OMFS Co 1 Ltd](#)²⁰ in which, it will be recalled, the Court of Appeal held that silence in the face of an offer to mediate was, as a general rule, unreasonable conduct meriting a costs sanction. That was so even if an outright refusal to mediate might have been justified. His Lordship explained that, although the defendants in the present appeal had not refused to mediate, they had "dragged their feet" until the claimants had lost confidence in the settlement process. Although Jackson LJ remarked that the judge's costs order was "a tough order"²¹ it was nevertheless justified. Jackson LJ concluded in the following terms:

"The message which this court sent out in PGF II was that to remain silent in the face of an offer to mediate is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed. The message which the court sends out in this case is ***C.J.Q. 16** that *in a case where bilateral negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it*. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction. In the present case, the costs sanction is severe, but not so severe that this court should intervene."²²

By reinforcing the decision in [PGF](#), [Thakkar](#) is yet another Court of Appeal authority that undermines the merits principle. [PGF](#) and [Thakkar](#) sit uncomfortably with the merits principle because they make clear that a party who is invited to mediation will be obliged to constructively engage with that invitation regardless of that party's belief in the strengths of his case. [PGF](#) and [Thakkar](#) oblige litigating parties to actively engage with a call to mediation and to respond in a constructive and cooperative manner. Simply remaining silent and thereby ignoring an invitation to mediation or dragging ones feet runs counter to the very nature of ADR and undermines Lord Woolf's philosophy of encouraging party cooperation and the early settlement of disputes. Further, both cases also appear to be consistent with the approach taken by the Court of Appeal in the leading case of [Dunnett v Railtrack Plc.](#)²³ in which Brooke LJ held that parties who "turn down out of hand" the chance of ADR may face "uncomfortable costs consequences".²⁴

It is also worth noting that the decisions in [PGF](#) and [Thakkar](#) go some way in vindicating Lightman J's dictum in [Hurst v Leeming](#)²⁵ on the merits factor. In [Hurst](#), an early pro-ADR case which followed

shortly after [Dunnett](#), Lightman J did not hesitate in dismissing the relevance of a party's belief in the merits of his case because this was "the frame of mind of so many litigants."²⁶ However, Dyson LJ in [Halsey](#) sought to qualify Lightman J's dictum by holding that a party's "reasonable belief" in the merits of his case may justify a refusal to mediate. As Dyson LJ put it:

"The fact that a party *unreasonably believes* that his case is watertight is no justification for refusing mediation. But the fact that a party *reasonably believes* that he has a watertight case may be sufficient justification for a refusal to mediate."²⁷

Although there is evidence of subsequent decisions upholding the [Halsey](#) merits factor of reasonable belief,²⁸ the latest line of Court of Appeal authorities severely undermine the reasoning in [Halsey](#) and vindicate Lightman J's dictum which was consistent with the pro-ADR jurisprudence which began to emerge before the chilling effect of the [Halsey](#) decision.

A final observation on [Thakkar](#) relates to Jackson LJ's emphasis on the continuing ADR obligation on the parties to explore and engage with mediation even in circumstances where the parties have previously engaged with negotiations—the cheapest, quickest and most flexible form of ADR procedure. Clearly, litigating parties are required to consider ADR throughout the court process *[C.J.Q. 17](#) regardless of the fact they have previously engaged in an ADR process. Where the parties have been proactive and have constructively engaged with ADR, this should suffice to discharge the parties of their ADR. Interestingly, Jackson LJ's emphasis on the parties' continuing obligation to engage with mediation goes further. It does so by keeping the parties to their ADR duties: they must remain proactive and they must not only consider the appropriateness of mediation but must engage in a further attempt at settlement via mediation. As Jackson LJ put it, "it behoves both parties to get on with it".

A mere four months after the decision in [Thakkar](#), the Court of Appeal took a completely divergent and inconsistent approach in [Gore v Naheed](#). That case concerned a boundary dispute. The defendants' invitation to mediation was rejected by the claimant. The defendants lost at first instance and they appealed both on the substantive issues and the costs order which was made against them. On the issue of costs, the defendants, relying on [PGF](#), argued that the judge should have made some allowance in their favour for the fact that the claimant had refused to engage with their invitation to mediation.

Giving the leading judgment, Patten LJ rejected the defendants' arguments on the issue of mediation. His Lordship adopted a completely opposite approach to that in [PGF](#) and [Thakkar](#) when he said:

"Speaking for myself, *I have some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated.* But, as Briggs LJ makes clear in his judgment, a failure to engage, even if unreasonable, does not automatically result in a costs penalty. It is simply a factor to be taken into account by the judge when exercising his costs discretion."²⁹

His Lordship agreed with the judge's conclusion that it had not been unreasonable for the claimant to have declined to mediate; the claimant's solicitor had considered that mediation had no realistic prospect of succeeding and would only add to costs. Patten LJ also approved of the judge's opinion that the case raised complex questions of law which made it unsuitable for mediation. Consequently, Patten LJ held that the judge's "refusal to make an allowance on these grounds cannot in my view be said to be wrong in principle".³⁰

The decision in [Gore](#) raises a number of difficulties. It obviously contradicts the decision in [PGF](#) and [Thakkar](#) which requires parties to seriously consider and engage with an invitation to mediate, regardless of the relevance of the merits factor. It is illustrative of the diverging, inconsistent and unclear messages emanating from the Court of Appeal on the issue of the parties' duties to engage with mediation. Further, Patten LJ's agreement with the judge's finding that the matter was too complex for mediation does not hold weight. The Court of Appeal has previously, on a number of occasions, held that the complexity of a matter is *not* a valid justification for rejecting mediation. In [Burchell v Bullard](#),³¹ a *[C.J.Q. 18](#) construction dispute, Ward LJ did not hesitate in dismissing the "complexity" argument when he said:

"The defendants behaved unreasonably in believing, if they did, that their case was so watertight that they need not engage in attempts to settle. They were counterclaiming almost as much to remedy *some* defective work as they had contracted to pay for the whole of the stipulated work. There was clearly room for give and take. *The stated reason for refusing mediation that the matter was too*

complex for mediation is plain nonsense."³²

In fact, Ward LJ was of the opinion that small construction disputes were "*par excellence* the kind of dispute which, as the recorder found, lends itself to ADR".³³ A similar approach was taken by Rix LJ in [Rolf v De Gurein](#).³⁴ In that case, the defendant, who had rejected mediation, argued that if he had participated in mediation then he would have had to accept "his guilt" and that he would not have been able to demonstrate to a mediator what the claimant's husband was like, as this could only be done at trial. In any event, the defendant argued, he wanted his "day in court". Rix LJ rejected the defendant's arguments and found his refusal to mediate to be unreasonable behaviour and, as a consequence, the court was entitled to exercise its discretion and make no order as to costs. Rix LJ held:

"As for wanting his day in court, that of course is a reason why the courts have been unwilling to compel parties to mediate rather than litigate: but it does not seem to me to be an adequate response to a proper judicial concern that *parties should respond reasonably to offers to mediate or settle and that their conduct in this respect can be taken into account in awarding costs.*"³⁵

Conclusion

[Thakkar](#) and [Gore](#) are the latest Court of Appeal decisions which are illustrative of the highly unsatisfactory state of the current ADR jurisprudence. They send out diverging, contradictory and confusing judicial messages to those who engage with the civil justice system—the parties, their lawyers and the judiciary itself. There is, therefore, an urgent need for a united approach to be taken by the senior judiciary on the extent of the parties' ADR obligations in order for a clear and more consistent judicial voice to emerge from the jurisprudence. The recent Civil Justice Council ("CJC")³⁶ ADR Working Group Interim Report on Civil Justice identifies a failure to make ADR a "cultural norm" as one of the problems with the current system. It calls for a debate to achieve greater promotion and understanding of the role of ADR within the civil justice system. However, debate and discussion will not be enough. What is urgently needed is judicial leadership in promulgating a united, clear and consistent voice on the extent of the parties' ADR obligation. The continued judicial neglect in resolving the contradictory nature of the ADR ***C.J.Q. 19** jurisprudence ultimately undermines the Court of Appeal's responsibility to provide leadership and guidance on the development of civil procedure. ***C.J.Q. 20**

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1. *Lord Justice Jackson, Review of Civil Litigation Costs: Final Report (TSO, 2010); Lord Justice Briggs, Chancery Modernisation Review: Final Report (TSO, 2013); Lord Justice Briggs, Civil Court Structure Review: Final Report (TSO, 2016).*

2. *Lord Justice Jackson, Review of Civil Litigation Costs: Final Report (TSO, 2010), Ch.36, p.355. Lord Justice Briggs, Civil Court Structure Review: Interim Report (TSO, 2015), para.7.25 refers to mediation as "the dominant method of ADR".*

3. See the comments of *Lord Justice Jackson, Review of Civil Litigation Costs: Final Report, Ch.36.*

4. [\[1981\] A.C. 909.](#)

5. [\[2004\] EWCA Civ 576; \[2004\] 1 W.L.R. 3002 CA \(Civ Div\).](#)

6. See also [Aird v Prime Meridian Ltd \[2006\] EWCA Civ 1866](#) in which the Court of Appeal held that it could not order the parties to participate in mediation. The most the court could do was to encourage the parties.

7. Section G (Alternative Dispute Resolution ("ADR"), The Commercial Court Guide (incorporating the Admiralty Care Guide) HM Courts and Tribunal Service, The Business and Property Courts of England and Wales, 10th edn., (2017).

8. An order named after Master Ungley and which is widely used in clinical negligence cases.

9. [Rule 44.4](#) set out the factors to be taken into account in deciding the amount of costs.

10. M. Ahmed, "Implied Compulsory Mediation" (2012) 31 C.J.Q. 151. See also Debbie De Girolamo, "Rhetoric and civil justice on the promotion of mediation without conviction in England and Wales" (2016) 35 C.J.Q. 162.
11. [Shirayama Shokusan Company Ltd v Danovo Ltd \[2003\] EWHC 3306 \(Ch\)](#); [C v RHL \[2005\] EWHC 873 \(Comm\)](#); [Mann v Mann \[2014\] EWHC 537 \(Fam\)](#); [\[2014\] 1 W.L.R. 2807](#). Ward LJ in [Wright v Michael Wright \(Supplies\) Ltd \[2013\] EWCA Civ 234](#); [\[2013\] C.P. Rep. 32](#) at [3] suggests that the court has the power in [r.26.4\(2\)\(b\) of the CPR](#) to direct mediation and to rigorously apply sanctions when it is refused. See also De Girolamo, "Rhetoric and civil justice on the promotion of mediation without conviction in England and Wales" (2016) 35 C.J.Q. 162.
12. Dyson LJ explained the merits principle and its public policy justification in the following terms: "The fact that a party reasonably believes that he has a strong case is relevant to the question whether he has acted reasonably in refusing ADR. If the position were otherwise, there would be considerable scope for a claimant to use the threat of costs sanctions to extract a settlement from the defendant even where the claim is without merit. Courts should be particularly astute to this danger. Large organisations, especially public bodies, are vulnerable to pressure from claimants who, having weak cases, invite mediation as a tactical ploy. They calculate that such a defendant may at least make a nuisance-value offer to buy off the cost of a mediation and the risk of being penalised in costs for refusing a mediation even if ultimately successful." [Halsey](#) at [16].
13. For example, [Société Internationale de Telecommunications Aeronautiques SC v Wyatt Co \(UK\) Ltd \[2002\] EWHC 2401 \(Ch\)](#); [Allen v Jones \[2004\] EWHC 1189 \(QB\)](#); [ADS Aerospac Ltd v EMS Global Tracking Ltd \[2012\] EWHC 2904 \(TCC\)](#); [Northrop Grumman v BAE Systems \[2014\] EWHC 3148 \(TCC\)](#); [Phillip Garritt-Critchley v Ronnan \[2014\] EWHC 1774 \(Ch\)](#).
14. [\[2017\] EWCA Civ 117](#).
15. [\[2017\] EWCA Civ 369](#).
16. [Thakkar v Patel \[2017\] EWCA Civ 117](#) at [10].
17. [Thakkar \[2017\] EWCA Civ 117](#) at [15].
18. [Thakkar \[2017\] EWCA Civ 117](#) at [27].
19. [Thakkar \[2017\] EWCA Civ 117](#) at [27](v).
20. [PGF II SA v OMFS Co 1 Ltd \[2013\] EWCA Civ 1288](#); [\[2014\] 1 W.L.R. 1386](#). For a discussion of various aspects of this case see P. Taylor, "Failing to Respond to an Invitation to Mediate" (2014) 80 Arbitration 470; M. Ahmed, "Silence in the Face of Invitations to Mediate" (2014) 73(1) C.L.J. 35; G. Meggitt, "PGF II SA v OMFS Co and Compulsory Mediation" (2014) 33 C.J.Q. 335; Sir Bernard Rix, "The Interface of Mediation and Litigation" (2014) 80 Arbitration 21; J. McQuater, "The Future of Part 36 (Part 8)" (2015) 1 J.P.I.L. 49; and E. Suter, "Unreasonable Refusal to Mediate and Costs" (2015) 81 Arbitration 2.
21. [Thakkar \[2017\] EWCA Civ 117](#) at [30].
22. [Thakkar \[2017\] EWCA Civ 117](#) at [30] (emphasis added).
23. [Dunnett v Railtrack Plc \[2002\] EWCA \(Civ\) 303](#); [\[2002\] 1 W.L.R. 2434](#).
24. [Dunnett](#), at [15].
25. [Hurst v Leeming \[2002\] EWHC 1051 \(Ch\)](#); [\[2002\] C.P. Rep. 59](#).
26. [Hurst](#), at [9].
27. [Hurst](#), at [16] (emphasis added).
28. For example, [Reed Executive Plc v Reed Business Information Ltd \[2004\] EWCA \(Civ\) 887](#) and [Swain Mason v Mills & Reeves \(A Firm\) \[2012\] EWCA \(Civ\) 498](#).
29. [Gore v Naheed \[2017\] EWCA Civ 369](#) at [49]. Emphasis added.
30. [Gore \[2017\] EWCA Civ 369](#) at [49].
31. [\[2005\] EWCA Civ 358](#).
32. [Burchell v Bullard \[2005\] EWCA Civ 358](#) at [41]. Emphasis added.
33. [Burchell \[2005\] EWCA Civ 358](#) at [41].
34. [\[2011\] EWCA Civ 78](#).
35. [Rolf v De Guerin \[2011\] EWCA Civ 78](#) at [41].
36. ADR and Civil Justice, CJC ADR Working Group Interim Report (October 2017).

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Evolution, revolution and culture shift: A critical analysis of compulsory ADR in England and Canada

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Abstract

Civil justice reforms in both England and Canada have consistently advocated the need for a litigation ‘culture shift’ away from the traditional adversarial trial process in resolving disputes to settlement through ADR. In seeking to implement this cultural shift, both countries have adopted distinctly diverging approaches to the issue of mandatory ADR. This paper critically analyses the current rules of civil process and associated judicial attitudes toward compulsory ADR in England and in Canada. It argues that the Canadian approach of legislating compulsory ADR provides greater consistency and predictability when it comes to ensuring that litigants undertake ADR efforts. In contrast, the English approach, which formally rejects but impliedly accepts and implements mandatory ADR, creates uncertainty for those who engage with the civil justice process. Drawing on the Canadian practice, this paper proposes ways in which the English court rules may be reformed to better integrate mandatory ADR.

Keywords

Alternative Dispute Resolution, civil justice systems, civil justice reforms, civil litigation, comparative law, ‘culture shift’, mandatory ADR, mandatory mediation

Introduction

For decades, legislators and courts in both England and Wales¹ and in Canada have been responding to calls for a ‘culture shift’ in their respective civil justice systems. Facing long-standing concern over the excessive costs and delays associated with trial-based litigation, seminal civil justice reform reports were issued in both England and Canada in the mid-1990s.

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These reports contemporaneously advocated for a dramatic change in the focus of the two nations' respective civil justice systems. In both countries, the recommended reforms included acknowledging and implementing alternative dispute resolution mechanisms (ADR) as legitimate and preferred methods of resolving civil disputes, relegating the traditional civil trial to a tool of 'last resort' (Canadian Bar Association Task Force on Systems of Civil Justice, 1996: 31; Woolf, 1995a).

Thirty years on, the suggestion to incorporate ADR into the civil litigation process has been largely embraced in both England and Canada. Policy makers and senior members of the judiciary in both countries have formally recognised and acknowledged the practical and economic benefits of ADR as a meritorious means of resolving disputes prior to trial. Despite this, both England and Canada have thus far embraced ADR primarily as a voluntary measure, and both have exhibited reluctance to make ADR a mandatory feature of litigation. Of the two countries, Canada has currently made greater strides in implementing compulsory ADR measures into its civil justice system, and, accordingly, in effecting a 'culture shift' in litigation which de-emphasises trial as the preferred method of civil dispute resolution.

The rules of civil process in England, known collectively as the Civil Procedure Rules (CPR),² do not currently provide the courts with an express legislative mandate to *compel* litigants to engage in ADR. In the context of this legislative void, prevailing jurisprudence is inconsistent in determining whether and when litigants can be compelled to participate in ADR. English jurisprudence is further inconsistent as far as identifying appropriate mechanisms to enforce a judicially-imposed ADR obligation. In contrast, civil procedure rules in several Canadian jurisdictions either prescribe or expressly authorise courts to mandate participation in pre-trial ADR. While this mandate is not universal across Canada, the legislative endorsement of mandatory mediation has enabled Canadian courts to be more consistent and predictable in their approach to compulsory ADR as compared to their English counterparts.

In this paper, we offer a comparative and critical analysis of the current rules of civil process and of the associated judicial attitudes toward compulsory ADR in England and in Canada. The purpose of this analysis is to identify ways in which the Canadian experience may provide useful guidance for improving the consistency of the judiciary's approach to mandatory ADR in England. England and Canada are appropriate and natural comparators on the issue of compulsory ADR because their systems of civil justice are built on the same common law traditions. Moreover, since current civil justice processes in both countries derive, at least in part, from contemporaneous law reform reports advocating for an increased role for ADR, it is instructive for the ongoing litigation 'culture shift' in each jurisdiction to examine how each of these countries is currently approaching the implementation of mandatory ADR.

In the first part of this paper we provide the foundation for our analysis by describing the civil justice reforms initiated in England and Canada in the mid-1990s, with particular focus on the recommended adoption of ADR as a dominant feature of the civil justice system in each country. In the second part, we discuss the judicial approaches to mandatory ADR as reflected in court decisions and extra-judicial statements in England and Canada respectively. Drawing on the preceding sections, in the next part we offer a comparison and critical analysis of the respective approaches of England and Canada to mandatory ADR, identifying ways in which the Canadian experience might be instructive in improving the consistency of the English approach. Finally, we conclude with a short summary of our findings.

For the purposes of this discussion, we have intentionally adopted a broad definition of 'mandatory ADR', encompassing any judicially or legislatively prescribed participation of litigants in a pre-trial dispute resolution process involving the assistance of an impartial third

party and intending to facilitate an out-of-court settlement. This definition includes both adjudicative and non-adjudicative processes as well as both interest-based and non-interest-based resolution practices. Mandatory private mediation (where the parties hire a private mediator to assist with settlement negotiations), judicial mediation (where a judge facilitates the settlement) and court-annexed mediation (where a court-appointed mediator or representative facilitates settlement) are all included. Settlement conferences involving a third party facilitator fall within the definition, but litigation conferences *not* specifically focused on settlement do not.

This discussion is not intended to be a debate over the value or appropriateness of mandatory ADR, ADR in general, or of particular forms of ADR. Instead, for the purpose of this comparative analysis, we assume that ADR mechanisms as a whole are beneficial and appropriate methods of attempting to increase access to justice by reducing the costs and delays associated with traditional trial-based litigation. Our sole focus is to determine what steps can be taken to make compulsory ADR a more reliable and functional component of the civil justice systems in Canada and England. It is worth noting that our consideration of mandatory ADR focuses exclusively on civil litigation *outside* of the family law context. We draw this distinction between family-law litigation and other litigation matters for pragmatic reasons, recognising that family-law disputes are often subject to specialised rules of process and may involve unique cost considerations. Likewise, we do not address legislation mandating mediation or arbitration as a precondition to litigation in the context of particular legal relationships (such as insurance contracts),³ but instead address only ADR as provided for in generally applicable rules of civil process. Finally, while acknowledging that the adoption of ADR into the civil justice systems of both England and Canada has been an evolving process, our discussion intentionally focuses on the rules of procedure as they currently exist in each country.

Civil justice reforms, ADR and compulsion

England

The resolution of civil disputes through consensual settlement has long been welcomed and promoted by the English judiciary, even before the revolutionary Woolf Reforms.⁴ There was an obvious but significant policy rationale which underpinned this judicial attitude: the settlement of civil disputes was in the public interest because pursuing litigation through the adversarial adjudicative process was (and continues to be) expensive and time-consuming for the parties while straining the courts' finite resources.⁵ One of the primary revolutionary features of the Woolf Reforms was the formal recognition and integration of ADR processes, for the first time in English civil justice history, as a significant aspect of the court process and of the civil justice system. Although the concept of compulsory ADR has been consistently rejected by civil justice reforms since the Woolf Reports, the virtues of settlement through ADR have been consistently *reinforced*.

Like many civil justice systems, the English civil justice system has suffered from the perennial problems of complexity, expense and delay. In the early 1990s, it was described as being 'in a state of crisis' (Glasser, 1994). This state of crisis was not unique to this time period. The problems of high litigation costs and delays, in particular, were a common feature in the past and earlier reforms proposed by, for example, the Winn Committee, the Cantley Committee, and the Civil Justice Review, had all failed to produce any significant solutions to these problems (Cantley Committee, 1979; Civil Justice Review, 1981; Winn Committee 1968). It

was not until the Heilbron–Hodge Report that a novel approach to tackling the problems of delay and cost was first proposed (Heilbron and Hodge, 1993). It was this novel approach which subsequently influenced Lord Woolf’s ADR revolution.

The Heilbron–Hodge Report advocated the need for a radical change in approach to civil justice. Unlike previous reforms which had concentrated primarily upon recommending structural changes to the system,⁶ the Heilbron–Hodge Report focused on recommending a change in litigation *culture*. In doing so, the authors of the report proposed the early settlement of disputes as an alternative aim of the justice system, which, to that point, had existed primarily for the vindication and enforcement of rights (Sorabji, 2014: 26).

Nine months after the publication of the Heilbron–Hodge Report, Lord Woolf was commissioned to conduct a formal review of the civil justice system with the aims of, *inter alia*, improving access to justice and reducing delay and costs (Woolf, 1995b). Adopting the approach advocated by the Heilbron–Hodge Report, Lord Woolf made clear that ‘the philosophy of litigation should be primarily to encourage early settlement of disputes’, and as such, trial must be considered as a last resort. Consistent with Heilbron–Hodge, Lord Woolf did not recommend compulsory ADR and he provided two principle reasons for this decision. First, Lord Woolf argued that, in England, judicial resources for the enforcement of civil rights were sufficient, unlike the situation in some United States jurisdictions where court resources were lacking and, consequently, compulsory forms of ADR were prevalent (Woolf, 1995b). Second, there was a need to preserve the citizen’s constitutional right to access the courts. As Lord Woolf explained:

I do not think it would be right in principle to erode the citizen’s existing entitlement to seek a remedy from the civil courts . . . I do, however, believe that the courts can and should play an important part . . . in providing information about the availability of ADR and encouraging its use in appropriate cases. (Woolf, 1995b: chapter 18, para. 4)

Despite his reluctance to introduce compulsory ADR, Lord Woolf did nevertheless enhance the role of ADR within the court process. The court is now obliged to further the overriding objective of dealing with cases justly and at proportionate cost by actively managing cases. A fundamental feature of active case management includes settlement. CPR Rule 1.4(e) provides that the court must encourage and facilitate parties to use an ADR procedure if it considers that appropriate. Additionally, during the litigation process the parties may request a stay of proceedings under Rule 26.4 in order to attempt settlement. For small claims disputes, the parties, *if they agree*, may have their dispute referred to the Small Claims Mediation Service.⁷

In his attempt to affect a change in litigation culture, Lord Woolf also introduced ‘pre-action protocols’ as a mechanism for controlling the conduct of the parties before formal proceedings are issued. Through the early exchange of information, the protocols are aimed at allowing the parties to understand the issues, to attempt to settle the matter, to consider any relevant ADR process to assist settlement and, where proceedings are issued, to assist case management and reduce the costs of resolving the dispute.⁸ As Lord Woolf explained, the main emphasis of the protocols is on settlement and ADR: ‘[they are] intended to build on and increase the benefits of early but well-informed settlements which genuinely satisfy both parties to a dispute’ (Woolf, 1995a). The court expects parties to have complied with any relevant protocol. Although the protocols do not state that ADR is compulsory, they make clear that the parties ‘should consider’ whether some form of ADR procedure might enable them to settle the matter without starting proceedings.⁹ Where there has been a failure to comply with a relevant protocol

without good reason, the court may exercise its powers under CPR Rule 44.4 to penalise that party for failing to follow the protocols.¹⁰

The two major civil justice reforms that followed the Woolf reforms, the Jackson Review and the Briggs Review adopted a consistent approach to the one taken in the Woolf reforms and the Heilbron–Hodge Report by promoting and reinforcing settlement while rejecting the idea of compulsory ADR on the policy grounds of preserving the constitutional right of citizens to access the courts (Jackson, 2010; Briggs, 2013).

In his review, Sir Rupert Jackson acknowledged the economic significance of ADR (and in particular mediation) as a valuable but underused tool, and he argued that an appropriately structured costs regime would encourage the use of ADR. Nevertheless, Sir Rupert expressly rejected any formal procedural change which would compel parties to engage in mediation or which would incorporate compulsory mediation within case management. Rather, his Lordship explained that courts should encourage the use of mediation by educating the parties of its benefits and by utilising their costs powers to penalise parties for unreasonably refusing to mediate.

Consistent with Lord Woolf's call for a culture change to make early settlement the philosophy of litigation (Woolf, 1995b: chapter 2, para. 7(a)), Briggs LJ recommended a cultural change in the management of cases (Briggs, 2013: 68). This proposal required the courts to embrace an approach emphasising 'the management of the dispute resolution process as a whole', including resolution of a claim via court adjudication or through the consensual settlement of disputes through ADR. The courts must, Briggs LJ explained, adopt 'a more active role in the encouragement, facilitation and management of disputes in the widest sense, rather than merely case preparation for trial' (Briggs, 2013).

Lord Justice Briggs reinforced the status quo on the issue of compulsory ADR in his most recent Civil Courts Structure Review Interim Report (IR)¹¹ and Final Report (FR).¹² In his IR Lord Justice Briggs made clear that '... the civil courts have declined ... to make any form of ADR compulsory. This is, in many ways, both understandable and as it should be ... the civil courts exist primarily, and fundamentally, to provide a justice service rather than merely a dispute resolution service' (Briggs IR, 2015: 28). His Lordship also emphasised the courts efforts in vigorously promoting pre-action protocols and, as a consequence, the use of ADR (Briggs IR, 2015: 29). Despite this, Lord Justice Briggs has recommended, *inter alia*, the establishment of an innovative online court¹³ to deal with lower-value¹⁴ (i.e. in monetary terms) cases. The online court will be structured in three stages. In a slightly modified structure to the online court to the one proposed in his IR, Lord Justice Briggs in his FR has recommended that the first stage, which is intended to be a mainly automated process by which the parties are assisted in identifying their case and are required to upload key documents so that it is easily understood by their opponents and the court, will now consist of three sub-stages: stage 0; stage 0.5; and by-passes.¹⁵ Stage 0 will include guidance about treating litigation as a last resort; provide affordable or free advice; and perhaps some commoditised summaries of the essential legal principles. Stage 0.5 is intended to include provision for a short exchange between the parties designed to find out whether there really is a dispute which the courts need to resolve. Lord Justice Briggs has recommended that the traditional solution to this early precaution is for the service of a Claim Form, requiring an Acknowledgment of Service stating whether the defendant intends to contest the claim. By-pass, the final sub-stage, is intended to 'address the reality that legally represented parties ... will not need, and should not necessarily have to be driven through, the whole of the interactive questioning needed to extract the key details of a case from the uninitiated LiP.'¹⁶ The second stage will involve a mix of conciliation

and case management, which will be conducted mainly by court officers, who will not have judicial powers but who will be experienced civil servants, and which will be conducted partly online or by telephone but not face-to-face. The choice of the most suitable conciliation process for each case should, Lord Justice Briggs recommended, 'be a matter for the experienced, judicially qualified trained and supervised, Case Officer in conjunction with the litigants themselves.'¹⁷ The final stage will consist of determination by a judge either on the documents, by telephone, by video or by a face-to-face hearing. However, Lord Justice Briggs makes it clear that there will be 'no default assumption that there must be a traditional trial' (Briggs, 2015: 79). In his FR, Lord Justice Briggs noted the potential for including, as part of a centrally managed online court, specialist experts sitting as judges for deciding cases which would be too complex for the non-specialist district judges who currently decide most of the cases in the small claims and fast tracks.¹⁸

There are three issues to note concerning Lord Justice Briggs' key recommendations. First, the sub-stages to the first stage (in particular sub-stage 0 and 0.5) reinforce Lord Woolf's philosophy that litigation should be concerned with settlement rather than trial. Secondly, although ADR is given an enhanced role within the proposed online court at stage two, it is not compulsory and this approach remains consistent with the approaches adopted in previous civil justice reforms. Thirdly, the structure of the online court and the involvement of court officers in managing cases, possibly to a resolution through a form of ADR, is consistent with Lord Justice Briggs' approach in introducing and promoting a *culture shift* in the management of disputes in the civil justice system as advocated in his earlier Chancery Modernisation Review. As Lord Justice Briggs has explained, stage two of the online court process 'is mainly directed to making conciliation a culturally normal part of the civil court process . . . [b]y that I do not mean that it should be made compulsory' (Briggs, 2015: 78).

Canada

Canada's civil justice system has always recognised and encouraged the settlement or resolution of disputes outside of the court system. Traditionally, such compromise was viewed as the voluntary and private prerogative of the disputing parties. Beginning around the 1970s, however, concerns about the cost, time and adversarial nature of litigation sparked the development of more structured private alternative dispute resolution mechanisms (see generally Alberta Law Reform Institute, 1990, 2003). Still, for the most part, efforts to formally integrate ADR into civil litigation procedures were not made until after the release of the Canadian Bar Association's 1996 *Systems of Civil Justice Task Force Report* (CBA Report), which identified cost and delay as significant barriers to access to civil justice in Canada.¹⁹ This report observed that, while a high percentage of civil cases settle before trial, these settlements typically occur too late in the litigation process to effectively save time and money for the litigants or the court system (CBA Report, 1996: 31). Accordingly, the CBA Report advocated for a multi-option civil justice system where trial is retained as a 'valued but last resort in dispute resolution', and where various dispute resolution mechanisms are integrated into the system in order to promote the early settlement of claims (CBA Report, 1996: 31). In particular, the CBA Report recommended that ADR be formally incorporated as a compulsory step at both early and later stages of the litigation process in order to facilitate the settlement of claims:

The Task Force suggests that as a precondition for use of the court system after the close of pleadings, and later as a precondition for entitlement to a trial or hearing date, the parties should be obliged to certify either that they have participated in a non-binding dispute resolution

process and that it has not resulted in resolution, or that the circumstances of the case are such that participation is not warranted or has been considered and rejected for sound reasons (CBA Report, 1996: 33).

In the years since the CBA Report was issued, numerous reforms have been made to the rules of civil process in Canada. These reforms have implemented the Task Force's recommendation for compulsory ADR to varying degrees.²⁰

Understanding the extent to which mandatory ADR has been integrated into Canada's current civil justice system is a complex task because of the numerous jurisdictions and court systems involved. Canada is a federation and, pursuant to the Canadian constitution, legislative authority over the civil justice system rests primarily with the regional governments (ten provinces and three territories), leaving the federal Parliament with jurisdiction over civil process only in relation to limited matters which may be heard by the federal court.²¹ Pursuant to this constitutional distribution of legislative powers, each jurisdiction has created its own court system and its own independent processes for resolving civil disputes. This means that, counting both standard²² and small claims structures, there are presently 27 distinct systems of civil process operating in Canada in 14 legislative jurisdictions. Further, while voluntary cooperation among the jurisdictions has resulted in significant commonality between the civil processes employed across the country, there are also notable differences, particularly in respect of the adoption of compulsory ADR.

Currently, the CBA Task Force's recommendation of mandatory ADR has not been widely implemented in Canada. As discussed in detail below, only three provinces have made ADR compulsory in the civil litigation process for all standard (non-family law) claims, and the operation of this mandatory ADR rule is, at present, significantly restricted in two of the three provinces. Four other jurisdictions authorise the court, on a case-by-case basis, either on its own initiative or in response to a request by a litigant, to order the parties to participate in ADR or in a judicial settlement conference.²³ The remaining seven jurisdictions have not formally implemented any mandatory ADR rules for standard cases. Compulsory ADR as a systemic component of litigation is slightly more common in small claims proceedings, with five jurisdictions requiring participation in an ADR process or judicial settlement conference in all small claims cases,²⁴ and two other jurisdictions authorising the court to order parties to participate in mandatory mediation or in a settlement conference when circumstances warrant.²⁵ Notably, with regard to both standard and small claims cases, the province of British Columbia uniquely provides for 'quasi-mandatory' ADR by enabling a litigant to force all other parties into mediation by serving a Notice to Mediate.²⁶

The three provinces currently mandating ADR participation as a systemic feature of the litigation process in standard cases are Saskatchewan, Ontario and Alberta. Saskatchewan's legislation provides that 'after the close of pleadings in a contested action or matter that is not a family law proceeding, the local registrar shall arrange for a mediation session, and the parties shall attend the mediation session before taking any further step in the action or matter.'²⁷ This requirement applies to most civil cases²⁸ and means that, once pleadings are complete, no further action can be taken in respect of the litigation until the parties have participated in a mediation proceeding. Saskatchewan legislation also provides for the government appointment of a Manager of Mediation Services²⁹ who is authorised to postpone the mediation to a later stage of the litigation, or to fully exempt parties from the compulsory mediation requirement.³⁰ The procedural rules do not provide any express guidance as to the circumstances in which such an extension or exemption might be appropriate, however it does not appear that exemptions are commonly sought or approved. Initially introduced in 1994 as a pilot project applicable in

only two municipalities, Saskatchewan's mandatory mediation rule now applies province-wide and is Canada's longest-standing mandatory mediation programme. By comparison, the mandatory mediation provisions adopted in Alberta and Ontario are far less robust in their application.

The mandatory mediation rule in Ontario requires litigants to participate in mediation 'within 180 days after the first defence has been filed'.³¹ This requirement applies, with limited exceptions, to most civil litigation matters.³² The rule only applies, however, to actions commenced in the City of Toronto, the City of Ottawa and the County of Essex.³³ Geographically speaking, this means that systemic compulsory ADR is not widespread in Ontario, although the City of Toronto and the City of Ottawa are major population centres. In the Ontario programme, the court is also empowered to extend the time for mediation or to dispense with the mediation requirement on a case-by-case basis.³⁴ The Ontario Rules do not specify the circumstances in which a court might exercise its discretion to exempt litigants from mandatory mediation. With regard to extending the time for mediation, however, the rules provide that the court 'shall take into account all the circumstances', including: 'the number of parties, the state of the pleadings, the complexity of the issues in the action'; whether motions to resolve the action on a preliminary basis are likely or pending; whether the mediation 'will be more likely to succeed if the 180-day period is extended to allow the parties to obtain evidence' through pre-litigation procedures; and more generally 'whether, given the nature of the case or the circumstances of the parties, the mediation will be more likely to succeed if the 180-day period is extended or abridged'.³⁵ Finally, in the event that a party fails to attend a scheduled mandatory mediation, the Ontario Rules empower the court to convene a case conference and to:

- a. establish a timetable for the action;
- b. strike out any document filed by a party;
- c. dismiss the action, if the non-complying party is a plaintiff, or strike out the statement of defence, if that party is a defendant;
- d. order a party to pay costs;
- e. make any other order that is just.³⁶

Alberta's Rules of Court require litigants to engage in 'good faith participation' in one or more itemised dispute resolution processes,³⁷ failing which the matter cannot be scheduled for trial.³⁸ The available listed dispute resolution processes all involve the assistance of a third-party mediator or arbitrator, and specifically include a judicial dispute resolution system (JDR) which provides for 'a judge to actively facilitate a process in which the parties resolve all or part of a claim by agreement'.³⁹ The rules further authorise the court, on application, to waive the mandatory mediation requirement only if:

- a. before the action started the parties engaged in a dispute resolution process and the parties and the Court believe that a further dispute resolution process would not be beneficial,
- b. the nature of the claim is not one, in all the circumstances, that will or is likely to result in an agreement between the parties,
- c. there is a compelling reason why a dispute resolution process should not be attempted by the parties,
- d. the Court is satisfied that engaging in a dispute resolution process would be futile, or
- e. the claim is of such a nature that a decision by the Court is necessary or desirable.⁴⁰

The operation of Alberta's compulsory ADR rule was suspended by a Notice to the Profession issued by the Alberta Court in 2013. The notice, which remains in effect today, provides that civil matters will be entered for trial without requiring compliance with the mandatory ADR Rule (Court of Queen's Bench, 2013). Without expressly identifying a reason for the suspension of the mandatory ADR obligation, the notice states that it will remain in effect 'until such time as the judicial complement of the Court and other resources permit reinstatement'. This wording may imply that the suspension was induced by a lack of sufficient judicial resources to conduct ADR, and particularly JDR, which is a popular choice for litigants in Alberta selecting from the menu of options listed in the mandatory ADR rule.⁴¹

Judicial attitudes and approaches to compulsory mediation

England

Although the reforms in England spoke with a united voice in rejecting compulsory ADR, the same cannot be said of judicial approaches and extra-judicial attitudes towards the issue of compulsion. While the official position of the senior judiciary is against compulsion, as recently reinforced by Lord Justice Briggs in his Court Structure Review, the courts appear to have assumed the power to compel parties to engage with ADR, utilising the threat of costs consequences for parties refusing to engage in ADR (Briggs, 2015).

Halsey, PGF and the issue of compulsion. The question of whether courts should compel parties to ADR was considered in the landmark decision of *Halsey v Milton Keynes General NHS Trust*.⁴² The main issue for the Court of Appeal was whether the defendants in two personal injury claims should be penalised in costs for refusing to mediate. Mediation had been offered by the claimants in both actions, and, in one case, a court had actually recommended it. Dyson LJ, giving the leading judgment, rejected the argument that the courts should compel parties to mediation. He reasoned that compulsion would breach the right to a fair trial enshrined in Article 6 of the *European Convention on Human Rights* (ECHR).⁴³ He stressed that the courts could, however, encourage the parties to consider mediation, and the strongest form of encouragement would be in the form of an ADR order (an order made in the Commercial Court which requires the parties to not only engage in ADR but also to provide reasons to the court if the ADR is unsuccessful). If a party subsequently failed to comply with such an order, that would amount to an unreasonable refusal to engage with ADR and would justify the courts penalising that party in costs.

Dyson LJ went on to explain that in assessing an unreasonable refusal, the court will consider all of the circumstances of the case including the following six non-exclusive factors: the nature of the dispute; the merits of the case; whether other settlement methods have been attempted; whether the costs of mediation would be disproportionately high; whether any delay in setting up and attending ADR would have been prejudicial; and whether the ADR process has a reasonable prospect of success. He confirmed that despite this, where one of the parties remained opposed to ADR, it would be wrong for the courts to compel them to embrace it.

Following on from *Halsey*, Lord Neuberger MR (as he was then), speaking extra-judicially, has reiterated the need to preserve the constitutional right of accessing the courts. His Lordship has forcefully argued that ADR, a system which provides private benefits to individuals, is not

and should not be considered as a branch of the government. Although ADR has a part to play in the civil justice system, it cannot serve the formal adjudicative role of the courts in administering equity and the law. ADR provides private justice because it exists within the framework of law and formal adjudication, without which ‘there would be mere epiphenomena’ (Neuberger, 2010a, 2010b). In his recent speech to the Civil Justice Council, Lord Neuberger reinforced his view that mediation is an effective adjunct to litigation, but can never be a substitute to it, and as such it is important to uphold and preserve the right to access the courts (Neuberger, 2015). However, as will be discussed later, Lord Neuberger did not rule out the possibility of certain small disputes being referred to compulsory mediation.

Dyson LJ’s stance on the ECHR Article 6 ‘right to trial’ issue was recently confirmed and followed in *PGF II SA v OMFS Co 1*.⁴⁴ In that case the claimant, at an early stage in the litigation process, wrote to the defendant to participate in mediation and, four months later, the claimant sent a second letter inviting the defendant to ADR. The defendant failed to respond to these invitations, however, and instead made a Part 36⁴⁵ offer without providing an explanation as to the basis of that offer. The matter eventually settled, with the claimant accepting the defendant’s Part 36 offer. At the costs hearing the claimant argued, *inter alia*, that the defendant was unreasonable to have refused to participate in ADR. The ADR point succeeded and both parties appealed.

Giving the leading judgment on appeal, Briggs LJ formally endorsed the advice of the authors of the Jackson ADR Handbook, and held that silence in the face of an invitation to participate in ADR is, as a general rule, itself unreasonable—even if a refusal might have been justified by the identification of reasonable existing grounds (Blake et al., 2013). By doing so, his Lordship made a ‘modest’ extension to the *Halsey* guidelines on assessing an unreasonable refusal to participate in ADR. His reasoning did, however, also endorse Dyson LJ’s point that the court should not compel parties to mediate because doing so would breach Article 6 of the ECHR. The court may encourage the parties to embark on ADR, that encouragement may be ‘robust’, and a failure to engage in ADR may result in adverse cost consequences for the defaulting party. Still, there is to be no compulsion.

Briggs LJ emphasised the success rate of mediation and the Court of Appeal’s own voluntary mediation scheme. He referred to the ‘intense focus’ of Sir Rupert’s report into costs in achieving proportionality between the overall cost of litigation and the damages being sought. This, according to Briggs LJ, was Sir Rupert giving a clear endorsement of ADR. Finally, Briggs LJ referred to the government’s austerity policy which had impacted on the ‘provision of state resources for the conduct of civil litigation.’ The issue of austerity, he elaborated, necessitated ‘[a]n ever-increasing focus upon means of ensuring that court time... is proportionately directed towards those disputes which really need it.’

Briggs LJ made clear in *PGF* that parties would be expected to attempt some form of ADR, regardless of whether the parties had a justifiable reason for refusal:

This case sends out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR, even if they have reasons which might justify a refusal... To allow the present appeal would, as it seems to me, blunt that message. *The court’s task in encouraging the more proportionate conduct of civil litigation is so important in current economic circumstances that it is appropriate to emphasise that message by a sanction which, even if a little more vigorous than I would have preferred, nonetheless operates pour encourager les autres.*⁴⁶

Both the *Halsey* and *PGF* decisions raise a number of issues regarding ADR compulsion. Both decisions reflect a tension between the formal rejection of compulsory ADR and the acknowledgement of the courts' powers to 'encourage' parties to engage in ADR. To say that parties should not be compelled to ADR but then to indicate that 'encouragement' may be robust and in the form of a court order appears to be contradictory. It is highly unlikely that parties, even if they are opposed to ADR, will decline to abide by a court order: such parties would clearly face severe cost consequences under CPR Rule 44.3. The court order and the threat of severe cost consequences would impliedly force the parties to ADR, rendering both Dyson LJ's and Briggs LJ's position on Article 6 of the ECHR obsolete.

Further, the pre-*Halsey* Court of Appeal decisions in *Cowl v Plymouth (City Council)*⁴⁷ and *Dunnett v Railtrack Ltd*⁴⁸ adopted a robust, pro-ADR stance. In *Cowl*, Lord Woolf MR was unequivocal in arguing that the courts should make appropriate use of 'their ample powers under the CPR to ensure that the parties try to resolve the dispute with the minimum involvement of the courts.' His Lordship went on to indicate that the courts could require the parties to provide an explanation as to the steps which they have taken to try to settle the matter. In disallowing the successful defendant's costs in *Dunnett* for failing to engage in ADR, Brooke LJ concluded with a stern warning when he stated:

It is to be hoped that any publicity given to this part of the judgment of the court will draw the attention of lawyers to their duties to further the overriding objective in the way that is set out in CPR Pt 1 and to the possibility that, if they turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequence.⁴⁹

The second issue relates to the strong emphasis by Briggs LJ in *PGF* on the need to utilise limited court resources proportionately, which arguably has overtaken Lord Woolf's first reason for resisting compulsory ADR. Briggs LJ placed great weight on the need for the courts to encourage the more proportionate conduct of civil litigation. For Briggs LJ, this was extremely 'important in the current economic circumstances', and it was important to send out the message of the significance of the need for the parties to conduct themselves proportionality during litigation. Briggs LJ emphasised this message by a sanction of an adverse costs order against the defendants. Thus, Lord Woolf's first reason not to have compulsory ADR is redundant.

Finally, it is worth reflecting on the comments of Sir Alan Ward in *Wright v Michael Wright Supplies Ltd*.⁵⁰ Sir Alan, who was a member of the court in *Halsey*, expressed doubt on the Article 6 of the ECHR 'right to a trial' point and called for the need for a possible review of *Halsey* in light of developments in the field of ADR since the decision. His lordship expressed his reservations over *Halsey* when he said:

Was it wrong for us to have been persuaded by the silky eloquence of the *eminence grise* for the ECHR, Lord Lester of Herne Hill QC, to place reliance on *Deweert v Belgium*... Does Civil Procedure Rule 26.4(2)(b) allow the court of its own initiative at any time, not just at the time of allocation, to direct a stay for mediation to be attempted, with the warning of the costs consequences, which *Halsey* did spell out and which should be rigorously applied, for unreasonably refusing to agree to ADR? Is a stay really 'an unacceptable obstruction' to the parties' right of access to the court if they have to wait a while before being allowed across the court's threshold?⁵¹

Diverging judicial and extra-judicial approaches on compulsion. Rather than settling the matter and providing clear jurisprudential guidance, Dyson LJ's approach to Article 6 of the ECHR led to the emergence of an opposing judicial school of thought which appears to have embraced the notion of compulsory ADR. Blackburn J in *Shirayama Shoukusan Co v Danovo*⁵² held no doubt that the courts have assumed the jurisdiction to order parties to mediation. Blackburn J drew support from Arden J's (as she was then) decision in *Kinstreet Ltd v Balmargo Co*,⁵³ in which the parties were ordered to mediation. Further, Coleman J in *Cable & Wireless Plc v IBM United Kingdom Ltd*⁵⁴ confirmed that the courts maintained the power to order unwilling parties to engage in ADR in the Commercial Court.

In *C v RHL*⁵⁵ the Commercial Court exercised its powers and made an ADR order. Coleman J, in making the order and actually setting the date for the conclusion of the mediation, stated:

I have no doubt that the overall interests of all parties . . . would be best served if the whole group of disputes between C and RHL was referred to mediation before any further substantial costs are incurred either in pursuing or defending satellite litigation . . . In many respects this series of disputes with its particular commercial background is the paradigm of a case which is likely to be settled by mediation.⁵⁶

The case of *Rolf v De Guerin*⁵⁷ is also illustrative of the diverging judicial approaches to compulsory ADR and the court's expectation that the parties will engage in settlement processes. The claimant issued proceedings against the defendant builder for defective work on a small building project. Before and after issuing proceedings, the claimant's various invitations to the defendant to enter mediation were rejected. When asked by the Court of Appeal why he had been unwilling to mediate, the defendant argued that, *inter alia*, he wanted his 'day in court'. Dismissing the defendant's contentions, Rix LJ found that the defendant's refusal to mediate was unreasonable behaviour for the purposes of CPR Rule 44(5) and, as a consequence, the court was entitled to exercise its discretion and make an order as to costs. Rix LJ held:

As for wanting his day in court, that of course is a reason why the courts have been unwilling to compel parties to mediate rather than litigate: but it does not seem to me to be an adequate response to a proper judicial concern that parties should respond reasonably to offers to mediate or settle and that their conduct in this respect can be taken into account in awarding costs.⁵⁸

An analysis of extra-judicial statements also supports compulsory ADR, contrary to *Halsey* and *PGF*. On the Article 6 point, Sir Gavin Lightman has argued that the court appeared to be unfamiliar with the mediation process and confused an order for mediation with an order for arbitration or some other order which places a permanent stay on proceedings (Lightman, 2007). An order for mediation did not interfere with the right to a trial: at most it merely imposes a short delay to afford an opportunity for settlement. Similarly, Lord Clarke MR (as he then was) also recognised the court's jurisdiction to require parties to engage in mediation when he stated that, despite the *Halsey* decision, it was at least 'strongly arguable that the court retains jurisdiction to require parties to enter into mediation' (Clarke, 2009). Also, Sir Bernard Rix, while recognising mediation as a 'given good', was critical of the decision in *Halsey* (especially on the Article 6 ECHR point) for being insufficiently supportive of mediation (Rix, 2014: 21).

Lord Neuberger alluded to the idea of extending the compulsory family mediation, information and assessment meeting (MIAM) to certain, smaller civil cases.⁵⁹ Although expressing

caution on the idea of compulsory mediation ‘happening’, Lord Neuberger appeared to embrace the idea of extending the MIAM to certain disputes when he said:

While, as I say, it would be wrong for me to go so far as to say that it ought to happen, I think there plainly must be a lot to be said for extending the MIAM scheme to smaller civil cases. Indeed, I understand that at last year’s conference, Lord Faulks, then Minister of State for Justice, said he would explore whether a similar system could be introduced for civil mediation (Neuberger, 2015).

More importantly, the European Court of Justice in *Alassini v Telecom Italia Spa*,⁶⁰ a decision which came after the *Halsey* decision, dealt directly with the issue of whether compulsory mediation was a breach of Article 6. *Alassini* concerned an action which was brought by customers of two telecom companies for breach of contract under the EU Directive on the Provision of Electronic Communications Network. The Italian government made legal action pursuant to the Directive conditional on a prior attempt to settle the matter before bringing proceedings. The Italian law, in the opinion of the Advocate General Kokott, pursued legitimate objectives in the general interest in the quicker and less expensive resolution of disputes. Advocate General Kokott found that the measure of requiring parties to engage in settlement discussions before commencing court proceedings was proportionate because no less restrictive alternative existed to the implementation of a mandatory procedure, since the introduction of an out-of-court settlement procedure which is merely optional is not as efficient a means of achieving those objectives. The Italian law did not seek to replace court proceedings and therefore access to the court was not denied but, at worst, delayed by 30 days.

Lord Dyson MR revisited the *Halsey* decision in his recent speech to the Belfast Mediation Conference in 2014.⁶¹ Lord Dyson reiterated that unwillingly parties should never be compelled to mediate but went on to argue, as he did in *Halsey*, that adverse costs orders would be an appropriate means of encouraging parties to use mediation. However, in light of the European Court of Justice ruling in the case of *Alassini*, his Lordship modified his position and conceded that compulsory mediation does not, of itself, breach Article 6 of the ECHR. He did maintain that if the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except adding to the costs of the dispute resolution process, possibly postponing the judicial determination of the dispute, and damaging the perceived effectiveness of the ADR process. Lord Dyson went on to argue that the ruling in *Alassini* did not mean that compulsory mediation will never breach Article 6, and that in some circumstances where, for example, the costs of mediation were very high, compelling a party to mediate could still be considered a denial of access to justice. There was also, in Lord Dyson’s opinion, a moral question: should a party be forced to attend mediation rather than exercising his right to go to court? Lord Dyson answered: ‘[i]t doesn’t seem to me that it is the role of a court of law to force compromise upon people who do not want compromise.’

In summary, there are currently two schools of thought on the issue of compulsory ADR within the English senior judiciary: the official position which dictates that parties should not be compelled into ADR, and the unofficial but implied position which confirms that the courts have power to compel parties to ADR. The unofficial position is reinforced by the existence and making of ADR orders by the courts and the very real threat of adverse cost consequences in the event of a breach of such an order. Further, there are clear signs of acceptance, albeit in a very cautious manner, at the most senior judicial level of the possibility of compulsory mediation for small disputes, as indicated by Lord Neuberger.

Canada⁶²

In the years since mandatory mediation was suggested by the CBA Report on access to justice, there has been considerable debate within Canada's legal community, including among members of the judiciary, about the perceived benefits and drawbacks of compulsory ADR. Resistance to compulsory ADR was founded in the customary notion that good faith participation of litigants in pre-trial settlement discussions necessarily requires the *voluntary* participation of the parties:

[The] traditional view was that although alternative dispute resolution was a useful process, the court would not ordinarily order it over the objections of a party. The thinking was that a mandatory dispute resolution process is an oxymoron because a party who believes that it is a waste of time and money will not engage in good faith negotiations.⁶³

It is clear from Canadian jurisprudence, however, that judicial attitudes toward compulsory ADR have now moderated, at least in jurisdictions where legislated rules of civil process compel litigants to participate in ADR as a matter of course, or permit the courts to order such participation on a case-by-case basis.⁶⁴

Judicial attitudes in jurisdictions with compulsory ADR rules

In *IBM Canada Ltd v Kossovan*, presently Canada's leading decision on mandatory ADR, Mahoney J summarised the 'new millennium view'⁶⁵ of the court in the context of Alberta's compulsory ADR rules:

The experience in this Court plus ample informed commentary suggests that requiring participation in an alternative dispute resolution process leads to many settlements that would otherwise not occur. Often disputants, when choosing between a settlement process or proceeding to trial, lack information, make distorted assessments, misjudge the cost, have an overly optimistic or constricted view of potential trial risks and outcomes and fail to understand the hidden benefits of entering structured settlement negotiations, like a JDR.

Even if a final agreement is not reached on all issues, the parties, by engaging in the process, can address their dispute sooner, learn valuable information to help sharpen their understanding of the real issues, reduce the costs of final resolution, and in some cases, improve their relationship. The Court has seen that even in major commercial litigation that was dealt with by way of a JDR, the process has led to quite unexpected positive results. Even in the field of healthcare disputes including medical malpractice, where negotiated settlements are the exception, breakthroughs in conflict resolution have been made as an alternative to litigation . . .

Making the alternate dispute resolution process mandatory is an attempt to ensure that parties to litigation are exposed to its proven benefits . . .⁶⁶

In other words, courts in mandatory ADR jurisdictions are less inclined to think that litigants or their counsel necessarily know best when it comes to determining whether a lawsuit might benefit from mediation or another out-of-court dispute resolution mechanism. The fact that a party does not voluntarily consent to participation in ADR is not determinative.⁶⁷ Instead, the judicial presumption is that, in most circumstances, a civil action will benefit, in some manner, if the parties engage in ADR. Some of these benefits, as identified by Canadian courts, include: educating the parties about methods of resolving the dispute in a less adversarial fashion; promoting effective communication between the parties; helping the parties to identify the

material issues in dispute; helping the parties to identify and understand their respective positions so as to more readily consensually resolve the matter after the ADR or to reduce the time and cost of a trial, should it become necessary.⁶⁸

The benefits of mandatory ADR are also vigorously protected by Canadian courts in jurisdictions where the legislated rules do not require ADR in all cases, but instead empower the courts to order ADR in appropriate circumstances. For example, in considering the utility of a court exercising its authority to compel ADR participation in the face of a litigant's resistance to mediation, Handrigan J of the Newfoundland and Labrador Supreme Court stated that:

[R]eluctance to participate in mediation, or even outright opposition to it, should not always trump the use of mediation. Rule 37A allows the court to 'order' mediation thereby overriding objections voiced by responding parties. It is important to be sensitive to the attitudes of the parties because mediation is less likely to be successful if it also has to overcome recalcitrance. But, as Green, C.J. of this court has said, '... a skilled mediator can do a lot to encourage participation by reluctant litigants and to bring them around to a positive way of thinking.'⁶⁹

As this comment suggests, the courts now recognise that a party's resistance to mediation may be overcome by the very act of participating in mediation, even where that participation is not initially voluntary. This leads to the further conclusion that parties should not be exempt from compulsory ADR simply because they mutually consent to the exemption. As stated by Burrows J of the Alberta Court of Queen's Bench, '[t]he intent that pre-trial dispute resolution no longer be voluntary would be entirely frustrated if the Rule could be waived by the consent of the parties to the litigation.'⁷⁰

The enthusiasm with which Canadian courts in mandatory ADR jurisdictions have embraced ADR as a desirable and useful component of the civil justice process is also reflected in the fact that these courts have been reluctant to exercise their discretionary authority to exempt litigants from the mediation requirement. For example, in *Kossovian*, Mahoney J refused to exempt the parties from compulsory mediation where the claimant, suing the defendants for fraud, argued that the proposed JDR would be futile because the claimant would settle for nothing less than full or near-full indemnity, and because the defendants did not have the resources to settle the case on a full-indemnity basis. Mahoney J concluded that this argument was premature because the plaintiff's position on compromise might change over the course of the JDR. He also held that the claimant's argument failed to acknowledge that there might be other benefits to participating in the JDR, beyond the immediate settlement of the action:

It is a fallacy to think that the outcome of a JDR will always result in a substantial compromise to one's initial position. While one of the objects of dispute resolution is to get both parties to 'move' from their initial positions to one upon which they can mutually accept, the ultimate objective is achievement of a judicious outcome that all parties can live with, put behind them and move on.

...

A number of plaintiffs enter into the litigation process believing that they are entitled to recover the full amount of their claim. Positions may be based on what they have been told by counsel, personal principles, or as in this case, corporate direction. Yet despite this belief successful settlements are often reached. Parties may be persuaded to resolve the dispute once the weaknesses in their own case is revealed to them, given the uncertainties of litigation. Having a Justice of this Court outline the strengths and weaknesses of each party's case may

cause one or both of the parties to modify their settlement positions. Alternatively, if a strong case is put forward where ability to recover is in issue, creative repayment solution might be successfully canvassed.

A belief that there is little room for flexibility and no major concession as to amount will be made does not act to render the alternate dispute resolution process futile.⁷¹

Thus, a party's objections to compulsory ADR on the basis of its negative perception of the substantive utility of ADR as a settlement mechanism is *not* a justifiable reason for a court to fail to enforce a compulsory mediation rule.

Canadian courts have also refused to exempt parties from compulsory mediation on procedural grounds. For instance, in *O (G) v H (CD)*,⁷² the Ontario Supreme Court of Justice refused to grant an exemption from mediation where the claimant, who was suing the defendant for a series of torts, including sexual assault and indecent assault, argued that she was too afraid of the defendant to be in the same room as him for the purposes of participating in ADR. The court essentially held that such procedural considerations do not trump the greater purpose served by engaging in ADR:

The concerns of the defendant can be accommodated by (a) selecting a mediator with skills to address issues of violence; and (b) exploring with that mediator whether the mediation can proceed without the necessity of the plaintiff G.O. and the defendant being present in the same room. With those concerns accommodated, I see no reason to exempt this action from mandatory mediation. Indeed, I find that it is consistent with the objective of the mandatory mediation pilot project that the parties participate in mediation in order to give them an opportunity to explore an early and fair resolution.⁷³

Along similar lines, in *Pelham Properties Ltd v Hessdorfer*, the Saskatchewan Court of Queen's Bench rejected the plaintiff's argument for an exemption from mandatory mediation on the grounds that it was going to be pursuing a summary judgment application against the defendant. Gerein J reasoned, in part, as follows:

The mediation requirement is universal. It does not in any way speak to the merits of a claim. The absence or presence of a defence plays no part in whether there should be mediation. The purpose of the process is to afford the parties an opportunity to resolve their dispute through agreement rather than through the adversarial process of litigation. The process affords a person, even one devoid of a valid defence, to seek and perhaps obtain a resolution through compromise. Even a confident plaintiff may make an accommodation to achieve early closure, eliminate risk and avoid expense. That possibility should not be removed simply because a summary judgment would be granted.⁷⁴

These cases are reflected in Mahoney J's findings in *Kossovian* that, given the purposes and benefits of mandatory ADR, the legislated discretion of the court to grant an exemption to a mandatory ADR rule should be exercised sparingly, and the threshold for obtaining an exemption should be high.⁷⁵ As stated by Mahoney J, even in the context of Alberta's rule, which expressly lists some of the circumstances in which the court may grant an exemption, '[a]bsent compelling reasons . . . the court should not use its discretion to bypass the legislated objectives of the Rule.'⁷⁶

Mahoney J did, however, acknowledge that an exemption to mandatory ADR may be granted in appropriate circumstances, with the burden of proving such circumstances being

borne by the party or parties seeking the exemption.⁷⁷ Relying on prior case law, he noted that appropriate circumstances might include: a complex case involving a catastrophic claim; multiple parties and complicated cross-claims; a case involving a party who lives in a foreign jurisdiction and where the costs of that party attending mediation are prohibitive and outweigh the cost advantages of the ADR process; a case which is pending certification as a class action; or a case involving an assault or a power imbalance where a mediator trained to address the parties concerns is not an option.⁷⁸ Additionally, it has been suggested that an exemption from mandatory ADR may be appropriate where the nature of the case means that public policy arguments favour a public trial rather than a private resolution.⁷⁹

As regards the optimal timing for mandatory mediation to take place, several courts have expressed the view that the benefits of ADR are usually most significant if ADR takes place early in the litigation. For example, Handrigan J of the trial court of Newfoundland and Labrador stated that:

Mediation is generally regarded as most beneficial if it occurs early in the proceedings... the rationale for this belief is simple: The parties are likely to become more firmly entrenched in their positions as time goes on. They will be less malleable and indisposed to the creative problem-solving techniques that successful mediation requires.⁸⁰

Similarly, Halvorson J of the Saskatchewan Court of Queen's Bench noted that '[o]ne objective of early mediation is to reduce costs of litigation, and this objective would be frustrated where mediation is delayed.'⁸¹ Further, Mahoney J of the Alberta Court of Queen's Bench noted that Alberta's mandatory ADR rule must 'be read in light of the objectives of accessibility, affordability and timeliness.'⁸² Ironically, this association between the timeliness of ADR and its benefits is likely the rationale behind the decision of the Alberta courts to suspend enforcement of the province's mandatory ADR rule. Specifically, where litigants select JDR as the mechanism by which they will fulfill their pre-trial ADR requirement, the cost and time saving benefits of compulsory ADR requirement are lost if, as a result of dwindling judicial resources, the JDR cannot be conducted in a reasonable period of time.

Of course, the definition of 'early' ADR, or ADR within a 'reasonable period of time', inevitably varies with the circumstances. It has been noted by Alberta's Associate Chief Justice John Rooke, for example, that for the purposes of achieving a settlement, JDR is most successful when conducted after pre-trial evidence disclosure procedures have been completed (Rooke, 2010). Some flexibility as to the timing of compulsory ADR, therefore, seems desirable.⁸³

Judicial attitudes in jurisdictions without compulsory ADR rules

Despite the benefits of mediation lauded by the judiciary in jurisdictions with rules mandating or expressly authorising the courts to order participation in ADR, in Canadian jurisdictions without such legislative provisions the courts have generally been unwilling to force parties to mediate. In fact, there does not appear to be a single reported case in which a court has compelled a party to mediate in circumstances where compulsory or court-ordered mediation is not provided for by the relevant rules of civil process. There are cases, however, in which these courts have been asked to award costs against a party who has refused the opposing party's offer to mediate the dispute. Here again, the courts have generally been

unwilling to indirectly compel mediation by threatening costs against a litigant because of that party's refusal to voluntarily participate in mediation.⁸⁴ In *Roscoe v Halifax (Regional Municipality)*, Muise J of the Nova Scotia Supreme Court held that 'in the absence of . . . statutorily mandated settlement steps, accompanied by costs sanctions for failing to take them, the failure to make all reasonable attempts to resolve a claim does not, by itself, warrant augmented costs.'⁸⁵ In *Michiels v Kinnear*,⁸⁶ however, the plaintiff's unreasonable refusal to mediate was listed among several factors considered by Power J of the Ontario Supreme Court in determining an appropriate costs award against the unsuccessful plaintiff. This suggests that, while Canadian courts are reluctant to use their discretion to award costs against a party as a direct punishment for failing to voluntarily engage in ADR, the Canadian judiciary has not fully closed the door on taking a party's unwillingness to mediate into account when considering an overall costs award. Generally, however, prevailing case law leads to the conclusion that, where legislated procedural rules do not expressly provide Canadian courts with the authority to compel parties to mediate, the courts are not presently inclined to assume jurisdiction to compel ADR.

Analysis

As the preceding discussion indicates, the major civil justice reforms in England and Canada over a quarter-century ago had one significant similarity: both identified the need for a culture shift in the civil justice process. Specifically, the reforms called for ADR mechanisms to be integrated into the civil litigation process as a standard *alternative* to the traditional adversarial trial process, so as to ultimately relegate trial to a mechanism of last resort. However, despite this common goal, the Woolf Reforms and the CBA Report adopted distinctly divergent approaches to the issue of ADR compulsion. Lord Woolf dismissed compulsory ADR on the grounds that, at the time, the courts were sufficiently resourced to conduct trials, and that there was a need to preserve the constitutional right of citizens to access the courts. In contrast, the CBA Report was bolder in its recommendation on ADR, calling for a multi-option civil justice system which would formally incorporate ADR as a compulsory step in the litigation process in order to facilitate the settlement of claims. In short, the English reforms advocated for an *evolution* of the civil justice system which would ultimately integrate ADR as an accepted part of civil procedure, whereas the Canadian reforms called for a *revolution* of the civil justice system, with governing legislation being amended to implement mandatory ADR.

As a result of these distinct approaches, England and Canada currently have very different civil justice regimes, and judicial attitudes, with regard to compulsory ADR. In England, the situation is especially complex. In the absence of any procedural rules requiring litigants to participate in ADR or expressly authorising the courts to compel parties to engage in ADR, the judiciary has divided itself along two lines of authority. The first states that the courts do not have the power to compel parties to participate in ADR and, even if the courts did have such a power, they should not exercise it. The second, unofficial judicial position stands in stark contrast with the first. It confirms that the courts do, in fact, have the power to compel parties to ADR through various means, and those powers have sometimes been exercised by the courts.

In Canada, the legislative approach to mandating ADR varies among the country's civil jurisdictions. Depending on the jurisdiction, civil procedure rules either (1) expressly require all litigants to participate in ADR prior to trial, subject to exemptions; (2) expressly authorise the courts to order parties to participate in ADR in appropriate cases; or (3) are silent as to whether parties can be compelled to participate in ADR. In this legislative environment,

judicial approaches and attitudes toward mandatory ADR are reasonably consistent and, as a consequence, Canadian jurisprudence on compulsory ADR is more coherent than that of England. This consistency is principally due to the enactment of court rules mandating ADR, setting clear exceptions to compulsory ADR, empowering courts to order ADR, and linking the obligations of the parties to engage with ADR with specific court powers to penalise defaulting parties.

The Canadian judiciary speaks with a united voice on the issue of compulsory ADR because of the court rules. Where the rules place a positive obligation on the parties to engage in ADR, they also limit the circumstances in which the courts may exempt a party from this obligation, and clearly link any default with appropriate court sanctions such as calling a case conference and making adverse costs orders. Where the rules expressly authorise a court to order mandatory ADR on a case-by-case basis, the judiciary is able to exercise this authority without puzzling over whether compelling ADR is in fact within the court's discretion. And, by contrast, where the rules are silent as to mandatory ADR, judges are able to point to their counterpart jurisdictions to definitively conclude that, unless express legislative authority exists to compel ADR, the court cannot require parties to participate in ADR.

In England, however, the absence of any rule within the CPR clearly mandating the parties to engage in ADR or providing the courts with clear powers to compel parties to ADR (at least in certain cases) has led the English judiciary to adopt opposing and inconsistent approaches. CPR Rule 1.4 does provide the courts with some discretion to assist the parties in settling the matter, but neither this rule nor other 'ADR rules' within the CPR oblige the parties to engage in ADR or provide the courts with the powers to compel parties to participate in ADR. CPR Rule 1.4 simply requires the court to help the parties to settle the case, while Rule 26.4 states that the parties 'may' request a stay of proceedings to attempt settlement, and the Small Claims Mediation Service is only available if the parties agree. Even the pre-action protocols speak of the need for the parties to *consider* ADR without stating that they should *engage* in an ADR process.

In England, the contradictory and opposing positions of the judiciary have left the issue of compulsory ADR in a wholly unsatisfactory state. The exercise by some members of the judiciary of their powers to compel parties to ADR in some cases has created unpredictability and a great deal of uncertainty for all participants in the civil court process, including judges, lawyers and, most importantly, the parties. Litigants are left in the undesirable position of not knowing what approach the courts will take in deciding whether to mandate ADR. They are also left with the potential risk of an adverse costs order ultimately being made against them because of a failure to participate in voluntary ADR. This uncertainty has the real potential to create costly satellite litigation and thus to increase the overall cost of conducting litigation, an outcome which undermines the purpose of the various civil reforms. Although *PGF*⁸⁷ is significant in confirming that parties should engage constructively with an invitation to ADR (and that silence in response to such an invitation maybe considered as unreasonable conduct warranting costs), it also stands as an example of how uncertainty on the issue of compulsion and the exercise of the courts powers in awarding costs can lead parties to engage in expensive satellite litigation that may find its way to the Court of Appeal.

In addition to these practical problems resulting from the current uncertainty surrounding mandatory ADR, continued resistance to the notion of compulsory ADR in England is no longer sustainable for a number of reasons. It will be recalled that Lord Woolf rejected compulsory ADR because, at the time, his Lordship was of the view that the courts were sufficiently resourced to deal with cases coming to them. He also rejected compulsory ADR because he wished to preserve the right of citizens to access the courts. It is this second

justification, in particular, which has been consistently used in subsequent civil justice reforms in rejecting the notion of compulsory ADR. These policy justifications for resisting compulsory ADR, however, are now redundant.

The courts are no longer sufficiently resourced to deal with all cases which are brought to them, especially in light of the current government agenda of austerity. As the current Lord Chief Justice, Lord Thomas, recently made clear:

We live in times where, so it seems now and for the foreseeable future, the State is undergoing, a period of significant retrenchment . . . the cutback on government expenditure is to continue for the foreseeable future. It was an approach born in times of austerity, but there is no indication that there will ever be a return to times of abundance in the provision of funding by the State (Thomas, 2014).

The need for parties to adopt more proportionate approaches to litigation and for the utilisation of proportionate court resources was also a major aspect of Briggs LJ's judgment in *PGF*. Briggs LJ did not hesitate to make an adverse costs order to highlight the importance of ADR and the need to utilise court resources proportionately during a time of austerity. Briggs LJ emphasised the need to send out the 'right message' to litigants by making an adverse costs order which operated 'pour encourager les autres'.⁸⁸ It is this policy rationale which now underpins the unofficial position on compulsory ADR, and which has arguably overtaken Lord Woolf's first justification in rejecting compulsory ADR.⁸⁹

The need to preserve access to the courts is also redundant as a basis for rejecting compulsory ADR. As discussed earlier, the English courts have not only assumed and confirmed their powers to compel parties to ADR, they have, in certain cases, actually exercised those powers. Coleman J in *RHL*⁹⁰ made an ADR order because it was in the 'interest of all the parties' to the dispute. Blackburn J's comments in *Danovo* and Arden J's judgment in *Kinstreet* continue to stand and have not been overruled, nor were they commented upon in *PGF*, even though those cases dealt with the controversial issue of compulsory ADR. Further, Rix LJ's comments in *Rolf* seemed to imply that small building disputes should use the courts as a last resort and only after engaging in ADR. Rix LJ stated:

In particular . . . the nature of the case, namely a small building dispute between a householder and a small builder, is well recognised as one in which trial should be regarded as a solution of last resort.

A further policy rationale which appears to emerge from the English jurisprudence and which appears to underpin the unofficial position on compulsory ADR is the need to expose parties to the benefits of ADR. That policy rationale places emphasis on the practical benefits of ADR processes for disputing parties, regardless of the opposing wishes of the parties to go to ADR. The emergence of this policy rationale was evident in the comments of Brooke LJ in *Dunnett* when he stated: Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide.⁹¹

More recently, Ramsey J in *Northrop Grumman v BAE Systems*,⁹² a case in which the defendant had failed to engage in mediation because it believed it had a strong defence and that

mediation had no prospect of success, pointed to benefits of exposing the parties to mediation when he held:

The authors of the Jackson ADR Handbook properly, in my view, draw attention at paragraph 11.13 to the fact that this seems to ignore the positive effect that mediation can have in resolving disputes even if the claims have no merit. As they state, a mediator can bring a new independent perspective to the parties if using evaluative techniques and not every mediation ends in payment to a claimant.⁹³

Notably, Canadian judges have also consistently referred to the practical benefits of engaging with ADR. As Mahoney J explained in *Kossovian*, engagement with ADR leads to many settlements and, even if a settlement is not reached, the process of engagement in ADR allows the parties to narrow the issues and achieves other positive results. Likewise, Handrigan J referred to the skills of a mediator in encouraging participation and in bringing the parties 'around to a positive way of thinking'.

Overall, the English judiciary appears to be moving toward a similar approach to that employed by the Canadian judiciary in presuming that, regardless of what prompts participation in ADR, parties benefit from being exposed to ADR. This is true whether that benefit is the settlement of the dispute, the narrowing of the issues, or some other advantage. Clearly, it is easier for the Canadian judiciary to justify overriding any opposition to ADR by the parties because of the existence of specific court rules on compulsory ADR. The fact that the English judiciary is reasoning in the same way as the Canadian judiciary with regard to the benefits of ADR indicates that a clearer procedural framework is required in England to resolve the current judicial inconsistencies on compulsory ADR.

Reform is required to remedy the current problems with the issue of compulsion in the English civil justice system. But a necessary precondition of that reform must be an appreciation by the senior judiciary that compulsory ADR does not restrict access to the courts. As argued previously and recognised by the ECJ in *Alassini*, ADR may, at worst, delay a litigant's right to go to trial, but it does not deny the litigant that right. ADR processes such as mediation, negotiation and conciliation are non-adjudicative and consensual forms of dispute resolution, and as such the parties are free to explore whether or not a settlement is possible. In the absence of a settlement agreement, the parties are not denied access the courts. Therefore, Lord Dyson's comments on the Article 6 of the ECHR 'right to trial' and Briggs LJ's subsequent confirmation of it should be formally rejected.

There must then be a review of the rules concerning the parties' ADR obligations with a view to amending those rules to expressly strengthen judicial authority to compel parties to engage in ADR in appropriate circumstances. Although Sir Rupert in his Final Report did not recommend a change to the existing rules on ADR (Jackson, 2010), it is submitted that this option should be reconsidered with the objective of remedying the current diverging judicial approaches. The following two options may be considered to strengthen ADR within the CPR and to bring about greater consistency, predictability and certainty.

The first option is to retain the existing rules on ADR, which simply require parties to consider settlement with the courts being under an obligation to assist the parties in this regard. However, those rules, such as CPR Rule 1.4(2), should be amended to make clear that the courts retain the power to refer parties to ADR. The benefits of this option are twofold. First, it remedies the uncertainty concerning the issue of whether the courts even possess the power to compel parties to ADR. It confirms the court's powers and thereby avoids parties and their

lawyers 'guessing' whether a court can order them to participate in ADR. It also avoids the courts relying on ADR orders as an implied way of exercising their powers of compulsion. The second advantage of this option is that it provides the parties with some freedom to engage in ADR from an early stage in the litigation process, while at the same time maintaining the court's powers to compel parties to ADR if they have not discharged their obligations.

The second option requires a clear rule to be inserted at the pre-action stage which, similar to some Canadian rules, obliges parties to engage in ADR before they are permitted to proceed to trial. It will be recalled that the rules in Saskatchewan require engagement with ADR after the close of pleadings; in Ontario the parties must participate in mediation within 180 days after the first defence has been filed; and the court rules of Alberta require participation in ADR failing which the matter cannot be listed for trial. Notably, these Canadian rules require participation in ADR after the claimants and defendants have completed formal pleadings. This requirement recognises that ADR should take place when the parties are aware of their own case as well as the issues raised by their opposition. Similarly, the pre-action protocols require essential details of the parties' cases to be set out in pre-action correspondence along with disclosure of any relevant evidence. Any change in the English rules to compel ADR should follow this example by ensuring that ADR take place at an appropriate stage in the litigation, when the parties have an understanding of the salient facts and issues, as well as disclosure of relevant evidence which would allow for better and more informed settlement discussions.

Conclusion

Just over a quarter-century ago, law reformers in England and Canada called for a culture shift in their respective civil justice systems and envisioned ADR as an accepted and even dominant feature of an improved civil litigation process. While the English reforms sought this change through an evolutionary process, Canadian reformers essentially called for a revolution of civil procedure rules so as to mandate ADR participation as an ordinary step in litigation. These different approaches are reflected in the judicial attitudes and rules of civil procedure today. English jurisprudence, while continuing to evolve, evidences ongoing confusion about the authority of the courts to compel ADR. In contrast, Canadian case authority is consistent as to if, and when, courts can order litigants to participate in ADR. To remedy the existing confusion, English law should follow Canada's example in expressly requiring litigants to engage in ADR or expressly authorising the courts to order litigants to participate in ADR in appropriate cases. As the preceding comparison of England and Canada's approach to mandatory ADR demonstrates, a smooth, consistent culture shift in litigation process must be spearheaded by legislative change.

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Notes

1. For the purposes of this discussion, England and Wales are collectively referred to as ‘England’.
2. Civil Procedure Rules 1998 (UK) (‘CPR’).
3. See for example Alberta’s Insurance Act RSA 2000, s. 519. See also Ontario’s Insurance Act RSO 1990, s. 258.6.
4. Woolf (1995a). See also Woolf (1995b: chapter 2, para. 7(a)). For a detailed and interesting discussion of the nature of the central plank of the Civil Procedure Rules, Rule 1 the ‘Overriding Objective’, see generally Sorabji (2014); see also Sorabji (2012: 77). Not all considered the Woolf Reforms to be revolutionary, however. See for example Zander (2009: 417); Zander (1995: 79).
5. See for example the comments of Lord Simon in *D v National Society for the Prevention of Cruelty to Children* [1977] UKHL 1.
6. See Sorabji (2014) for a detailed account of the history of previous civil justice reforms.
7. CPR Rule 26.4A.
8. Ministry of Justice, Practice Direction—Pre-action Conduct and Protocols. Available at: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct (accessed 2 April 2016).
9. *Ibid.* at para. 8.
10. See *Citation Plc v Ellis Whittam Ltd* [2012] EWHC QB 764 at para. 20, where Tugendhat J held that ‘[the] CPR provides a strong incentive to parties to engage in pre-action communications, with the risk to those who do not do this that they may not recover their costs, even if they bring an action in which they are the successful party’.
11. Briggs LJ (2016) Civil Courts Structure Review: Interim Report. Available at: <https://www.judiciary.gov.uk/wp-content/uploads/2016/01/ccsr-interim-report-dec-15-final1.pdf>
12. Briggs LJ (2016) Civil Courts Structure Review: Final Report. Available at: <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> (Accessed 31 July 2016).
13. Briggs (IR) (2015) chapter 6. At paragraph 6.1 Briggs refers to the development of an online court as “... the single most radical and important structural change with which this report is concerned.”
14. Lord Justice Briggs had recommended a financial threshold of £25,000 for the online court (Briggs IR Chapter 5). Following a period of detailed consultation, Lord Justice Briggs in his FR has confirmed that the online court jurisdiction will remain at £25,000 (Briggs FR para. 6.47 – 6.54).
15. Briggs (FR) (para. 6.108 - 6.111).
16. Briggs (FR) para. 6.111.
17. Briggs (FR) para. 6.113.
18. Briggs (FR) para. 6.114.
19. See Canadian Bar Association Task Force on Systems of Civil Justice (1996) (‘CBA Report’).
20. For an inventory of the reform initiatives regarding ADR, see Canadian Forum on Civil Justice Inventory of Reforms—Alternative Dispute Resolution. Available at: <http://www.cfcj-fcjc.org/alternative-dispute-resolution-inventory> (accessed 3 April 2016).
21. See Canada’s Constitution Act 1867 (UK) reprinted in RSC 1985, ss 92(13), 94(14), 101. See also Northwest Territories Act RSC 1985, s. 16; Yukon Act SC 2002, s. 3; Nunavut Act SC 1993, s. 23.

22. For the purposes of this paper, a ‘standard’ case is one that is not categorised as a small claims case under the procedural rules set out by a province or territory.
23. Canada’s Federal Court may refer any proceeding to a dispute resolution conference: Federal Court Rules (1998) (SOR/98-106), rule 386. The New Brunswick Court may order the parties to appear before a judge at a settlement conference: New Brunswick Rules of Court (NB Reg 82-73), rule 50.07. Available at: http://www2.gnb.ca/content/gnb/en/departments/attorney_general/acts_regulations/content/rules_of_court/rules_of_court.html (accessed 3 July 2016). The Newfoundland and Labrador Court may order the parties to attend mediation or a settlement conference: Rules of the Supreme Court (1986) (SNL), rules 37A, 39B. All cases in the Yukon Territory must proceed through case management and the case management judge may order the parties to attend a dispute resolution conference or a judicial settlement conference. The Yukon court also has a general authority to require parties to attend a judicial settlement conference: Rules of Court (2006) (YOIC 2009/65), rules 36(6), 37.
24. See British Columbia’s Small Claims Rules (BC Reg 261/93), rules 7, 7.2, 7.4. See also Newfoundland and Labrador’s Small Claims Rules (NLR 52/97), rule 10; the Northwest Territories’ Territorial Court Civil Claims Rules (NWT Reg 034-92); Nunavut’s Small Claims Rules of the Nunavut Court of Justice (Nu Reg 023-2007), rule 11; and Ontario’s Rules of the Small Claims Court (O Reg 258/98), rule 13.
25. See Alberta’s Mediation Rules of the Provincial Court—Civil Division (Alta Reg 271/1997), s. 65; and Saskatchewan’s Small Claims Act, 1997 (SS 1997, c S-50.11), s. 23.
26. Notice to Mediate (General) Regulation (BC Reg 4/2001); see also British Columbia’s Small Claims Rules, rules 7.2, 7.3.
27. See Saskatchewan’s Queen’s Bench Act, 1998 (SS 1998, c Q-1.01), s. 42(1.1). See also Saskatchewan’s Queen Bench Rules (2013 S Gaz), rule 4-10.
28. The limited exceptions regarding the types of claims which are not subject to mandatory mediation are set out by regulation: The Queen’s Bench Regulation (RRS, c Q-1.01), regulation 1, section 5.
29. The Justice and Attorney General Act (SS 1983, c J-4.3), s. 14.1.
30. Queen’s Bench Act (SS 1998), s. 42(1.2).
31. Rules of Civil Procedure (RRO 1990, Reg 194), rule 24.1.09(1).
32. For exempted matters, see *ibid.* at rules 24.1.04(2), (2.1), (3).
33. *Ibid.* at rule 24.1.04.
34. *Ibid.* at rules 24.1.09(1), 24.1.05.
35. *Ibid.* at rule 24.1.09(2).
36. *Ibid.* at rule 24.1.13(2).
37. Rules of Court (Alta Reg 124/2010), rule 4.16(1).
38. *Ibid.* at rule 8.4(3).
39. *Ibid.* at rule 4.17. Further details of the judicial dispute resolution process are set out in rules 4.18-4.21.
40. *Ibid.* at rules 4.16(2), 8.5.
41. Court of Queen’s Bench of Alberta (2013a). This explanation is further supported by subsequent Notices to the Profession aimed at prioritising the use of limited judicial resources for Judicial Dispute Resolution. See for example Court of Queen’s Bench of Alberta (2013b); Court of Queen’s Bench of Alberta (2014a); Court of Queen’s Bench of Alberta (2014b).
42. *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.
43. Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (213 UNTS 221). Article 6(1) holds that ‘in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an

independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice’.

44. *PGF II SA v OMFS Co 1* [2013] EWCA Civ 1288. For an example in which the court confirmed that it did not have the power to compel mediation, see *Aird & Anr v Prime Meridian Ltd* [2006] EWCA Civ 1866 at para. 6, holding that ‘[s]ince the court cannot order the parties to participate in mediation, neither can the court make orders stipulating the details of how the parties should conduct a mediation. The most the court can do is to encourage’.
45. CPR Rule 36 offers are formal settlement offers that can be made by either the claimant or defendant, which, if made in accordance with the rules, will attract cost consequences for the parties.
46. *PGF*, n. 36 at para. 56 (emphasis added).
47. *Cowl v Plymouth (City Council)* [2001] EWCA Civ 1935.
48. *Dunnett v Railtrack Ltd* [2002] EWCA Civ 3030.
49. *Ibid.* at para. 15.
50. *Wright v Michael Wright Supplies Ltd* [2013] EWCA Civ 234.
51. *Ibid.* at para. 1.
52. *Shirayama Shoukusan Co v Danovo* [2003] EWHC Ch 3306.
53. *Kinstreet Ltd v Balmargo Co* [2000] CP Rep Ch D 62.
54. *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC Comm 2059.
55. *C v RHL* [2005] EWHC Comm 873. See also the subsequent case of *Honda Giken Kogyo Kabushiki Kaisha (a firm) v Neesam* [2009] EWHC Pat CA 1213.
56. *RHL*, n. 47 at para. 8.
57. *Rolf v De Guerin* [2001] EWCA Civ 78.
58. *Ibid.* at para. 41.
59. See Neuberger (2015). See also The Children and Family Act 2014 (UK), s. 10, which makes it mandatory for ‘separating couples’ wishing to commence family proceedings to attend a MIAM. At this meeting the parties are provided with information regarding the mediation of family applications, ways in which such matters may be resolved other than through the courts, and to assess whether the particular matter is suitable for mediation.
60. *Alassini v Telecom Italia Spa* [2010] 3 CMLR 17.
61. See Dyson (2014). See also Lord Dyson MR’s previous speech on Halsey to the Chartered Institute of Arbitrators Third Mediation Symposium.
62. The ‘Canada’ portion of the paper focuses on judicial attitudes toward mandatory ADR in the context of standard, rather than small claims, cases. In the opinion of the authors the issues surrounding the merits or use of compulsory ADR in standard cases do not arise in the same degree in small claims matters, because the litigation processes for small claims actions in Canada are typically far less formal than in standard actions and provide for more judicial intervention in the case for a wide range of issues, including settlement.
63. *IBM Canada Ltd v Kossovian* [2011] ABQB 621 at para. 25.
64. Although a discussion of the attitudes of lawyers regarding compulsory ADR is beyond the scope of this paper, it has been suggested that lawyers in mandatory ADR jurisdictions have come to see the benefits of this system. See for example MacFarlane and Keet (2005: 688) for a discussion of the views of lawyers in Saskatchewan before and after the province’s implementation of mandatory ADR rules.
65. *Kossovian*, n. 55.

66. Ibid. at paras. 26-28.
67. See for example *Cassidy v Westwood Holdings* [2000] OJ No 5396; *Dumoulin v Ontario* [2004] OJ No 2778 at para. 6.
68. See for example the following cases, each of which identify one or more of the itemised benefits of ADR in civil disputes. *Kossovian*, n. 55 at para. 12; *Rampersaud v Baumgartner* [2012] ABQB 673 at para. 8; *Welldone Plumbing, Heating & Air Conditioning (1990) Ltd v Total Comfort Systems Inc* [2002] SKQB 475.
69. *Drodge v Martin* [2005] NLTD 73 at para. 27.
70. *Rampersaud*, n. 60 at para. 4.
71. *Kossovian*, above n. 55 at paras. 39-42.
72. *O (G) v H (CD)* (2000) 50 OR (3d) 82.
73. Ibid. at paras. 19-20.
74. *Pelham Properties Ltd v Hessdorfer* [2005] SKQB 234 at para. 8.
75. Ibid. at para. 31.
76. *Kossovian*, n. 55 at para. 13.
77. Ibid. citing *Chase v Great Lake Altus Motor Yacht Sales* [2010] ONSC 6365 at para. 15; *Welldone Plumbing*, n. 60 at para. 13.
78. See *Kossovian*, n. 58 at para. 30 for a summary of the law and citations to various other common law cases. For an example of a case in which the court considers, and rejects, the argument that the action before it is too complex to be mediated, see *Drodge*, above n. 61.
79. This possibility was raised by a Master of the Ontario Supreme Court in *Maldonado v Toronto (Metropolitan) Police Services Board* [2000] OJ No 5401, where the plaintiff, a homeless man, alleged that he had been assaulted by the police. Otherwise, this issue has not been specifically addressed by Canadian courts. It does, however, reflect a question that appears to be increasingly raised by legal commentators in Canada with regard to the use of ADR in the civil justice system. The question asks whether the resolution of civil claims outside of the courtroom is contrary to the interests of justice for the parties involved and for society at large because justice is not 'seen to be done' and because common law principles cannot develop in the absence of the judicial resolution of actions. See for example Farrow (2014).
80. See *Drodge*, n. 61 at para. 23.
81. *Ross v Seib* [1996] SJ No 375 at para. 8.
82. *Kossovian*, n. 55 at para. 17.
83. See Prince (2007) at 89 for further discussion on the flexibility of the timing for compulsory ADR.
84. See for example *Dhillon Group Investments Ltd v Peel Standard Condominium Corp No 919* [2013] ONSC 7833; *Muirhead v York Regional Police Service Board* [2015] ONSC 2142.
85. *Roscoe v Halifax (Regional Municipality)* [2013] NSSC 5 at para. 25.
86. *Michiels v Kinnear* [2011] ONSC 6024.
87. *PGF*, n. 39.
88. Translated as 'in order to encourage others'.
89. Of course, court resources can also be an issue in conducting ADR, as illustrated by Alberta's experience with judicial resources for the purposes of conducting JDR. Our intention, however, is not to advocate for any particular form of ADR, but rather to simply focus on the inclusion of mandatory ADR as part of the procedural framework for civil justice systems.
90. *RHL*, n. 50.
91. *Rolf*, n. 52 at para. 14.
92. *Northrop Grumman v BAE Systems* [2014] EWHC TCC 3148.
93. Ibid. at para. 59.

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