# Resolving the Costs of the Action by Mediation not Litigation

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**Abstract**

This article considers the role of mediation in resolution of the quantum of costs in civil proceedings in the courts of England and Wales as an alternative to detailed assessment by a judge under the Civil Procedure Rules 1998. The benefits of mediation are reviewed by carrying out a comparison with the court process, emphasizing the speed, costs savings, informality and privacy which resolution other than going to court can deliver. The article also comments upon whether making mediation in costs mandatory would assist parties who pay and receive costs, and whether this is likely to happen in the foreseeable future.

**Keywords:** civil procedure; legal costs; detailed assessment; alternative dispute resolution; costs mediation.

## [A] INTRODUCTION

In civil proceedings in the Courts of England and Wales, the general rule is that the winner's costs are paid by the loser because they 'follow the event', meaning the outcome of the trial.

There are numerous exceptions: in family law cases, the usual order is that each party pays their own costs, whilst in most other forms of litigation, the general rule is often adjusted to reflect the claimant's relative success or failure. For example, a case may involve a claim seeking damages in the hundreds of thousands of pounds, but which is concluded at trial in an award of a few hundred pounds. In circumstances such as these, the order for costs will be modified to reflect the success which the opponent has had in defeating all but a small part of the claim. In an extreme case, that might involve the claimant, even though the theoretical winner, being ordered to pay all the defendant's costs.

Once a costs order in a civil action has been made at the conclusion of a case, either by a judge or by agreement, the question arises—what happens next if the parties cannot agree what those costs should be?

## [B] DETAILED ASSESSMENT

The answer which will usually be given to that question is that the Civil Procedure Rules (CPR) 1998 must be deployed. They provide that costs will be quantified by the process of detailed assessment, by which is meant the justifying by the successful party to the satisfaction of a judge that the costs claimed have been reasonably incurred. However, before that happens, parties ought to be considering whether there is an alternative way of dealing with the costs other than by 'having one's day in court'. The reasons for that are multifarious.

The court way proceeds as follows. CPR rule 47 provides that the detailed assessment cannot be started until the proceedings have reached their conclusion, but, when that has happened, the party receiving costs must commence proceedings under CPR rule 47.6. The rule continues:

> (1) Detailed assessment proceedings are commenced by the receiving party serving on the paying party–
>
> (a) notice of commencement in the relevant practice form;
>
> (b) a copy or copies of the bill of costs, as required by Practice Direction 47 …

The time limits for doing so are set out in rule 47.7:

> 47.7 The following table shows the period for commencing detailed assessment proceedings.

| | Time by which detailed assessment proceedings must be commenced |
|---|---|
| Judgment, direction, order, award or other determination | 3 months after the date of the judgment etc. Where detailed assessment is stayed pending an appeal, 3 months after the date of the order lifting the stay |
| Discontinuance under Part 38 | 3 months after the date of service of notice of discontinuance under rule 38.3; or 3 months after the date of the dismissal of application to set the notice of discontinuance aside under rule 38.4 |
| Acceptance of an offer to settle under Part 36 | 3 months after the date when the right to costs arose |

The bill referred to in CPR rule 47.6(1)(b) must set out in a prescribed form, the claim for costs, so that the paying party can see, through the detailed assessment process, how the money sought has been calculated. If the sums claimed are thought to be unreasonable, the party paying the costs must set out their objections. Rule CPR 47.9 provides that:

> (1) The paying party and any other party to the detailed assessment proceedings may dispute any item in the bill of costs by serving points of dispute on –
>
> (a) the receiving party; and
>
> (b) every other party to the detailed assessment proceedings.
>
> (2) The period for serving points of dispute is 21 days after the date of service of the notice of commencement.

Provision is then made for replies to be served to the Points of Dispute, if the receiving party wishes to do so. After payment of a court fee of up to £6,640 depending upon the size of the bill, the matter will then be listed before a judge who will adjudicate upon the reasonableness of the charges and decide what sum is one that it is just for the paying party to pay. That amount is then enforceable as a judgment debt if it is not paid, which carries interest at 8%.

If this procedure sounds relatively straightforward, the reality can be starkly different. Although the introduction of costs budgeting on 1 April 2013 has meant that, in most cases where the costs are not fixed, all parties will know what their respective expenditure in costs will be as the action unfolds, detailed assessments are far from being a 'tick through'. The potential exists for entrenched arguments about preliminary points, for example whether the winner had actually authorized (in the sense of being liable for the costs sought) the expenditure, or about the hourly expense rates the solicitors have charged.

Frequently, too, the costs of the assessment proceedings themselves increase to a level which is out of all proportion to the size of the damages recovered, meaning that arguments about the amount which it is reasonable for the loser to pay can take days to sort out, on occasion, even longer than the trial itself took—see *Deutsche Bank AG v Sebastian Holdings Inc* (2022) in which the detailed assessment lasted 104 days. Little wonder, then, that consideration should be given to finding different and more financially effective means to sort out the costs. It is here that alternative dispute resolution (ADR) has a role to play.

## [C] ADR—THE ALTERNATIVE TO DETAILED ASSESSMENT

In other spheres of dispute, it has long been the case that ADR can resolve differences as an alternative to going to court. The glossary to the CPR defines ADR as 'a collective description of methods of resolving disputes otherwise than through the normal trial process'.

The best-known form of ADR is mediation, a concise description of which was given by Catherine Newman QC in *Burgess v Penny* (2019):

> Mediation should not be about one side getting what they want. That is a misconception of the purpose of mediation. Mediation should be about attempting to reach a solution which both parties can live with as a better alternative to litigation (para 15).

## [D] JUDICIAL GUIDANCE IN RELATION TO ADR

In deciding who should pay the costs of an action, judicial encouragement to use ADR, and in particular mediation, has gathered strength over the past two decades: it is now trite law that an unreasonable refusal to participate in mediation is likely to lead to an adjustment in the costs award which otherwise would be made. In *Halsey v Milton Keynes General Hospital* (2004), Dyson LJ expressed the position thus:

> In deciding whether to deprive a successful party of some or all of his costs on the grounds that he has refused to agree to ADR, it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. In our view, the burden is on the unsuccessful party to show why there should be a departure from the general rule. The fundamental principle is that such departure is not justified unless it is known (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR (para 13).

A decade later, Briggs LJ put it more forcefully in *PGF II SA v OMFS* (2013):

> 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 of whether an outright refusal or 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 (para 34).

Turner J followed this guidance when awarding costs at a trial in which the case had been decided in favour of the defendant on every substantive

issue pleaded against him—see *Laporte v The Commissioner of Police of the Metropolis* (2015). However, as the defendant had declined an offer to mediate, and due to his failure without adequate (or adequately articulated) justification to engage in a mediation that had had a reasonable prospect of success, the judge reduced his award of costs (estimated to exceed £200,000) by one-third.

The principle applied by Turner J of punishing an unreasonable refusal to mediate was followed by Jackson LJ in *Thakkar and Another v Patel and Another* (2017) in these 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 that 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 (para 31).

## [E] THE QUESTION OF COMPULSION

One key question—to date answered generally in the negative, but which remains on the table for possible future development—is whether ADR should be compulsory, either in general or in specific categories of cases.

To some extent at least, the risk of costs penalties for unreasonably failing to engage in ADR already carries a degree of compulsion. However, that has generally instead been couched in terms of 'encouragement' to mediate—even 'encouragement in the strongest terms' to use Dyson LJ's description in *Halsey*.

In *Halsey*, Dyson LJ addressed the questions both of whether compulsion, rather than encouragement, was legally permissible and, if so, whether it was desirable. The answer to both questions, at that time at least, was 'no':

> 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 …
>
> Even if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it … If the court were to compel parties to enter into a

> mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process … if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it … the court's role is to encourage, not to compel (paras 9-11).

However, nothing in law is immutable. Driven no doubt at least in part by what might be described as at best the limited success only of other 'Jackson' measures such as costs budgeting and a 'new' proportionality test under CPR rule 44.3(5) to control the costs of litigation, these questions have been revisited. In its June 2021 report on *Compulsory ADR*, the Civil Justice Council (CJC) reached the opposite view, concluding firstly that parties could lawfully be compelled to participate in ADR and secondly that in certain circumstances at least such compulsion could be both desirable and effective.

In part, the answer to the first question was led by the developing jurisprudence in relation to compulsion and, in particular, the distinction drawn by the courts between compelling parties to mediate and compelling parties at least to consider an attempt at ADR.

Here, the parties' powers of compulsion are essentially twofold. Firstly, the ability to impose a stay to allow time for ADR to be attempted, even if the parties (or more usually one of the parties) does not want such a stay. Secondly, the already well-established threat of a costs sanction. The practical thinking here appears to be that if parties are told that the case will not proceed for a period in any event, and are also told at the same time that if they behave unreasonably in not engaging in ADR, then there will be very limited disincentive at least to attempt ADR.

In *Lomax v Lomax* (2019), the Court of Appeal drew a distinction between mediation and early neutral evaluation (ENE), noting that compelling parties to engage in ENE could not be seen as a denial of justice, since the court process remained available to the parties if the ENE was unsuccessful. Whilst the distinction from mediation was perhaps necessary in order to avoid a conflict with the otherwise binding precedent of *Halsey*, it is difficult in practice to see why the same principle could not be applied to other forms of ADR.

In *McParland v Whitehead* (2020), Sir Geoffrey Vos went further and considered that it was probably open to the court to require parties to engage in a mediation notwithstanding *Halsey*. The now Master of the Rolls' views on ADR (or perhaps now simply DR) are well recorded, as is

his enthusiastic support for dispute resolution in the pre-proceedings 'space', particularly through the portal schemes now well established for low-value personal injury claims and similar schemes.

One of the key points made by the Master of the Rolls is to remove the perceived divide between ADR and other forms of dispute resolution (such as the court process) and to achieve a process of 'integrated dispute resolution',[1] with an increased use of online dispute resolution methods, particularly in 'bulk' areas. It was the Master of the Rolls who instigated the CJC report (2021) referred to above, and he has wholeheartedly endorsed its conclusions.[2]

The principle, therefore, is clear: parties who unreasonably refuse a reasonable offer of mediation do so at their peril as to costs. The drive towards ADR is only likely to grow stronger and the prospect of compulsory ADR (or perhaps it should be said compulsory ADR more widely in civil litigation generally, since it may legitimately be said that it already exists in some forms in some areas of civil disputes) looms large.

If ADR is to be encouraged generally and if unreasonable failures to consider or engage in it are routinely to be sanctioned, that in turn begs the questions: what is the position where the quantification of costs after the action has been settled or resolved at trial is concerned, does mediation have a role to play in the assessment of costs and, if so, in what way? Are the principles applicable—and the judicial guidance—any different in the costs sphere? And does it work?

The answer is that it does, but the contrast between mediation and detailed assessment could hardly be more stark.

## [F] MEDIATION IN PRACTICE IN THE COSTS SPHERE

In detailed assessment proceedings, once the receiving party has served the bill, exchanged Points of Dispute and replies under CPR rule 47.9 and paid the court fee, control of the case is transferred almost exclusively to the court. It is the court which fixes the hearing date, it is the court which allocates the judge, it is the court which decides which materials are to be deployed, it is the court which conducts the assessment, it is the court

1 See, for example, the Master of the Rolls' March 2021 speech on 'The Relationship between Formal and Informal Justice' (Vos 2021a).

2 See, for example, the Master of the Rolls' October 2021 speech on 'Mediated Interventions within the Court Dispute Resolution Process' (Vos 2021b).

which dictates who should say what and when and it is the court which makes decisions that will bind the parties.

Mediation is strikingly different. It is the parties who control events. They decide whether there should be a mediation, they decide who will be the mediator, they decide where the mediation will take place, they decide how long the mediation will last, they decide how much they want to spend and, perhaps most importantly, they decide whether they wish to settle the claim or take their chances later on in court, the mediator having no power to impose a solution which will bind the parties.

There are other differences. In court, the judge runs the show, everything is tape-recorded and it all takes place in public. In mediation, the show goes on in private, the participants decide what documentation (if any) they wish to use, everything said and done is in confidence and if the mediation does not result in an agreement, nothing that has gone on can thereafter be used or referred to in court. However, if a settlement is reached (the percentages are high), there can be no subsequent change of heart. The agreement is binding and enforceable, just as it would be if made by order of the judge after a contested hearing.

And a final nuance, unlike the judge, the mediator can be told of offers made and refused. Knowing the amount that it will take to bridge the gap is an important feature of any mediation, a matter about which a judge must be kept in complete ignorance if offers have been made under CPR Part 36 until the detailed assessment has been completed.

Of course, not every mediation results in a settlement and those sceptical about its use are quick to point to the fact that, if there is a failed mediation, two sets of assessment costs will have been incurred where there would only have been one set of expenditure had mediation not been attempted in the first place. That is beside the point. If the parties put their minds to mediation early enough, that is to say before the court fee has been paid and the mediation then succeeds, the overall saving (no court fee, no costs of the detailed proceedings, no appeals) will be substantial.

There are other advantages for both sides where costs are settled through mediation. For a receiving party anxious for payment, receipt of the money will be accelerated, an all-important factor when cash flow is tight and the wait for a date for a detailed assessment hearing can be up to a year. For a paying party, resolving the costs and paying them, means that interest will stop accruing at 8% from the date that the order

for costs was made. Moreover, for all parties, there is no risk that one or other will fail to beat a Part 36 offer at the assessment hearing, thereby engaging the costs consequences which flow thereafter, still less taking the chance that the unpredictable 'proportionality test' under CPR rule 44.3(5) will deal a blow to one or other side, or possibly to both.

Assuming now that the parties have agreed to appoint a mediator with a view to resolving the costs of an action through mediation rather than through the courts, there are various prerequisites. Administratively, there need to be signed terms and conditions of business and a mediation agreement. So far as the costs of the mediation are concerned, it is usual for the agreement to provide that the mediator's fee will be shared, but if the mediation does not work, the costs of the ADR process will be 'costs in the case'. That means that whoever is ultimately awarded the costs of the detailed assessment proceedings will also collect the costs of the mediation.

Once the administration has been completed, there comes the day of the mediation itself. This can take place in-person or via a remote platform, as has become customary during the Covid-19 pandemic. Optionally and preferably and in advance, an agreed bundle of relevant documents will be provided. Position statements setting out the big-ticket items which have prevented agreement are helpful, but these should be short and to the point. In particular, they should not deploy detailed legal arguments on every point as if they were skeleton arguments for the use of the trial judge.

In terms of personnel, it is usual for representation to be by counsel, solicitors or costs lawyers, and it is essential that the mediation is attended by a party authorized to settle. Ideally, that will be the claimant in person, if receiving costs (which can be a remote attendance) and a representative of the defendant if paying, with authority to sign the cheque. Both also need a willingness to compromise, so that a solution can be reached which both sides can live with.

In no sense can either party expect to 'win' at a mediation. If a spectacular victory is the prize sought, the ambitious party must go to court, but doing that brings the chance not only of winning, but also of losing.

There is no such thing as a case which cannot be lost. None is totally watertight: things can go wrong on the day, such as not beating a Part 36 offer or of a witness not coming up to proof. Therefore, a party who is unwilling to compromise should not go to mediation, but they need to be

cautioned that an intransigent stance carries a major risk if matters go awry before the costs judge. There needs to be a realization that a party who goes to a detailed assessment may win, but that party could also lose or that there will be no winners, only two losers if neither side get their way.

A mediation carries no such risks because the parties cannot be compelled to settle and only agree terms if they wish to do so. That said, if a mediation works, it usually does so on the basis that if the receiving party takes less than he or she feels is just and the opponent considers that over the odds has been paid, the outcome is probably about right.

Finally, with the administrative documents complete and the representatives in place, the mediation can begin. It is usual, after an introduction by the mediator, for the parties to discuss points of difficulty across the table in the mediation room. This is known as facilitative mediation. Rarely, if ever, does the facilitative stage result in a settlement. It is more likely that the parties will invite the mediator, who is likely to be an expert in the field of legal costs, to engage in a private session. That involves the parties retiring into private rooms (which can be created remotely if using a remote platform) in which they will have confidential discussions with the mediator. Whilst the mediator is neutral, if asked to do so, a view on merits will be given. That is a sensible step: after all, as the mediator will be experienced in the types of costs dispute being the subject matter of the mediation, it would be pointless not to take advantage of that expertise.

If the mediation 'works', that is to say, terms are agreed at the facilitative stage after private session, such an outcome will usually have been achieved through shuttle diplomacy undertaken by the mediator between the private rooms. That will have involved the bearing of offers of settlement to and fro between the parties until a figure that is acceptable to both has been reached. Upon that event, it is the responsibility of the parties to draft any settlement agreement: the mediator does not have a hand in that.

If, however, the facilitative mediation does not result in a settlement, that is the end unless, by agreement, the parties are willing to move to an evaluative mediation. By that is meant that the parties ask the mediator (signing a further document expressing their wish to do so) to provide a non-binding view about the case. That must be consensual. If only one side asks for an evaluative mediation, the day is at an end. However, if both agree, the mediator can be asked to give a view on merits and/or to provide a fair figure for settlement. It is then 'take it or leave it'. The

mediator cannot compel the parties to accept the figure advanced, but, having reached that stage, it would be unwise if they were unwilling to do so.

So, if mediation can and does work in the costs sphere, do the same judicially driven imperatives to engage in mediation—or other forms of ADR generally—also exist?

## [G] INCENTIVES TO ADR (OR DISINCENTIVES NOT TO) IN THE COSTS SPHERE

In many ways it would be perverse if there was any less incentive to engage in ADR in the costs sphere. By its very nature, a detailed assessment is essentially a dispute about quantum in circumstances where liability has effectively been decided. One party is subject to a costs order and has to pay a sum yet to be determined.

Such disputes pre-eminently appear to be suited to a process of mediation.

Often that process—and the process of settlement generally—will be further facilitated by the fact that the paying party may already have been ordered to pay a significant percentage of the costs on account, a process which has grown more common and where the ordered percentage has typically grown in size since the introduction of costs budgeting.

Further incentives to settle exist in the fact that interest will usually run on outstanding costs at the Judgments Act 1838 rate (presently 8%), providing paying parties with a good reason not to delay settlement and from the fact that the express presumption under CPR rule 47.20 is that the paying party will be paying the (often expensive) cost of the detailed assessment process unless the court orders otherwise.

Whilst the court will take into account all the circumstances when deciding whether to order 'otherwise', a major factor in any such decision will be whether the paying party has made—and bettered—an offer to settle the assessment process. The paying party is therefore again incentivized to make effective offers. The fact that the general scheme of Part 36 also applies to assessments means that the CPR rule 36.17 'benefits' are available to a receiving party who makes and betters their own offers on assessment, and is a further reason why paying parties have good reason to engage in the settlement process.

Overall, therefore, there are substantial reasons for both paying and receiving parties to seek to resolve costs claims without going to a hearing, even without engaging in any formal ADR process.

Nevertheless, the value of mediation remains. Indeed, it is arguably in those very cases where the existing incentives 'baked into' the CPR have not worked that mediation perhaps holds its greatest strength. A case where the arguments are all about quantum, where the parties have made offers and tried to settle, but where they have reached an impasse is, perhaps, a classic case for ADR. Moreover, it is well established that the detailed assessment process itself is costly, lengthy and a drain on the use of the court's time and the parties' resources. Anything which encourages the resolution of those cases which otherwise seem intractable is likely to produce a benefit for all concerned.

What has been the court's approach to encouraging the use of ADR in such situations?

The starting point is that the *Halsey* principles are of equal application to detailed assessments as to any other form of civil litigation. Indeed, for some of the reasons identified above, arguably of greater application.

Those principles have been applied by the costs courts in a number of cases—see for example *Bristow v The Princess Alexander Hospital NHS Trust* (2015), a decision of Master Simons, where the paying party took three months to respond to a request for mediation and then ultimately declined, which led to an order for costs of the detailed assessment being made against it on the indemnity basis.

Similarly, in *Reid v Buckinghamshire Healthcare NHS Trust* (2015), a different costs judge ordered a paying party to pay costs on the indemnity basis from three days after the date that an offer had been made to mediate, which it had unreasonably refused.

There have been a number of other similar cases including *BXB v Watch Tower and Bible Tract Society of Pennsylvania and Another* (2020), *DSN v Blackpool Football Club Ltd* (2020) and *Wales (t/a Selective Investment Services) v CBRE Managed Services Ltd and Another* (2020).

Those cases include matters where the paying party was the 'unsuccessful' party on the assessment and faced a sanction that the costs it would otherwise have been ordered to pay for the assessment process on the standard basis were instead ordered to be paid in whole or part on the indemnity basis: and also of instances where the paying party was the 'successful' party (having bettered its own offer), but where it

did not recover all the costs it otherwise would have done because those costs were disallowed in whole, or in part, by virtue of its unreasonable refusal to engage in mediation.

The recurrent theme of the cases appears to be that it is usually the paying party which is sanctioned for unreasonably not engaging in mediation. There is no particular legal reason why this should be so—the proposal to engage in mediation could as easily come from a paying party and for the reasons identified above (not least that unless and until it finds a reason to displace the presumption then the paying party will be paying the costs of the detailed assessment process anyway)—there is every good reason for paying parties to engage in active dispute resolution. Nevertheless, perhaps for institutional reasons, there appears to be a relatively well-established pattern that it is usually paying parties, not those receiving the costs, who are loathe to engage in ADR.

## [H] CONCLUSIONS

The general conclusion that can be drawn, therefore, is that not merely are mediation and ADR generally likely to be effective mechanisms for resolving costs disputes (perhaps more so even than in other spheres of litigation), but also that the general principles by which the courts 'encourage' the use of mediation, are of at least equal applicability in this sphere.

What has yet to be seen (or at least reported) in the costs assessment arena is the even more pro-active approach towards ADR identified by the Master of the Rolls and the Court of Appeal and set out above. Again, it could perhaps be said that if there was an area of dispute where there would be real merit in the courts, at an early stage, not merely encouraging, but also requiring parties to engage in ENE or short-form mediation or ADR, then costs assessments might be it.

Indeed, if the rule-makers were looking for a part of the CPR such as CPR rule 47, where there was a bespoke set of procedural rules which could be adapted to introduce a mandatory dispute resolution process for some cases without 'infecting' the rest of the CPR, with a reasonable prospect of such rules resulting in savings of time and cost, then perhaps detailed assessment is precisely that test bed.

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