
ALTERNATIVE DISPUTE RESOLUTION AND THE CIVIL COURTS: A VERY BRITISH TYPE OF JUSTICE—THE LEGACY OF THE WOOLF REFORMS IN 2022

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Abstract

In 1996, Lord Woolf described a vision for civil English and Welsh justice, culminating in his culture-changing reforms (the Woolf Reforms) and the Civil Procedure Rules of April 1999. These impose a continuing duty on litigants to consider alternative dispute resolution (ADR) in preference to litigation, even after it has commenced, and on the courts, to encourage ADR. These duties are a central method for the delivery of justice. They required a radical new way of thinking about disputes from litigants, their advisors and the courts.

This article focuses on Lord Woolf's vision and his Reforms, and their impact on the approach to ADR taken by the courts since 1999. It seeks to identify how that approach informs a concept of justice within the practice of modern litigation. The approach, supported by relevant case law, presents a broader and arguably more sophisticated view of justice that involves party autonomy, dialogue, settlement, creativity, flexibility of outcome, compromise, satisfaction and saving costs, as well as the more conventional approach to determining rights at trial after due process.

Keywords: ADR; mediation; justice; civil justice; court reforms; overriding objective; *Halsey*.

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[A] INTRODUCTION

In 1996, Lord Woolf described a vision for civil English and Welsh justice (civil justice), culminating in his reforms (the Woolf Reforms) and the Civil Procedure Rules of April 1999 (the CPR).¹ It made a duty to consider alternative dispute resolution (ADR) and the active encouragement of settlement of disputes in preference to litigation wherever possible a central method for the delivery of justice. It required a new way of thinking about disputes from litigants, their advisors and the courts.

There has been a rich seam of case law since then. Commentary about ADR in civil justice has also been well-considered. Issues such as whether cost sanctions should be applied for the refusal to consider an ADR process (including what amounts to ‘reasonable refusal’), whether litigants can be compelled to engage in ADR and whether a court has the power to order such engagement despite the lack of consent of the parties, have all dominated the ADR discourse almost since the CPR’s inception (eg Spenser Underhill 2003; 2005; Shipman 2011; De Girolamo 2016; Clark 2019; Ahmed 2019, 2020). This article’s valuable contribution to this commentary is in its focus on Lord Woolf’s vision and the Woolf Reforms, and their impact on the approach to ADR taken by the courts since 1999. It seeks to identify how that approach informs a concept of justice within the practice of modern litigation.

The article will examine: Lord Woolf’s *Interim* and *Final Reports* (Woolf 1995, 1996); the CPR requirements in relation to ADR; the development of the case law in relation to ADR and the CPR; and conceptions of justice arising therefrom. It will conclude that, as a collective, this illustrates a propensity to view justice as something beyond the traditional view of substantive justice as espoused by Abel, Fiss and Genn in their critiques of ADR (eg Abel 1982; Fiss 1984; Genn 2012). Rather, it creates a broader and arguably more sophisticated view of justice that involves party autonomy, dialogue, settlement, creativity, flexibility of outcome, compromise, satisfaction and saving costs, as well as the more conventional approach to determining rights at trial after due process.

[B] THE INTERIM AND FINAL REPORTS OF LORD WOOLF

In his *Final Report*, Lord Woolf recited from his *Interim Report* eight principles that he considered the civil justice system should meet to ensure access to justice (1996: section I, para 1). The first principle

¹ The CPR is under constant review and a revision and is published annually.

was that it is ‘just in the results it delivers’ (section I, para 1(a)). He considered the civil justice system he had reviewed to be too expensive, slow, adversarial, fragmented and uncertain. He was concerned about the inequality between the better-resourced and the under-resourced litigant. He was also concerned that the litigation process was incomprehensible to many who used it (section I, para 2). He made proposals for an enhanced role for ADR (eg section II, paras 7(d), 16), which he considered important to tackle the inadequacies of the litigation process, while acknowledging that litigants could not be compelled to engage in ADR.

Lord Woolf hoped to create a ‘new landscape’ of civil litigation underpinned by an obligation on the courts and the parties to further what he called the overriding objective, which was to deal with cases ‘justly’ (section I, para 8) and which embodied principles of equality, economy, proportionality and expedition. The new landscape would have several features. This article focuses on two, found at section I, para 9 of the *Final Report*.

The first feature is that ‘Litigation will be avoided wherever possible.’ About that, the *Final Report* states (section I para 9):

- (a) People will be encouraged to start court proceedings to resolve disputes only as a last resort, and after using other more appropriate means when these are available.
- (b) Information on sources of alternative dispute resolution (ADR) will be provided at all civil courts.
- (c) Legal aid funding will be available for pre litigation resolution and ADR.
- (d) Protocols in relation to medical negligence, housing and personal injury and additional powers for the court in relation to pre litigation disclosure, will enable the parties to obtain information earlier and promote settlement.
- (e) Before commencing litigation both parties will be able to make offers to settle the whole or part of a dispute supported by a special regime as to costs and higher rates of interest if not accepted.

This feature remains as important today as it was in 1996. In the CPR themselves, paragraphs 8 and 9 (Settlement and ADR) of the Practice Direction—Pre-Action Conduct and Protocols (2022) (the Practice Direction) state in part:

- 8. Litigation should be a last resort. As part of a relevant pre-action protocol or this Practice Direction, the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings.

9. Parties should continue to consider the possibility of reaching a settlement at all times, including after proceedings have been started
...

The second new landscape feature is that 'Litigation will be less adversarial and more co-operative.' About that, the *Final Report* states (section I para 9):

- (a) There will be an expectation of openness and co-operation between parties from the outset, supported by pre litigation protocols on disclosure and experts. The courts will be able to give effect to their disapproval of a lack of cooperation prior to litigation.
- (b) The court will encourage the use of ADR at case management conferences and pre trial reviews, and will take into account whether the parties have unreasonably refused to try ADR or behaved unreasonably in the course of ADR.

[C] THE CIVIL PROCEDURE RULES AND THE OVERRIDING OBJECTIVE

In speaking to the courts' approach to ADR through the CPR, it is necessary to have regard, albeit briefly, to certain provisions. Part 1.1.1 (CPR 2022 edition) explains that the rules are a 'procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost'. Part 1.1.2 sets out a non-prescriptive list of what those words mean or comprise, including reference to parties being treated equally and participating fully in proceedings, the saving of expense, consideration of the value of the case both monetarily and non-monetarily, ensuring a proper allocation of court resources, and dealing with cases quickly and fairly.

Furthering the overriding objective includes determining whether time and costs can be saved and, as importantly, whether court resources should be allocated to particular cases. While Lord Woolf states in both his *Interim* and *Final Reports* that the civil justice system should be just in the results it delivers, they are nevertheless achieved within the constraint of what is financially proportionate (Woolf 1995; 1996: *passim*).

In 2009, Jackson LJ reviewed civil litigation costs, reporting on the high costs of litigation in his *Review of Civil Litigation Costs: Final Report*, stating it to be 'a matter of building upon Lord Woolf's work and proposing reforms' (2009: chapter 1 para 6.2). For both Lord Woolf and Jackson LJ the need to deal with costs was imperative to further the overriding objective (eg Woolf 1996: section II chapter 1 para 7(d); Jackson 2009: part 6, para 36, 355ff). It is therefore not surprising that

fiscal discipline, both from litigant (the personal costs of litigation for the parties) and state perspectives (appropriate use and allocation of limited court resources) would become a guiding principle within civil justice (eg Higgins & Zuckerman 2007; Ahmed 2021; *DSN v Blackpool Football Club 2020*: para 28). Since the Woolf Reforms, ADR, with its potential to reduce costs, has been regarded as a primary way to keep costs proportionate: it is relatively fast as the parties can agree on a process and execute it promptly; and it is economical as it requires less input from lawyers and court resources than does litigation (Jackson 2009: *passim* esp chapter 36, 355-363). The relevance of ADR as a means to achieve fiscal discipline underpins Lord Woolf's vision of his Reforms and the resulting CPR provisions, further emphasized by Jackson LJ's review (2009).

The Woolf Reforms have had a greater impact on the evolution of justice than simply how to spend money better. Lord Woolf's support for ADR processes also ensures their role in civil justice through the CPR's direct reference to the obligation on litigants, their advisors and the courts to consider using ADR to achieve the overriding objective: for example, part 1.4.1 imposes a duty on the court to further the overriding objective by 'actively managing cases'; part 1.3 imposes a duty on the parties to help the court further the overriding objective; and part 1.4.2 sets out a non-prescriptive list of 12 acts which that task includes. Three are particularly relevant:

- (a) encouraging the parties to cooperate with each other in the conduct of the proceedings
- ...
- (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure.
- (f) helping the parties to settle the whole or part of the case

The CPR defines ADR as a 'collective description of methods of resolving disputes otherwise than through the normal trial process' (2.2).

ADR in the CPR underlies Lord Woolf's aim that 'litigation will be avoided wherever possible' (1996: section I para 8). This combination of the need for proportionate fiscal discipline and the acknowledged benefits of ADR is part of Lord Woolf's vision of a certain primacy of settlement in civil justice, which expands the conception of justice that is delivered in England and Wales.

Pre-action protocols

The new landscape focused on what was perceived to be the profound desirability to avoid litigation entirely by requiring the parties to exchange information and, in effect, to commence a dialogue with a view to settlement. The point for our purposes is that civil justice is intended to be accessible (in the sense Lord Woolf used the term) *before* litigation commences, as well as afterwards. To empower the parties to settle their cases before proceedings commence (using ADR if needs be) by requiring the exchange of information is a fundamental part of that.

The Woolf Reforms introduced pre-action written protocols (PAPs) (1996: section III, chapter 10 *passim*). The Practice Direction states that they ‘explain the conduct and set out the steps the court would normally expect parties to take before commencing proceedings for particular types of civil claims’ (CPR Practice Direction 2022: para 1). Originally only three, there are now many that cover a range of disputes such as personal injury, professional negligence, debt claims and construction disputes.

The principal dynamic of the PAPs is the exchange of information between the prospective litigants. There are several purposes of exchange. Two of them are (i) to try to settle issues without proceedings and (ii) to enable the parties to ‘consider a form of [ADR] to assist with settlement’ (CPR Practice Direction 2022: para 3; Woolf 1996: section III, chapter 10, paras 1-6). PAPs offer a non-descriptive typology of ADR, including mediation, arbitration, early neutral evaluation and any ombudsmen schemes (CPR Practice Direction 2022: para 10). They are part of the CPR’s procedural code that enables ‘the court to deal with cases justly and at a proportionate cost’ (part 1.1.1), even though the conduct with which they are concerned occurs before litigation commences.

Not every case reaches pre-action settlement, however. When litigation does commence, the court must further the overriding objective which includes helping the parties to settle their cases and encouraging the use of ADR. This leads us to the case law.

[D] THE CASE LAW AND OTHER SOURCES

Early case law

In what appears to be the first reported case on the subject after the CPR came into force in 1999, the Court of Appeal in *Sat Pal Muman v Bhikku Nagasena* (1999: 4), troubled by the large costs incurred in litigation

that was achieving nothing, refused to lift a stay on proceedings until the parties had attempted to resolve the dispute by mediation. Mummery LJ stated in paragraph 5 of his Order that ‘No more money should be spent from the assets of this charity until ... all efforts have been made to secure mediation of this dispute in the manner suggested.’

In *Kinstreet v Balmargo Corporation* (1999), the court directed that mediation should be attempted notwithstanding one party’s concerns that the other would not conduct it in good faith and would misuse the confidential information exchanged in the process. The court was particularly concerned about the disproportionate amount of legal costs the parties were incurring. Arden J (as she then was) stated (13):

CPR rule 1.1 provides that the overriding objective of the new procedural code is to deal with cases justly and this includes, so far as is practicable, dealing with the case in ways which are proportionate to the financial position of each party.

The claimant in *Paul Thomas Construction v Damian Hyland* (2000) was ordered to pay indemnity costs where it was found by HHJ Wilcox to have been ‘exceedingly heavy-handed’, ‘wholly unreasonable’, ‘unco-operative’ and in breach of the relevant PAP (1, 2). The judge stated (at 2) that: ‘The CPR pre-action protocol did apply and the strong imperative put upon both parties to negotiate, to be frank in disclosing documentation and to talk and discuss was upon them.’

Tuckey LJ in *Tarajan Overseas v Donald Lee Kaye* (2001: para 11) explained that one reason for personal attendance at a case management conference was to facilitate settlement if the court were to consider ADR should be used.

R (Frank Cowl) v Plymouth City Council (2001) warrants particular attention because of the tone it set. It provides useful, contemporaneous insight into how Lord Woolf himself envisaged how the parties should conduct the resolution of their disputes.

In this public law case, the claimant/applicants were residents of a residential care home who applied for judicial review of a decision by their local authority to close their home. Lord Woolf CJ said this (*R (Frank Cowl)* 2001: paras 1-3):

The importance of this appeal is that it illustrates that, even in disputes between public authorities and the member 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 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 times, expense and stress. ...

The courts should then 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 ...

To achieve this objective the court may have to hold, on its own initiative, an inter parties hearing at which the parties can explain what steps they have taken to resolve the dispute without involvement of the courts. In particular the parties should be asked why a complaints procedure or some other form of ADR has not been used or adapted to resolve or reduce the issues which are in dispute. If litigation is necessary the courts should deter the parties adopting an unnecessarily confrontational approach to the litigation. If this had happened in this case many thousands of pounds in costs could have been saved and considerable stress to the parties could have been avoided.

He identified ‘the unfortunate culture in litigation of this nature of over-judicialising the processes which are involved’. If the parties could not come to a sensible way to resolve the matter ‘then an independent mediator should have been recruited to assist’. In his view, ‘Today sufficient should be known about ADR to make the failure to adopt it, in particular when public money is involved, indefensible’ (ibid: para 25).

In this case, the parties had access to a pre-action complaints procedure that they insufficiently explored. In an interesting passage about the ensuing judicial review litigation, Woolf CJ stated (*R (Frank Cowl) 2001*: para 14):

The parties *do not today, under the CPR, have a right* to have a resolution of their respective contentions by judicial review in the absence of an alternative procedure which would cover exactly the same ground as judicial review. *The courts should not permit, except for good reason, proceedings for judicial review to proceed if a significant part of the issues between the parties could be resolved outside the litigation process* (emphasis added).

This statement might be confined to judicial review cases. However, it would resonate the following year in *Cable & Wireless plc v IBM UK* (2002) when the court held that parties, who had agreed a tiered disputes resolution clause in their contract that included embarking on a specified mediation process, should keep to their bargain before litigating. In that case, the claimant skipped over the mediation phase and commenced proceedings. The court stayed those proceedings.

These early judgments reveal by their tone and content an almost passionate embrace of the two features of the new landscape described

above. It might fairly be supposed that, in that new landscape, the litigants and those advising them (believing they cannot be forced to negotiate, let alone compromise) were unclear about what was, precisely, a reasonable and unreasonable approach to ADR during litigation, and what the consequences of any unreasonable approach might be. These considerations dominate later cases.

Picking up on the sentiments of Lord Woolf in *Frank Cowl, Susan Dunnett v Railtrack* (2002) was a significant response to the new landscape because costs of an appeal did not 'follow the event' where one party refused to engage in ADR when the court suggested it, even when it had the better case and had already made an offer to settle. (It is difficult after 20 years to appreciate how truly revolutionary this decision was as the old orthodoxy of loser pays was emphatically rejected in the new landscape of the CPR.)

Mrs Dunnett had unsuccessfully sued Railtrack because she alleged it was responsible for the deaths of her horses. She asked for permission to appeal the decision. The court suggested to the parties they consider ADR to avoid the need for an appeal. Mrs Dunnett was open to the idea. Railtrack refused on the basis that it had already made an offer to settle and would not make a further one. Also, it considered it had a strong case. In the view of the Court of Appeal, Railtrack did not have a good reason to refuse the court's suggestion. Railtrack's refusal resulted in it not recovering its costs of appeal which had not, but normally would have, followed the event.

Brooke LJ made a direct connection between the duty of the parties to further the overriding objective and the duty on litigants to consider ADR. He quoted the notes to CPR 1.4 (2001) which stated (para 12):

The encouragement and facilitating of ADR by the court is an aspect of active case management which in turn is an aspect of achieving the overriding objective. The parties have a duty to help the court in furthering that objective and, therefore, they have *a duty to consider seriously the possibility of ADR procedures being utilised for the purpose of resolving their claim or particular issues* within it when encouraged by the court to do so (emphasis added)

He said:

the parties themselves have a duty to further the overriding objective. That is said in terms in CPR r.1.3. What is set out in CPR r.1.4 is the duty of the court to further the overriding objective by active case management (para 13)

Acknowledging the usefulness of mediation, Brooke LJ said (para 14):

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* ... A mediator may be able to provide solutions which are *beyond the powers of the court to provide* (emphasis added).

In the same year as *Dunnett*, another court considered the question of when it was reasonable to say no to ADR. In *Hurst v Leeming* (2002), a client sued his barrister but then withdrew his claim, an action usually triggering an entitlement to costs. The client argued that he should not have to pay any costs because the barrister had previously refused mediation. The barrister admitted he had refused, but argued that ADR is not compulsory, and he had several reasons to refuse. Although the judge rejected most of them, he accepted one of them (the likelihood that negotiation would fail). Lightman J stated (12):

Mediation in law is not compulsory and [the professional negligence pre-action protocol] spells that out loud and clear. But alternative dispute resolution is at the heart of today's civil justice system, and any unjustified failure to give proper attention to the opportunities afforded by mediation, and in particular in any case where mediation affords a realistic prospect of success of resolution of the dispute, there must be anticipated as a real possibility that adverse consequences may be attracted ...

Unreasonable conduct was scrutinized a year later in *Leicester Circuits v Coates Brothers* (2003). A party that had agreed to mediation changed its mind two days before the mediation was about to take place because it considered the mediation had no reasonable prospect of success. The court applying *Dunnett* considered this was not a good reason: that having agreed to mediate, it was inherently unreasonable for a party to withdraw. There was a prospect that the mediation *could* have succeeded, and it was not necessary for the court to assume it *would* have succeeded (para 18). The party was allowed its costs up to the point it had agreed to mediate but disallowed them after that.

The *Halsey* impact

In only four years after 1999, case law was developing the appropriate way for parties to behave to fulfil their duties of furthering the overriding objective (Spenser Underhill 2003; 2005). ADR is central to this. How to behave was not straightforward. Matters came to a head in 2004 with the leading case of *Halsey v Milton Keynes General NHS Trust* (2004).

Mrs Halsey sued the hospital charged with the care of her late husband. She failed but was denied costs liabilities because she had invited the hospital to mediate but it had refused. Very briefly, the hospital had considered it had been reasonable to refuse to engage in ADR because it had a strong case and there was no reasonable prospect of mediation success. The court accepted the hospital's position and Mrs Halsey appealed.

Upholding the court's decision, the Court of Appeal found that Mrs Halsey had failed to prove that the hospital had acted unreasonably when it refused to mediate, although it accepted that the case was suitable for mediation. She also failed to prove that the mediation would have had a reasonable prospect of success. The Court of Appeal stated that a court cannot compel a party to engage in ADR, including attending a mediation, because to do so would be to infringe their rights under article 6 of the European Convention on Human Rights 1950 (ECHR). Instead, it can only (robustly) encourage. As Dyson LJ (as he then was) of that court said, it would be 'an unacceptable constraint on the right of access to the court' (*Halsey v Milton Keynes General NHS Trust* 2004: para 9) to make mediation compulsory to those who did not want it.

While not supporting compulsion, the Court of Appeal recognized the value of mediation (ibid para 15). It offered 'some guidance as to the general approach that should be adopted when dealing with the costs issue' (para 13). This (non-exhaustive) guidance became the Halsey Guidelines (paras 17-32), which are a list of factors for a party to consider when deciding whether it is reasonable to refuse ADR. In summary, they are: (i) the nature of the dispute/intrinsic suitability for ADR; (ii) the merits of the case; (iii) the extent to which other settlement offers have been made; (iv) whether the costs of ADR are disproportionately high; (v) whether setting up and conducting an ADR process would cause prejudicial delay; and (vi) whether there is a reasonable prospect of ADR succeeding.

It is important to emphasize that the court accepted mediation was not a panacea (*Halsey v Milton Keynes General NHS Trust* 2004: para 16) and did not consider that there should, in every case, be a 'presumption in favour of mediation' (ibid). It further acknowledged that not every case was suitable for ADR (paras 16, 35). It considered, however, that many disputes are suitable for mediation (para 6).

Halsey applied—some examples

Overnight, *Halsey* became the benchmark against which a litigant's obligations *vis-à-vis* ADR under the overriding objective must be considered. Ward LJ, dealing with a small home-building dispute in *Burchell v Bullard* (2005: para 43) speaks of the importance of *Halsey* in the support for ADR:

Halsey has made plain not only the high rate of a successful outcome being achieved by mediation but also its established importance as a track to *a just result, running parallel to that of the court system*. Both have a proper part to play in the administration of justice (emphasis added).

These statements are notable in that they refer to the place of ADR within civil justice and also suggest that settlement results in a just outcome.

By way of further examples, the Halsey Guidelines were applied in *P4 v United Integrated Solutions* (2006) where a defendant had rejected several offers by the claimant to mediate. They were also applied in *Hickman v Blake Laphorn* (2006) where mediation was not the ADR method in issue, but simple negotiation.

In 2007, the Halsey Guidelines were applied in *Jarrom v Sellars* (2007) where a prospective defendant refused to attend a pre-litigation settlement meeting on the grounds (amongst others) it was, in its opinion, not worth the cost as no detailed proposals had been put forward to make it worthwhile; there was not even an agenda to the meeting. The court held this was not reasonable. While it accepted the meeting would not have settled the whole case, it would have provided the opportunity to narrow the issues and the possibility of exploring how to avoid litigation.

The court in *Rolf v de Guerin* (2011) also applied the Halsey Guidelines in examining whether a refusal to engage in negotiation or mediation was unreasonable, finding that trial should be a last resort in view of the nature of the case (here again, a small building dispute), with Rix J (as he then was) stating at paras 41 and 44 that a litigant's desire for trial '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'.

Northrop Grumman v BAE Systems (Al Diriyah C41) (2014) was another unreasonable conduct case that widened the Halsey Guidelines. The unsuccessful claimant asked for a 50% reduction in the costs it would have to pay to the defendant because the defendant had failed to take part in a mediation. The defendant had, however, made an offer to settle that the claimant had rejected, and it also considered it had a strong

case. The judge held that the defendant had unreasonably failed to explore mediation whereas the claimant had failed to accept an offer to settle. The costs sanction which would have followed the former was cancelled out by the latter. In other words, were it not for the defendant making an offer to settle, the court would have reduced the defendant's recoverable costs because it refused to explore mediation *even though* it considered (reasonably and rightly as it turned out) it had a strong (and winning) case.

As to the defendant's belief that it had a strong case and mediation had no prospect of success, and while acknowledging that *Halsey* stated that a reasonable belief in a watertight case 'may well be sufficient justification for a refusal to mediate' (para 58), the judge went on to state (*Northrop Grumman v BAE Systems* 2014: paras 59-60):

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 a payment to a claimant.

However, 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.

A party's belief in the strength of its case was considered more recently in *DSN v Blackpool Football Club* (2020). The defendant repeatedly refused to engage in ADR because it thought it had a strong case. However, it was wrong and lost at trial. The court held (para 28):

The reasons given for refusing to engage in mediation were inadequate. They were, simply, and repeatedly, that the Defendant 'continues to believe that it has a strong defence.' No defence however strong, by itself justifies a failure to engage in any kind of alternative dispute resolution. Experience has shown that disputes may often be resolved in a way satisfactory to all parties, including parties who find themselves able to resolve claims against them which they consider not to be well founded. Settlement allows solutions which are potentially limitless in their ingenuity and flexibility, and they do not necessarily require admission of liability, or even payment of money.

Deliberate refusal was not the only way to garner cost sanctions. Silence in the face of a request to mediate is *prima facie* an unreasonable refusal to engage in ADR. The Court of Appeal in *PGF II SA v OMFS Co 1* (2013) held that a defendant's silence in the face of two offers to mediate

constituted an unreasonable refusal to consider ADR and warranted a costs sanction. Briggs LJ said (at para 34):

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

Thakkar v Patel (2017) approved *PGF*, characterising that case's 'message' to be (para 31):

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 [present] case is 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.

This small sample of cases after *Halsey* (by no means a complete list) shows that the Halsey Guidelines have not only been carefully applied but appear to have been widened over time. It is now beyond reasonable argument that litigants cannot escape their obligation at least to consider the suitability of ADR and be seen to take a position on it (eg whether they refuse or accept to engage in it and why) without the risk of adverse costs consequences.² Such an obligation is part of a litigant's duty to further the overriding objective. Lord Woolf's original landscape has been kept in focus, although the cases tend mainly to be concerned with the singular issue of when a party can escape costs sanctions when it (for whatever reason) has avoided ADR. What is important to note is that, in coming to these decisions, the courts have made significant comment on the value of ADR and the importance of its process and outcomes to the delivery of justice in England and Wales.

² It would, however, be misleading to suggest that a litigant has no right to refuse ADR or that a refusal will always be punished. For example, in *Hurst v Leeming* (2004), the barrister was found to have acted reasonably in refusing mediation. In *Mason & Others v Mills & Reeve* (2012) the Court of Appeal stressed that parties cannot be compelled to mediate and acknowledged that ADR was not appropriate in every case. It applied the *Halsey* 'merits' Guideline and found that the defendant had acted reasonably in refusing ADR. What is clear from all the authorities, however, is that a refusing party will need to stand on very strong ground to avoid sanction.

Beyond the original landscape—compulsory ADR?

Constraints prevent us from discussing this important area of law fully. We raise it to express the view that apparent recent interest in compulsory ADR may broaden and bring into sharper focus Lord Woolf's landscape.

As we have seen, 2013 was notable because by then even silence in the face of an invitation to consider ADR was deemed to be unreasonable. Also, in 2013, compulsion in ADR re-emerged in *Wright v Michael Wright (Supplies)* (2013). The parties had ignored all encouragement by the court to mediate. Ward LJ (para 3), exasperated at the behaviour of the litigants, suggested that it was perhaps time for the courts to 'have another look at *Halsey* in the light of the past 10 years of development in this field'. He questioned whether it really was an 'unacceptable obstruction' to justice, or a breach of human rights to a fair trial to stay litigation for mediation to be considered and occur.

A year later, in *Bradley v Heslin* (2014), the judge was vexed that a dispute between neighbours about the use of a shared private gateway had consumed a three-day trial in the High Court. Norris J said this (para 24):

I think it is no longer enough to leave the parties the opportunity to mediate and warn of costs consequences if the opportunity is not taken ... The Court cannot oblige truly unwilling parties to submit their disputes to mediation: but I do not see why, in the notorious case of boundary and neighbour disputes, directing the parties to take (over a short defined period) all reasonable steps to resolve the dispute by mediation before preparing for trial should be regarded as an unacceptable obstruction on the right of access to justice.

These decisions reflect a barely concealed desire by some courts to compel parties at the very least to consider mediation for appropriate cases, to impose a stay on litigation while they do so, and highlight the importance that ADR had acquired in civil justice, but they fall short of compelling the process itself.

In 2015 (*Interim*) and 2016 (*Final*), Briggs LJ (as he then was) published two reports on his review of the Civil Courts. His *Interim Report* appeared to support non-compulsory ADR and the existing approach of imposing sanctions where conduct had been unreasonable (2015: 28, paras 2.86-2.87).

Shortly afterwards, the ADR working party of the Civil Justice Council reported (2017 (*Interim*); 2018 (*Final*)). Broadly, compulsory ADR or automatic referral by a court to mediation was not recommended (Civil Justice Council 2018: para 8.23(1)). Instead, there should be stronger

encouragement by the Government and courts on parties to use ADR, which includes the use of costs sanctions (2018: section 8 *passim*, paras 9.19-9.24). Greater public awareness about ADR was recommended (2018: section 6 *passim*, paras 9.2-9.11). How the parties behaved both before and during the litigation process should be the subject of more stringent judicial review (2018: paras 8.5-8.8, 8.20). It recommended the Halsey Guidelines be made tighter (they were too generous to the refusing party) (2018: paras 4.26, 8.23(2), 8.27-8.28, 9.21-9.23). The clear direction of the report was in favour of a greater role of ADR in civil justice, falling short of compulsion (2018 *passim*).

In 2019, the Court of Appeal, however, in *Lomax v Lomax* (2019), considered the issue of compulsion. Distinguishing *Halsey* (which only dealt with compulsory mediation), it held that the court has power under CPR 3.1(2)(m) *to order* the parties to attend an early neutral evaluation, in appropriate cases, and thus introducing the possibility of compulsion being extended to other forms of ADR.³

In *McParland v Whitehead* (2020), with *Lomax* in mind, Vos LC (as he then was) raised the possibility that a court may order compulsory mediation (but he did not do so in that case) (para 42).

In January 2021, further consideration of the compulsion issue was requested by the Master of the Rolls, Vos MR. He asked the Civil Justice Council to report on the legality and desirability of compulsory ADR. Its report was published in July 2021. While the courts' 'existing nudges and prompts' that lead the parties to ADR will still have a 'significant role to play' (115), the report concluded that mandatory ADR is compatible with article 6 ECHR and would be both lawful and desirable, subject to certain safeguards. It concluded:

We think that introducing further compulsory elements of ADR will be both legal and potentially an extremely positive development

Above all, as long as all of these techniques [listed above] leave the parties free to return to the court if they wish to seek adjudicative justice (as at present they do) then we think that the greater use of compulsion is justified and should be considered. (Civil Justice Council 2021: 118, 119)

The courts have applied the Halsey Guidelines for about 18 years. For half that time, some courts have expressed some frustration that they do not go far enough, and the frustration becomes most apparent around

³ Family court procedures in England & Wales (which are not considered in this article) already have compulsory financial dispute resolution appointments that the parties must attend unless the court directs otherwise.

the subject of whether the courts should compel ADR. The question is, far enough for what? The answer, we suggest, is found in Lord Woolf's original vision of litigation (let alone a trial) truly being a thing of last resort, and the parties trying really hard to settle their cases rather than litigating them to trial. His vision was uncompromising—it required litigants to litigate only if they had run out of all other options. The apparently insurmountable obstacle he faced (and the courts subsequently) was that the courts were powerless to compel the parties to exhaust those options before and even after litigation had begun.

We have seen that the early cases from 1999 to *Halsey* in 2004 were characterized by their evident zeal for the Woolf Reforms, expressing visions of the new landscape where settlement and ADR were dominant features. *Halsey* (responding to perceived uncertainty about what was a reasonable refusal to engage in ADR) in effect (but perhaps not with intention) codified the approach to ADR that the parties should adopt, while acknowledging that compulsory ADR was not appropriate. Case law that followed has been mainly concerned, on a fact-sensitive and case-by-case basis (as *Halsey* anticipated, at para 16), with what amounts to reasonable or unreasonable approaches to ADR, with frequent *obiter dicta* about the character and benefits of ADR and its broader application.

The courts have never lost sight of the central importance of ADR. Yet, there appears in recent years to be a rediscovery of the original zeal immediately following the Woolf Reforms which set out the new landscape in which settlement plays a very important role. Part of this zealous return appears to involve the one area where even Lord Woolf, as well as Jackson and Briggs LJ, would not stray, which is compulsory ADR. Support for some form of compulsory ADR, whether through court orders or mandated legislation, seems to be gaining traction. Compulsory ADR is not yet part of English and Welsh law and practice. However, the Master of the Rolls has recently been advised, albeit in theoretical terms, that it is not unlawful where the compulsion is exercised properly in appropriate cases, and that it should be considered.

This growing case for and renewed interest in some form of compulsory ADR further supports the increasing relevance of settlement in the delivery of justice, as will be explored below.

[E] JUSTICE, ALTERNATIVE DISPUTE RESOLUTION AND THE CIVIL PROCEDURE RULES

Scholars within the ADR literature have considered more broadly the nature of the justice that is or can be delivered by ADR processes. Genn and Fiss lead the discussion with their critiques about the ability of ADR to provide substantive justice, arguing that there is no justice in private dispute resolution processes such as mediation (Fiss 1984; Genn 2012). Others have, for example, considered the ability of ADR processes to deliver substantive justice despite operating outside a legal framework (De Girolamo 2018), its delivery of a Rawlsian procedural justice (Ojelabi 2012) or procedural justice generally (MacDermott & Meyerson 2018; Ojelabi 2019) or justice as compromise (Shipman 2011) and its delivery of access to justice (Ahmed & Quek Anderson 2019; Quek Anderson 2020). These reflect a varied approach to the delivery of justice through ADR and illustrate the extent to which the issue appears unsettled.⁴

Whatever may be said elsewhere about ADR in and of itself being effective to administer justice to litigants, we consider that the decisions coming out of the Woolf Reforms indicate the nature of the relationship between ADR and justice. For Lord Woolf, as suggested in his reports, access to justice is more readily (or at least, preferably) achieved by bestowing on litigants greater autonomy and agency in the dispute resolution process. Such autonomy (as well as financial agency) is necessarily compromised when the parties delegate final resolution to a court and, to an extent, the sometimes complex and detailed procedures leading to trial which the parties must obey.

The Woolf Reforms, as applied subsequently by the courts over the years, strongly suggest that the delivery of justice is achieved not only by the adjudication of a claim pursuant to state laws by a state-appointed judicial decision-maker; it is also achieved by a settlement of the dispute by the parties directly, without state adjudication, whenever possible.

Lord Woolf introduced the importance of ADR within civil justice in his two reports, but he emphasized its relevance in *Frank Cowl* with his comment that it was critical that litigation be avoided if at all possible and that ADR can do so while meeting the needs of both the litigants and the public (2001: para 1). He noted that costs, time and stress would be

⁴ There is also commentary in the literature about the impact of the proportionality requirement, more generally, on the nature of justice delivered by the CPR: see, for example, Ahmed 2016, 2018, 2019, 2020, 2021; Shipman 2006, 2011; Meggitt 2014; Sime 2021; Zuckerman 2015.

lessened at the same time (para 1). This extraordinary comment might appear to seek to dissuade parties from accessing the civil justice system for an adjudication of their claims. Courts, he says, should have minimal involvement in the resolution of their disputes. He also appeared to state (at least for judicial review cases) that there was no right to litigate where there were facilities elsewhere that could resolve the matters before the court but that had not been used (para 14). Not only are efforts required before litigation commences to avoid litigation through the various PAPs, but effort is required to avoid trial even after litigation begins. Rix J's (as he then was) comment in *Rolf* that a desire for one's day in court is insufficient reason to refuse an invitation to mediate a dispute resonates with this suggested devaluation of a litigant's right to trial (para 41).

Sir Geoffrey Vos as Chancellor of the High Court in *OMV Petrom SA v Glencore International AG* (2017), while considering the issue of settlement offers under part 36, also seems to underscore the primacy of settlement over litigation when he refers to a shift in the culture of litigation which includes an obligation to engage actively with settlement (para 39):

The culture of litigation has changed even since the Woolf reforms. Parties are no longer entitled to litigate forever simply because they can afford to do so. ... The parties are obliged to make reasonable efforts to settle ... The parties are obliged to conduct litigation collaboratively and to engage constructively in a settlement process.

Private resolution of a dispute through settlement achieved between the parties appears to become an objective in itself. For example, Ramsay J in *Northrop Grumman* considers that resolution can be obtained through ADR even if a case has no merit (2014: para 59); Lightman J in *Hurst v Leeming* considered that a satisfactory resolution can be had from mediation that may elicit from the parties 'a more sensible and more conciliatory attitude' (2002: 15); for Sir Geoffrey Vos in *OMV Petrom SA*, parties are obliged to engage in constructive settlement discussions and engage in litigation collaboratively (2017: para 39); Brooke LJ in *Dunnett* refers to the ability to reach a settlement that the parties could be happy to live with, with ADR offering an opportunity to reach a more satisfactory solution than is within the power of lawyers or the court to deliver (2002: para 14); Moylan LJ in *Lomax* states that a fair and sensible resolution can be reached through (compulsory) early neutral evaluation, a form of alternative dispute resolution process (2019: paras 26, 29); and the court in *DSN* emphasizes that no defence, however strong, justifies a refusal to mediate as satisfactory solutions can be obtained which litigants may feel are not meritorious (2020: para 28). Merely the prospect of achieving a settlement through

mediation is sufficient to require a litigant to agree to a mediation process as we have seen in *Leicester Circuits* (2003: para 18); *Thakkar* takes this one step further when stating that silence is an inappropriate response to an invitation to mediate, even if mediation is unlikely to succeed (2017: para 31).⁵ Note too the importance of the outcome that is achieved through the settlement suggested by these cases—it can be fair, sensible, satisfactory or one that parties would be happy to live with.

Moreover, the benefits purported to be offered by mediation further support the pre-eminence of settlement and value of outcome to be achieved. For example, as stated above, Lord Woolf in *Frank Cowl* cites saving time and the avoidance of cost and stress (para 1); *Northrop Grumman* (relying on the highly influential *Jackson ADR Handbook* (Blake & Ors 2021)) points to the benefit of an independent perspective brought to claims through mediation (2014: para 59); *Wright* speaks to being able to help parties move beyond feelings of betrayal arising from a breakdown of particular relationships (2013: para 31); *Dunnett* (2002: para 14) and *Halsey* (2004: para 15) (just two examples) point to the opportunity for ingenuity and flexibility of solutions that a court cannot provide.

The sample of decisions discussed in this article illustrates a focus on resolution and suggests that justice can be delivered through collaborative, consensual ADR processes, which are private processes. They were made by judges seized of the duty to further the overriding objective. They appear to support a view of justice that includes and promotes a non-adjudicative outcome for litigants. Justice is not confined to the vindication of the legal merits of a claim; it is also found in settlement reachable by the parties through an active engagement with each other. Civil justice seems to imply compromise (suggestive of receiving less than one's perceived or even actual entitlement), as well as obtaining consensual outcomes that courts cannot give.⁶ For agreement, compromise may be needed, and even such compromise can be satisfactory. Settlement, whether or not a compromise, can be a just outcome as is an adjudicated outcome, as Lord Woolf envisioned, and subsequently endorsed by judges such as Ward LJ in *Burchell* when he stated that mediation can lead to a just result (para 43).

⁵ In contrast, for the court in *Gore v Naheed*, a litigant desiring to have his rights adjudicated by a court was not unreasonable in his refusal to attend mediation given that 'those rights are ultimately vindicated' (2017: para 49) suggesting that the right to litigate, for Patten LJ, continues to figure prominently in civil justice.

⁶ *Halsey* (para 26) values the willingness of parties to compromise when assessing whether a mediation has a reasonable prospect of success.

[F] CONCLUSION

The issue at the heart of this article is the use of ADR to further the overriding objective, and how it forms part of Lord Woolf's 'new landscape' in which judicial support for ADR in lieu of litigation and settlement in lieu of an adjudicated outcome suggests a broadened notion of justice and the just outcome. This is important because it affects how litigants experience justice within the context of the encouragement of ADR as required by the legal framework of the CPR. Recall Lightman J's statement in *Hurst v Leeming* that 'alternative dispute resolution is at the heart of today's civil justice system' (2002: 12) and Ward LJ's comment in *Wright* that mediation and litigation 'are intended to meet the modern day demands of civil justice' (2013: para 3). The CPR, in its encouragement and support for ADR, impacts the delivery of justice within civil justice: conceptions of justice are expanded as a result.

There seems to be no controversy that the administration of justice partly entails fiscal discipline and management of limited resources by all concerned, including the courts. It is also clearly more than that. Lord Woolf was concerned about the barriers facing litigants who want to access justice but cannot, for various reasons, and saw a need for far-reaching reforms.

For us, perhaps Lord Woolf's most profound insight was that an amicable resolution of a dispute with minimal intervention by a court (even without a court ruling) can deliver a just outcome, and this is to be desired and pursued, arguably above all else. Ideally, if disputes could be compromised before litigation began, so much the better. If they could not, the court would encourage settlement. He recognized the benefits of alternative processes for resolution of disputes to achieve this.

As a result of his reforms, with the development of the CPR and their application by the courts, justice in the modern practice of litigation includes settlement and compromise: it has become much more than a consideration of the merits of a claim and the delivery of a legally correct outcome. Although it appears to be accepted that some cases are not suitable for ADR, these appear to be vanishingly small. To deal with cases justly is actively to encourage settlement and at the very least to consider ADR. To go further, these cases suggest that the just outcome may be achieved by encouraging parties not to start proceedings or, if they have already started, not to go to trial. This is the consequence of Lord Woolf's vision of justice.

The overriding objective has expanded the conception of justice that is delivered by the CPR. The premise is that justice may be obtained without taking a matter to trial. Moreover, it must follow that, where two alternative ways are set out to achieve a resolution of a dispute (one through ADR/settlement and the other by court determination), it would be perverse if one route was perceived to be just and the other not. The ADR/settlement route places high regard on the autonomy of the parties, their powers of self-determination and their ability to discover for themselves pragmatic and acceptable outcomes to disputes that adjudicated justice may not be able to produce. It is evident from the cases that have emerged since 1999 that the courts have been striving to realize Lord Woolf's vision of justice being delivered at proportionate cost both in and out of the courtroom. However, it is equally evident that the courts have not finished this task and the situation remains as dynamic now as it was in 1999.

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