Civil Justice Council Interim Report on the future role of ADR in Civil Justice

Walker Morris LLP - response

1. GENERAL COMMENTS

1.1. Walker Morris is a full service, leading UK commercial law firm based in Leeds. It has one of the largest and most successful Litigation and Dispute Resolution teams outside London offering specialist legal services in litigation, arbitration and Alternative Dispute Resolution (**ADR**). In addition to general commercial litigation and dispute resolution the firm has specialists in areas including intellectual property, construction and engineering, competition, finance, insolvency, real estate, regulatory issues, HR, fraud and corruption. We advise clients in every industry sector, ranging from multinational corporations and major financial institutions through to SMEs and high profile individuals. We regularly advise on potentially contentious aspects of major corporate and financial transactions. We are always mindful of early dispute resolution.

1.2. Solicitors from a range of commercial litigation practice areas within Walker Morris were unable to reach a consensus of opinion in respect of the questions posed in the consultation. All of the different views expressed in our discussions are noted in this response. This in itself serves to validate our strongly-held view that there is no "one-size-fits-all" approach to the application of ADR in civil justice. Different practice areas will have different experiences and requirements which will require different approaches. What will be suitable for a clinical negligence claim will not necessarily be suitable for a complex piece of commercial litigation. Even on a case-by-case basis, the approach to ADR adopted in one case may be completely unsuitable in another, for example where fraud is alleged or it is abundantly clear that the parties are far apart and attempting ADR – in particular mediation or any other "formal" means of ADR – would be a waste of everyone's time and money.

1.3. It was felt that the questions posed in the consultation are based on an underlying assumption that the existing system is not working and that ADR will always be appropriate. The reality is that this simply will not always be the case. The conclusion Walker Morris' solicitors reached is that the system works well in its current form. ADR is a dispute resolution tool - a valuable and flexible tool – but parties must be able to rely on the courts to progress litigation where ADR is not the answer. It is essential that parties are not penalised for exercising their core fundamental right of access to justice. It would be inappropriate and counterproductive to introduce a compulsory, prescriptive regime at any stage of the litigation process (including pre-action, where the issue is already dealt with, adequately, in the Pre-Action Protocol). However, we have set out below in responses to a number of specific questions for consultation various suggestions as to how we consider that the existing system could be improved.

1.4. It is important to keep in mind that there are significant differences between the different types of ADR. A number of our responses below deal specifically with mediation and other "formal" ADR processes but the debate is wider-ranging. (For the avoidance of doubt, our

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responses generally do not focus on more informal ADR attempts, such as simple settlement discussions/negotiations.)

2. RESPONSES TO SPECIFIC QUESTIONS

2.1. Question 10.1: The Working Group believes that the use of ADR in the Civil Justice system is still patchy and inadequate. Do consultees agree?

Some solicitors agreed, others strongly disagreed (in particular that use of ADR is inadequate).

Using mediation as an example, some thought that there was an issue about suggesting it to an opposing party because it would be seen as a sign of weakness. This was not a view shared by everyone. The completion of the Directions Questionnaire gives a party an "excuse" to raise ADR, whether that be a suggestion of mediation or a without prejudice meeting, with their opponent at an early stage which can help to alleviate that issue. Similarly, being able to point to the Pre-Action Protocol and any other rules/requirements.

In certain types of cases, such as those involving professional negligence against professionals where insurers are involved and a party really pushes and probes as a tactic, ADR is especially difficult and any attempt at conciliation of any sort can be seen as a weakness and exploited.

Over recent years, we have seen a move away from parties having an expectation of mediation, to them being more willing and ready to pursue litigation in sophisticated cases where there is a genuine, valid dispute and a desire on the client's part to achieve real justice. This is perhaps indicative of some clients' perception that incurring the time and cost of formal ADR encourages them to achieve commercial settlements in some cases where that might not actually be fair/the best outcome for them. We have seen this trend, in particular, in complex lender litigation.

In intellectual property disputes, the usage of ADR is often infrequent because of the issues associated with it. It often happens that a party needs a very specific issue to be considered, and there can be a concern that a quality result is not going to be achieved at a mediation, for example.

There are certain types of cases where ADR is not appropriate. For example, in cases concerning alleged fraud, or in certain property litigation claims (such as rectification claims or disputes concerning the priority of charges) there is no reason to enter into an ADR process because it is clear that the parties are not going to agree and/or there are simply no areas of "give and take" to negotiate.

Even in areas where ADR is usually appropriate, that will not always be the case. It will depend on the particular case in question and the court process must acknowledge the legal adviser's ability and responsibility to explain the options and to advise; the client's discretion and right to decide; as well as the ability of the adviser and their client to consider when is the right time to invoke ADR. As we have said above, even within types of cases each case has to be assessed on its own basis as different factors that affect the decision will come into play at different stages of the proceedings.

Part 36 is used a reasonable amount.

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The Pre-Action Protocol meeting requirement (which appears to have been "watered down" in the Pre-Action Protocol for Construction and Engineering Disputes) does not seem to be used regularly.

The judiciary only see the cases that are inevitably difficult to resolve; they do not see all of the cases that get settled without their involvement. We consider this an important factor to be taken into account in this review. In addition, whilst in some areas (for example, claims advanced by claims management companies) it may be true that some litigation is progressed unnecessarily/unmeritoriously, so as to generate fees, for most parts of the profession that is simply not the case. That view should not be used as a reason to impose ADR across the board.

2.2. Question 10.3: Why do consultees think that a wider understanding of ADR has proved so difficult to achieve?

In some solicitors' experience, ADR is understood across a range of clients. Again, it was reiterated that not every case will be suitable for ADR.

As mentioned above, there can be an issue about not showing weakness. If the Pre-Action Protocol has been followed correctly (and some disputes have better Pre-Action Protocols than others, for example the Pre-Action Protocol for Professional Negligence) then that should have flushed out some of the issues between the parties. To get to the point where solicitors are instructed and letters of claim are sent out, often the possibility of resolution without recourse to court litigation has been explored and has failed. In our view, there is good awareness of ADR options within the profession and amongst clients (in terms of the advice given to them by solicitors). If it is appropriate and the timing is right, therefore, ADR is likely to be considered. However, there is a high cost involved in certain processes, such as mediation, and if the timing is wrong when ADR is imposed or undertaken, it could do more damage and make the parties more entrenched, as well as increasing the costs.

In some cases there is a perception that a case is "incapable" of settlement or that ADR will not prove beneficial. Reticence can prevail. However in the same case there might be a change of heart later in the process as the costs continue to increase.

The "voluntary" nature of ADR has allowed for a degree of cynicism/scepticism and a lack of convictions as to its benefits. There may be a perception that going down an ADR route just means that the claimant ends up settling for less than they would have been awarded by a court.

The Pre-Action Protocol and the Directions Questionnaire already require parties to consider ADR, but there is a perception that this is approached by some parties as a "tick box" exercise.

2.3. Question 10.4: How can greater progress be achieved in the future?

In line with the responses above, not everyone shared the view that greater progress needs to be achieved.

One suggestion is that parties should be required to explain why ADR, especially mediation, is not appropriate. They are not being forced to mediate, or to settle, or to "accept less", but they should be required to explain, in the context of costs expenditures and court time, why the case requires a trial. If there were such a requirement, then there

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may be an expectation that it needs to happen, or at least that it becomes entirely normal (at some point, probably post disclosure) that mediation ought to take place.

In order for greater progress to be achieved, ADR needs to become the norm in all cases where it is appropriate and suitable.

It might be useful if a statement of issues were more widely considered. Statements of case have become so long and sometimes complicated that a summary of the issues would help parties address how far apart they actually are (in this regard, an overhaul of how statements of case are presented and enforcing a limit on their length could form the basis of a separate consultation).

Low cost mediation options are needed to make that more attractive in lower value cases (for example, the court schemes that have run in the past).

2.4. *Question 10.7: Are there other steps that should be taken to promote the use of ADR when disputes (of all kinds) break out?*

The appropriate stage at which ADR is possible or appropriate can vary widely. Nobody wants to be forced into it at too early-a stage (and with too harsh-a sanction – see the response to Question 10.17 below). There is also a suggestion that unless disclosure is front-loaded, parties are unlikely to be able to engage in very meaningful ADR until they have had an opportunity to find that "smoking gun". Whether this changes in light of ongoing proposals to reform the approach to disclosure remains to be seen. Any attempts to review/reform the approach to ADR must not, therefore, be undertaken in isolation.

ADR should be promoted to clients very early on, in appropriate cases. Solicitors know that they can use Part 36 at any time as a low cost form of ADR.

2.5. *Question 10.8: Is there a case for making some engagement with ADR mandatory as a condition for issuing proceedings? How in practical terms could such a system be made to work? How would you avoid subjecting cases which are not in fact going to be defended to the burden of an ADR process?*

No. It is unclear how this would work in practice.

The Pre-Action Protocol and case law already say that litigation should be a last resort. If the system goes much further (imposing a compulsory regime/imposing costs sanctions at an interim stage – see the response to Question 10.17 below) there is a real risk of significant erosion of the fundamental right of access to justice. Court fees have increased significantly in recent years. To try to prevent a party that has already made the commitment to, and incurred the cost of, issuing proceedings, from progressing litigation seems wrong. ADR should be a tool for resolution, not a requirement.

2.6. *Question 10.11: Do consultees agree with the Working Group that the stage between allocation and the CCMC is both the best opportunity for the Court/the rules to apply pressure to use ADR and also often the best opportunity for ADR to occur?*

Again, there were differing views on this question. Some solicitors agreed that this is the most suitable juncture as the claim will have progressed by then. It was suggested that there should possibly also be some consideration post exchange of witness evidence and before significant trial costs are incurred.

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It was also suggested that while this is a pressure point, in practice parties are likely to want disclosure first.

As with all of the court reforms discussed in recent years, caution should be exercised before imposing a one-size-fits-all approach. In many cases, the appropriate time for ADR (including mediation) tends to be after some of the key stages have been completed. That might be after disclosure, exchange of witness statements or expert reports, depending on the case. Although it is appreciated that the idea is to save the costs of going ahead with the litigation (if settlement is possible, particularly at an early stage) there has to be a balance, as a failed approach to settlement could make things worse as well as incurring costs (if it is mediation).

At the Case Management Conference (**CMC**) the judge could mention ADR to the parties (then, on the rare occasion that a solicitor may not have mentioned this to their client, or if there is a litigant in person, this could raise awareness or encourage the parties to talk about the possibility to each other). When setting case management directions perhaps time should be built in to allow effective ADR to take place alongside the directions that allow the matter to progress to trial. If the timetable is too tight then there is no time to stop and use ADR (particularly mediation which takes some time to sort out). A one month stay allowed for in the Directions Questionnaire may not be enough and that should be recognised.

If there was a requirement to consider and discuss ADR at the CMC, this could potentially alleviate the perceived weakness point and it could afford all cases with a consistent opportunity to address ADR (there would, however, be a practical difficulty with regard to without prejudice/Part 36 offers). The CMC would present an opportunity for the judge to actively explore and understand why a party/both parties consider that ADR is not appropriate. There should be something on the record fairly early on to explain the parties' approach, in the context of considering costs/conduct later on.

2.7. *Question 10.12: Do consultees agree with those members who favour **Type 2** compulsion (see paragraph 8.3 above) in the sense that all claims (or all claims of a particular type) are required to engage in ADR at this stage as a condition of matters proceeding further?*

As mentioned above, ADR is not always appropriate and its usage should be discretionary.

It was suggested that strongly encouraging parties to engage, or requiring an explanation as to why they are not prepared to engage, could work after the disclosure stage.

2.8. *Question 10.13: If compulsion in particular sectors is the way forward, what should those sectors be? Should they include clinical negligence? Should they include boundary/neighbour disputes?*

We are unable to comment on the areas cited. On large commercial disputes generally ADR does of course have its place, but as explained above it is important that the timing is right and there is concern about people paying lip service to an ADR process if it is done at the wrong time. The way that the Pre-Action Protocol meetings generally do not seem to work demonstrates this. To have compulsion in the process so soon after issue of proceedings is not likely to work as not enough would have changed from the Pre-Action Protocol period.

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2.9. *Question 10.14: Alternatively, should the emphasis at this stage be on an effective (but rebuttable) presumption that if a case has not otherwise settled the parties will be required to use ADR?*

Again, it would be more appropriate for there to be an element of discretion. We have set out above how we consider that this could work, with court intervention where necessary. A lot will turn on the approach of the judge in the individual case, and the extent to which they exercise their existing case management powers.

2.10. *Question 10.17: Are costs sanctions at this interim stage practicable? Or is there no alternative to the court having the power to order ADR ad hoc in appropriate cases (**Type 3** compulsion)?*

No, they are not practicable. There may be good reasons why parties are not prepared to engage in ADR and sanctions would therefore be too onerous. Imposing what is effectively a merits-based sanction in the middle of proceedings on what could be a genuine and valid claim (particularly in those cases where values are low to middle and/or for parties with limited resources) could operate in practice as a significant bar to access to justice. It could be open to tactical abuse, to "bully" the other party. Parties would be put on the back foot and they should not be put in that position. Costs should be dealt with separately from the merits of the claim, at the end of the proceedings.

Parties already face a cut in their costs recovery because of the changes to costs management. ADR costs sanctions would apply on top of this, potentially further eroding the successful, vindicated party's recovery. That simply does not seem just.

2.11. *Question 10.18: Do consultees agree that whatever approach is taken at an earlier stage in the proceedings it should remain the case that the Court reserves the right to sanction in costs those who unreasonably fail or refuse to use ADR issues?*

There was a consensus that this is wholly appropriate, absent a satisfactory/credible explanation. There are a lot of defendants, particularly those that are insurance backed, that act unreasonably and push the claimant to incur a lot of cost (as though they are testing the claimant's resolve). A lot of costs could be saved if those defendants' conduct and approach was improved.

Recent case law in this area has been confusing (compare the Court of Appeal's decision in *PGF II SA v OMFS Company* with its decision in *Gore v Naheed and Ahmed*). There was no consensus of opinion as to whether guidelines would be helpful or whether case-by-case assessment is the better option.

2.12. *Question 10.20: Do consultees agree with the Working Group and with Lord Briggs that there is an ADR gap in the middle-value disputes where ADR is not being used sufficiently?*

This was a key area in which no consensus could be reached. Views differed widely even within this one firm.

2.13. *Question 10.21: Is part of the problem finding an ADR procedure which is proportional to cases at or below £100,000 or even £150,000 in value?*

Again, there was no consensus on this question.

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As mentioned above, if mediation is used it is expensive. If the opponent is in another city there are travel costs, the costs of preparation and attendance as well as the fees of the mediator. The mediation costs can easily be £25,000-£30,000 plus VAT for a one day mediation. In some cases counsel are also involved which increases the costs further.

It depends on the nature of the case. A standard professional negligence lender claim is particularly suited to mediation. Those acting for the parties tend to be experienced solicitors who understand the merits of a claim. On the whole, the mediators used have an excellent grasp of the issues and the law. Spending up to £10,000 on a mediation for an early settlement in a case worth anywhere from £100,000 to £multi-million has always been beneficial whether successful or not (it is rarely unsuccessful and even if there is no settlement on the day there is a platform created that the parties often can work on to resolve the case at a later date).

The cost of mediation can be a very significant issue in a low/middle value case and/or where one of the parties is under pressure financially. The issue is how to reduce the costs while maintaining standards that the client and solicitor can trust.

2.14. *Question 10.23: Should the costs of engaging in ADR be recognised under the fixed costs scheme?*

It was generally agreed that this is a sensible option. It is noted that the amount allowed for mediation/ADR in the proposed pilot is relatively low, which may have a bearing on which mediators can be engaged and for how long. However, generally there are a lot of different options available as regards mediators and it could be open to the parties to agree in the mediation agreement how the costs of the person they agree on should be paid.

2.15. *Question 10.40: Do consultees agree that Judges and professionals still do not feel entirely comfortable with mediation in terms of standards and consistency of product? Is there a danger that the flexibility and diversity which many regard as the strength of mediation is seen as inconsistency and unreliability by other stakeholders?*

Again, there were differing views in response to this question. This is not an experience shared by some solicitors, who find that most commercial mediations are well-run. However, it is not possible to predict the approach of the opposing party.

A negative experience with the process can be off-putting for both the solicitor and the client. One of the issues that can arise is that if one party's solicitor suggests a mediator the opponent immediately rejects that person. There are some very good sets of mediators now and parties can go to the Centre for Effective Dispute Resolution and ask them to nominate (some of our solicitors would tend to suggest someone from Independent Mediators or the Association of Northern Mediators). However, people have different views about what is important, for example, expertise in a particular area of law/personality/approach of the mediator. As more solicitors have experience of mediators the approach to the appointment of the "right person" will be likely to improve (and confidence in the process should also increase).

2.16. *Question 10.41: How do consultees think that these concerns can be reassured and addressed?*

Solicitors should take some time to look at ADR more closely in every case. There could be a training gap here. ADR should form an important part of legal training. As there is more pressure on costs this becomes more and more important.

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It was suggested that higher standards need to be enforced (and see 2.17 below).

2.17. Question 10.42: Is there a case for more thorough regulation? How could such regulation be funded and managed?

Again there was no consensus on this point. It was suggested that perhaps regulation of mediators would help to counteract varying standards. See also the suggestion in response to question 10.41, which would not require additional funding.

2.18. Question 10.43: What other challenges are faced by mediation?

Again, there was no consensus on this question as to whether there other challenges.

It was suggested that there is a concern that, if mediation becomes the norm, the process for litigation may become even further protracted.

On the whole, mediation is a very useful tool. It has been used effectively by claimant solicitors post disclosure to force parties who have been dragging their heels to engage in settlement. Results have been achieved for clients far in excess of what they expected, perhaps as a result of defendants not being forced into the court process. Mediators have generally been excellent. The challenge is in getting mediation to become an expected step/hurdle to go through before you "get your day in court", and whether in fact that is necessarily a good thing. How much risk (costs) is it worth taking to reject or refuse to offer a mediation?

It was suggested that it would be helpful to look at the success rates, and consideration of ADR/mediation needs to become an essential part of the litigation process, rather than a "bolt-on", as it sometimes is.

In summary:

2.18.1. There can be a perception that suggesting mediation is a sign of weakness and that attitude needs to change;

2.18.2. Judges could get more involved and identify cases that are suitable for mediation;

2.18.3. Awareness should be increased among junior lawyers so that they consider ADR (including mediation) in every case as a matter of course.

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