W/S of: Ian Andrew Gatt KC
On behalf of: Interveners
No of Statement: 1
Date: 23 May 2023
Exhibit: IAG-1

Claim No: CA-2022-001778

IN THE COURT OF APPEAL, CIVIL DIVISION

ON APPEAL FROM THE COUNTY COURT SITTING AT CARDIFF

BETWEEN:

JAMES CHURCHILL

Claimant / respondent

- and -

MERTHYR TYDFIL COUNTY BOROUGH COUNCIL

Defendant / appellant

EXHIBIT IAG-1 TO THE WITNESS STATEMENT OF
IAN ANDREW GATT KC

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N244

Application notice

For help in completing this form please read the notes for guidance form N244 Notes.

Find out how HM Courts and Tribunals Service uses personal information you give them when you fill in a form: https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about/personal-information- charter

Name of court COURT OF APPEAL	**Claim no.** H42YJ543 **Appeal Ref. CA-2022-001778**
Fee account no. (if applicable)	**Help with Fees – Ref. no.** (if applicable)
	H W F - -
Warrant no. (if applicable)	
Claimant's name (including ref.) Mr James Churchill	
Defendant's name (including ref.) Merthyr Tydfil County Borough Council	
Date	23 May 2023

1. What is your name or, if you are a legal representative, the name of your firm?

Stewarts Law LLP

2. Are you a ☐Claimant ☐Defendant ☒Legal Representative

☐Other (please specify)

If you are a legal representative whom do you represent? The Applicants (defined below)

3. What order are you asking the court to make and why?

Following the Order of Lady Justice Andrews dated 21 November 2022, which transferred the appeal of Claim No. H42YJ543 to the Court of Appeal (the "**Appeal**"), the "**Applicants**" (being The Civil Mediation Council, the Centre for Effective Dispute Resolution and the Chartered Institute of Arbitrators) now apply for permission to intervene as non-parties in the Appeal.

The Interveners invite the Court to give this permission by the exercise of the Court's discretion under its inherent jurisdiction.

There should be no order as to costs in respect of this Application.

The parties to the Appeal should have liberty to apply to set aside this order.

4. Have you attached a draft of the order you are applying for? ☒Yes ☐No

5. How do you want to have this application dealt with? ☐at a hearing ☒without a hearing

☐at a remote hearing

6. How long do you think the hearing will last? Is this time estimate agreed by all parties?

1 Hours 00 Minutes

☐ Yes ☒No

7. Give details of any fixed trial date or period

Appeal hearing on 28 June 2023

8. What level of Judge does your hearing need?

Lord/Lady Justice

9. Who should be served with this application?

The Parties to the Appeal

9a. Please give the service address, (other than details of the claimant or defendant) of any party named in question 9.

10. What information will you be relying on, in support of your application?

☒the attached witness statement

☐the statement of case

☐the evidence set out in the box below

If necessary, please continue on a separate sheet.

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11. Do you believe you, or a witness who will give evidence on your behalf, are vulnerable in any way which the court needs to consider?

☐ Yes. Please explain in what way you or the witness are vulnerable and what steps, support or adjustments you wish the court and the judge to consider.

☒ No

3

Statement of Truth

I understand that proceedings for contempt of court may be brought against a person who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

☒ **I believe** that the facts stated in section 10 (and any continuation sheets) are true.

☐ **The applicant believes** that the facts stated in section 10 (and any continuation sheets) are true. **I am authorised** by the applicant to sign this statement.

Signature

☐ Applicant

☐ Litigation friend (where applicant is a child or a Protected Party)

☒ Applicant's legal representative (as defined by CPR 2.3(1))

Date

Day	Month	Year
23	05	2023

Full name

Ian Andrew Gatt KC

Name of applicant's legal representative's firm

Stewarts Law LLP

If signing on behalf of firm or company give position or office held

Partner

Applicant's address to which documents should be sent.

Building and street

5 New Street Square

Second line of address

Town or city

London

County (optional)

Postcode

E C 4 3 B F

If applicable

Phone number

020 7822 8000

Fax phone number

DX number

Your Ref.

108995.1

Email

igatt@stewartslaw.com; ebailes@stewartslaw.com; mcaples@stewartslaw.com

5

Claim No: CA-2022-001778

IN THE COURT OF APPEAL, CIVIL DIVISION
ON APPEAL FROM THE COUNTY COURT SITTING AT CARDIFF

BETWEEN:

JAMES CHURCHILL

Claimant / Respondent

- and -

MERTHYR TYDFIL COUNTY BOROUGH COUNCIL

Defendant / Appellant

[draft] ORDER

UPON the Civil Mediation Council ("**CMC**"), Chartered Institute of Arbitrators ("**Ciarb**") and the Centre for Effective Dispute Resolution ("**CEDR**") (together the "**Interveners**") filing an application notice dated 23 May 2023 inviting the Court to exercise its discretion under its inherent jurisdiction to make an order that the Interveners be given permission to intervene in these proceedings (the "**Application**")

AND UPON reading the witness evidence of Ian Andrew Gatt KC dated 23 May 2023 (and exhibit IAG-1)

AND UPON the Appellant and Respondent providing the consents in respect of the Application contained in the correspondence appended to this Order

AND UPON the Court determining the application on paper and without the need for a hearing

IT IS ORDERED THAT:

1. The Interveners are permitted to intervene as non-parties in this Appeal.
2. The Interveners are permitted to make written submissions and to make oral submissions at the Appeal Hearing listed for 28 June 2023.
3. There be no order as to costs of this application.
4. There be no order as to costs in favour of, or against, the Interveners in these proceedings.
5. The Appellant and Respondent be given liberty to apply to set aside or vary this Order within 14 days.

Ryan Ho

From: Jo-Ann Cameron-Branthwaite <Jo-Ann@mcdermottsmithlaw.co.uk>
Sent: 22 May 2023 10:35
To: James South
Subject: RE: Myrthyr Tydfil v Churchill

Importance: High

Dear Mr South

We consent for CEDR,CMC and Clarb to intervene in this matter providing all parties will not seek costs against each other in other words cost neutral basis.

Kind regards

Jo-Ann Cameron-Branthwaite
Head of Japanese Knotweed

McDermott Smith Law Ltd

Authorised and Regulated by the SRA
SRA Number: 627762

Address: 5th Floor, St Hugh's House, Trinity Rd, Stanley Precinct, Bootle, L20 3QQ

Telephone Number: 0151-363-6799

Website: www.mcdermottsmithlaw.com

From: James South <jsouth@cedr.com>
Sent: 22 May 2023 09:27
To: Jo-Ann Cameron-Branthwaite <Jo-Ann@mcdermottsmithlaw.co.uk>
Cc: Lauren McGuirl <lmcguirl@cedr.com>
Subject: RE: Myrthyr Tydfil v Churchill

Dear Ms Braithwaite

Further to my email of last week, could you please confirm your clients consent for CEDR, CMC and Ciarb to intervene in this matter and that your client will not seek costs against these organisations for their joint intervention.

Kind regards

James South

James South

Chief Executive

E: jsouth@cedr.com

CEDR Services Limited
100 St. Paul's Churchyard, London, EC4M 8BU
www.cedr.com

From: James South <jsouth@cedr.com>
Sent: Monday, May 15, 2023 1:27 PM
To: Jo-Ann@mcdermottsmithlaw.co.uk
Cc: Lauren McGuirl <lmcguirl@cedr.com>
Subject: Myrthyr Tydfil v Churchill

Dear Ms Braithwaite

I would like to introduce myself, I am James South the CEO of Centre for Effective Dispute Resolution (***CEDR***) together with Rebecca Clark, the Chair of the Civil Mediation Council (the **CMC**) and Catherine Dixon, Director General of the Chartered Institute of Arbitrators (***Ciarb***). We are writing to you to seek your consent to our joint application for permission to intervene in the Court of Appeal hearing of James Churchill v Merthyr Tydfil.

The CMC is a registered charity, with a mission to promote and encourage the use of mediation in the resolution of conflicts and disputes. The CMC is the recognised authority for matters related to civil, commercial, workplace, SEND, peer and other non-family mediation. It is the first point of contact for the Government, the judiciary, the legal profession and industry on mediation issues. The largest mediation providers, trainers and mediation organisations are members of the CMC, including CEDR, Ciarb and Royal Institution of Chartered Surveyors (***RICS***). Although there is no statutory regulation of mediators, the CMC runs a system of voluntary registration and regulation for individual civil/commercial and workplace mediators, alongside organisational suppliers of mediation services and those providing mediation training. Mediators and providers registered with the CMC abide by a Code of Conduct, have been trained to acceptable industry standards, have suitable insurance, carry out continuing training and development, and offer access to a complaints process if needed. The CMC provides the public with a trusted directory of mediators across various areas and keeps members and the public abreast of developments in mediation, the mediation process and its place in the settling of disputes in a constructive, non-confrontational manner.

CEDR is the leading provider of mediation and alternative dispute resolution services in England and sets the gold standard for mediation training. We have over 30 years of experience providing mediation and alternative dispute resolution services in England and worldwide, and are a non-profit organisation and registered charity. As the leading UK provider of conflict, negotiation and mediation training we have trained over 10,000 mediators in more than 30 countries. Our mediators lead the forefront in thought leadership and have been relied upon in the Civil Justice Council's Report on Compulsory ADR dated July 2021. Further, our biannual audit, which has been running for 20 years, is the most comprehensive survey of the Commercial Mediation Marketplace in the United Kingdom.

Ciarb is an independent, charitable membership and professional body committed to supporting the effective resolution of disputes. Ciarb champions all aspects of private dispute resolution including arbitration, mediation and adjudication, collectively known as ADR, across the world and supports best practice by acting as a quasi-regulator and setting professional and ethical standards to which members must comply. Ciarb's membership spans a diverse range of geographies, backgrounds and professional disciplines with members in 150 jurisdictions. As Royal Charter body, Ciarb is committed to providing education and training in ADR globally and to the promotion of ADR by considering the best form of dispute resolution in support of the best outcome for the parties (which does include the courts). Ciarb's membership is growing and of our 18,000 members in 43 branches around the world, approximately 4810 are Mediators, making up more than 25% of our total membership. In England & Wales, approximately 1100 Ciarb members are qualified and practicing Mediators.

We proposes to seek permission to intervene by way of:

- Written submissions of no more than 20 pages;
- Evidence of no more than 20 pages; and
- Oral submissions of no more than 40 minutes.

We expect to file and serve our application during the course of this week.

The purpose of our intervention would be to introduce evidence and submissions addressing the status of *Halsey v Milton Keynes NHS Trust* including the power of the Court to Order:

- parties to "*refer their disputes to mediation*";
- a stay of the proceedings to facilitate the Alternative Dispute Resolution.

We ask for your consent to this prospective application.

We are currently in the process of instructing solicitors and counsel on a pro bono basis and we ask that you agree that you will not seek from us any costs in relation to our application for permission to intervene, and if the application to intervene is successful, any costs in relation to any aspect of the intervention. Consequently, we will not seek to recover our costs incurred in relation to our intervention in the appeal against any party to the appeal. Further, we would be grateful if you could also please provide a copy of your Skeleton argument, as we understand this was filed with the Court at the end of last year, together with any other intervener submissions you have received, so that we can ensure that our submissions are streamlined.

In view of the hearing date in June, I would be grateful for your response at the earliest opportunity.

Yours sincerely

James

James South

Chief Executive

E: jsouth@cedr.com

CEDR Services Limited
100 St. Paul's Churchyard, London, EC4M 8BU
www.cedr.com

Ryan Ho

From: Jones, Simon (Legal) <Simon.Jones@merthyr.gov.uk>
Sent: 15 May 2023 14:55
To: James South
Cc: Iain Wightwick; Michel Kallipetis; Maya Chilaeva
Subject: RE: Myrthyr Tydfil v Churchill [NOT PROTECTIVELY MARKED]
Attachments: 3 CHURCHILL V MERTHYR TYDFIL CBC APPEAL NO CA-2022-1778 APPELLANT'S SKELETON ARGUMENT ON APPEAL 30.11.22.pdf

Classification: **NOT PROTECTIVELY MARKED**

Hi James

I confirm that we consent to your application to intervene on the basis that no costs will be sought by you against us and likewise no costs will be sought by us in relation to the application and the intervention should the same be granted by the court.

I attach our skeleton argument. Mr Churchill's solicitors will no doubt provide you with their skeleton argument. So far we have had confirmation that the Housing Law Practitioners Association have received leave to intervene but to date we have not received their submissions.

Regards

Simon Jones
Senior Solicitor
Merthyr Tydfil County Borough Council
01685 725201

MONDAY 21 NOVEMBER 2022

IN THE COURT OF APPEAL

ON APPEAL FROM THE COUNTY COURT AT CARDIFF
DEPUTY DISTRICT JUDGE KEMPTON-REES
H42YJ543

IN THE MATTER OF AN APPEAL TRANSFERRED TO THE COURT OF APPEAL PURSUANT TO CPR 52.23(1)

CA-2022-001778

BEFORE LADY JUSTICE ANDREWS DBE

ON PAPER

Appeal No.

CA-2022-001778

B E T W E E N

JAMES CHURCHILL

CLAIMANT / RESPONDENT

- and -

MERTHYR TYDFIL COUNTY BOROUGH COUNCIL

DEFENDANT / APPELLANT

UPON READING the Appellant's Notice, Grounds of Appeal and Appellant's skeleton argument in support of the application for permission to appeal; the Order of HH Judge Harrison granting permission to appeal and transferring the matter to the Court of Appeal pursuant to CPR 52.23 and his accompanying reasons for doing so; the Civil Justice Council's report on compulsory ADR, and correspondence from the parties concerning the question whether the appeal should be expedited;

AND UPON considering the order made by Lord Justice Arnold in *Davies v Bridgend County Borough Council* (CA 2022-001604)

IT IS ORDERED THAT:

1. The Court of Appeal accepts the transfer up of the appeal.

2. The appeal is not to be linked to CA-2022-001604 which raises very different issues albeit in the context of a claim for nuisance by the encroachment of Japanese Knotweed from the defendant Council's property onto the claimant's land;

3. I refuse to direct expedition of this appeal. I am not persuaded by the Appellant's arguments that there is any or any sufficient justification for doing so. However it would be helpful if the appeal could be listed for a hearing either late next term or in the Easter term because the Respondent's claim should not be put on hold indefinitely. There are limited periods in the year when knotweed can be sprayed with effective chemicals.

4. The Appellant's skeleton argument for the appeal is to be filed and served by no later than 4.30pm on 2 December 2022. The Respondent's skeleton argument and any Respondent's Notice is to be filed and served no later than 4.30pm on 16 December 2022. Save as aforesaid the timetable set out in PD 52C shall apply.

5. The parties have permission to apply to the Court in writing to vary the time limits for service of documents or for further directions.

6. For the avoidance of doubt, the stay of the underlying proceedings in the County Court that was granted by the lower court shall remain in place until the determination of the appeal or further order of the Court of Appeal in the meantime.

7. The case is patently unsuitable for the Court of Appeal Mediation Scheme.

8. Appeal is to be listed before three LJs. Time estimate 1 day; parties to notify the Court as soon as is practicable if they disagree with that estimate, and why.

REASONS:

1. This case raises an extremely important issue relating to access to justice, namely whether a claimant who unreasonably refuses to engage in ADR in breach of the requirements of the Practice Direction (Pre-Action Conduct and Protocols) can be precluded from bringing or advancing a claim in court. The Court will need to consider whether, and if so to what extent, its decision in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 is

affected by the Practice Direction, and particularly paragraph 15, which came into force 11 years later.

2. Although the issue arises in the specific context of a claim for damages for nuisance caused by the alleged incursion of Japanese Knotweed from Council-owned land into the claimant's land, and the Court is informed that the Council is currently defending a number of such claims in the County Court which is placing a strain on its limited financial resources, it seems to me that the remedy lies in seeking a stay of the other proceedings pending the resolution of this issue by the Court of Appeal rather than in expediting the hearing of the appeal, which deserves to be properly prepared and argued. This Appellant can look after its own interests and it is not a justification for expedition to claim that other local authorities may be unaware of the possibility of using the ICP as a means of deterring costly litigation not just in knotweed cases but in many different fields (including housing).

3. It is highly likely that interested organisations such as the Civil Justice Council, (which has produced a report on compulsory ADR), the Local Government Association, the Law Society and the Bar Council to name but a few, may wish to intervene and make submissions. I regard the appellants' response to this objection, namely that the point is not complex and it will not take long for such interveners to muster their arguments, as unrealistic.

4. I anticipate that there may well need to be a case management hearing or at least further case management directions on paper before the appeal is heard, so that skeleton arguments and documents can be filed in a logical sequence and the various arguments are streamlined so that duplication is avoided. The time estimate may also need to be revised upwards depending on how many interested parties wish to get involved.

5. This case is not suitable for linking with *Davies,*-2022-001604, which is about the proper approach to the quantification of damages in knotweed incursion claims. The nature of the underlying claim in this case does not really matter, as it does not affect the issues of principle involved.

COMPULSORY ADR

JUNE 2021

- the cost and time burden on the parties;
- whether the process is particularly suitable in certain specialist areas of civil justice;
- the importance of confidence in the ADR provider (and the role of regulation where the provider is private);
- whether the parties engaged in the ADR need access to legal advice and whether they have it;
- the stage(s) of proceedings at which ADR may be required; and
- whether the terms of the obligation to participate are sufficiently clear to the parties to encourage compliance and permit enforcement.

11. It is appropriate to permit sanctions for breach of a rule or order requiring participation in ADR. If ADR is no longer "alternative" or external to civil justice, then parties can surely be compelled to participate in ADR as readily as they can be compelled to disclose documents or explain their cases. The sanction for failure to participate may be to prevent the claim or defence continuing, either by making the commencement of proceedings conditional on entering ADR, or empowering the court to strike out a claim/defence if a party fails to comply with a compulsory ADR order at a later stage in the proceedings. Any strike-out could be set aside if there was a valid reason for non-compliance.

12. This is consistent with the use of initial prompts towards settlement in an online procedure and the active role of a case officer or judge in seeking to facilitate settlement.

13. We do not make detailed proposals for reform in this paper, but make three specific observations on the form compulsory ADR might take:

culturally normal one, but they have to participate, and they do participate with positive results.

84. As to the second concern, regarding the constitutional role of the court: we do not consider that the introduction of compulsory ADR, in appropriate cases and subject to appropriate rules, will undermine the primary purpose of the courts in dispensing justice, or their vital role as guardians of the rule of law. We agree with Professor Genn that a well-functioning civil justice system should offer a choice of dispute resolution methods, and that adjudication in the courts should always be available; but that is not incompatible with compulsory ADR. Provided the compulsory ADR mechanism does not lead effectively to parties being coerced into settlement against their will, and a litigant is free to refuse any settlement offer and revert to the adjudicative process, courts will remain for the assertion of a litigant's rights, and will continue to apply, uphold and develop the law accordingly. Particularly at a time when the civil justice system in general and the court system as a whole are struggling to cope with its case-load, concerns about diverting too many parties into settlement seem misplaced.

85. Tony Allen in his book Mediation Law and Civil Practice argues for a reconsideration of the issue of compulsion. Before citing ***Bradley v Heslin*** (see paragraph 29 above) he says this:

> *"A civil justice system is surely able to protect its users from themselves and to try to make sure that whatever is litigated in front of the courts justifies that level of judicial input. Moreover it should only do so if all parties unshakeably resolve to litigate despite examining every alternative*."[45]

86. The reason that mediation is the focus of such resistance must, we think, be that of all of the forms of ADR under consideration, it imposes the greatest burden in terms of cost, time and energy on the parties, and is dispensed by a body of neutrals who are not yet recognised by the wider public as a profession. We will consider these disadvantages further below.

[45] Mediation law and Civil Practice 2nd Edition, p. 125.

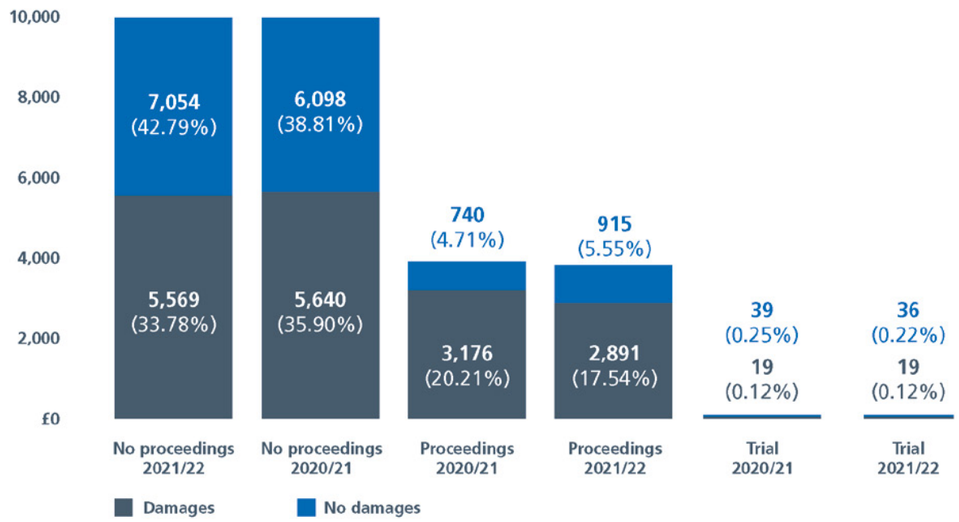
NHS Resolution

Annual report and accounts
2021/22

HC **436**

Advise / Resolve / Learn

Figure 8:
16,484 clinical and non-clinical claims were settled in 2021/22 compared with 15,712 in 2020/21 with an increasing percentage settled without proceedings[1]



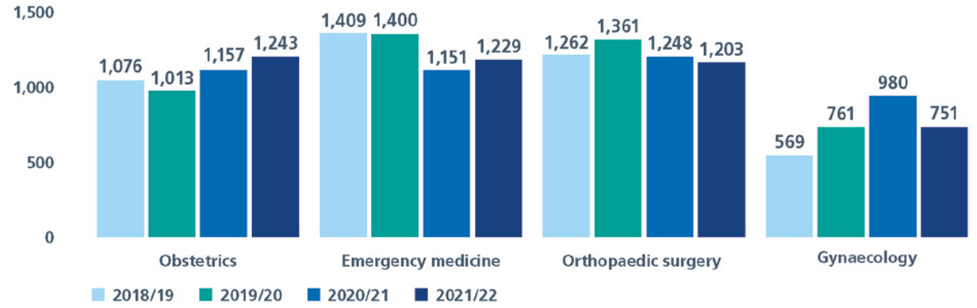
A total of 12,623 claims were settled without proceedings in 2021/22 (compared with 11,738 in 2020/21). This reflects an ongoing improvement in our litigation rate over the medium-term, settling more claims before formal court proceedings are required, based on our deployment of dispute resolution techniques, such as mediation and more collaboration with claimant lawyers. This has been achieved without compromising the rigour of our investigation of eligibility for compensation. Indeed, for clinical claims, the percentage of claims that have resolved without damages being paid has increased from 43.7% (2020/21) to 48.5% (2021/22). This includes claims managed under our CNSGP and ELSGP schemes, which have different approaches to the triaging of claims. Excluding those schemes, the percentage of clinical claims that have resolved without damages being paid has increased from 36% (2020/21) to 41% (2021/22).

Figure 9:
Litigation rate for clinical claims (2017/18 to 2021/22)

[1] The number of claims with and without proceedings will differ from those reported in 2020/21 as we have retrospectively incorporated historical claims received under our ELSGP.

In 2021/22, 77% of claims were settled without litigation, the highest ever volume achieved, reflecting our ambitions to keep patients and healthcare staff out of litigation wherever possible. The percentage of claims that have litigated continues to reduce, down from 26% (2020/21) to 23% (2021/22). We continue to deliver fair resolution of cases in line with our strategic priorities, considering the merits of each case and compensating harmed individuals where negligence is found. Where claims have entered litigation, which is unavoidable in some cases, for instance approval of a child's damages award, the percentage of litigated claims that have resolved without an award of damages has increased from 19% (2020/21) to 24% (2021/22). For clinical claims only, the number of litigated claims that have resolved without an award of damages has increased from 19% (2020/21) to 25% (2021/22).

Figure 10:
The top four categories of clinical claims received each year from 2018/19 to 2021/22 by number



Alongside obstetrics claims, which increased to 1,243 (1,157), emergency medicine claims increased to 1,229 (1,151 while orthopaedic surgery claims decreased to 1,203 (1,248). Over the medium term, obstetrics claims have become the largest volume received by speciality.

Managing claims fairly and effectively and developing legal precedent

We continue to develop legal precedent, taking cases to trial or to the higher courts in areas of law which need to be challenged in the broader interests of the NHS, or which require certainty. Testing claims at trial often has wider implications for other, similar cases and so the outcome of a case can either provide an opportunity for others to claim under similar circumstances or deter claims without merit.

Ministry of Justice

National statistics

Civil Justice Statistics Quarterly: April to June 2022

Published 1 September 2022

Applies to England and Wales

Contents

1. Main Points

Decrease in County Court claims, driven by money claims	Compared to the same period in 2021, County Court claims in April to June 2022 were **down** 5% to 374,000. Of these, 300,000 (80%) were money claims (**down** 9%). Compared to the same quarter in 2019 (pre-covid baseline), County Court claims were **down** 20%.
Damages claims were up 6% at 33,000	The **increase** in damages claims was driven by an upturn in Personal Injury claims (**up** 16% to 25,000) compared to the same quarter in 2021. This has been partially offset by Other Damages claims (**down** 15% to 7,900). Compared to the same quarter in 2019 (pre-covid baseline), total damages claims were **up** 6%.
The number of claims defended and the number of trials decreased compared to 2021	There were 63,000 claims defended (**down** 7%) and 12,000 claims that went to trial in April to June 2022 (**down** 9%) compared to the same quarter in 2021. Compared to the pre-covid baseline, claims defended were **down** 15% and claims that went to trial were **down** 20%.
Mean time taken from claim to hearing has increased slightly	The mean time taken for small claims and multi/fast track claims to go to trial was 50.8 weeks and 75.0 weeks, 1.6 weeks **longer** and 3.9 weeks **longer** than the same period in 2021 respectively. Compared to 2019, these measures are 14.2 weeks **longer** for small claims and 15.9 weeks **longer** for multi/fast track claims.
Judgments were up 4% and default judgments were up 8%	Judgments were **up** 4% (to 230,000) in April to June 2022, compared to the same period in 2021; with 91% of these being default judgments. Compared to the same period in 2019, judgments were **down** 24%.
Enforcement applications and orders fell to 10,000 and 8,600 respectively	Enforcement applications were **down** 35%, while enforcement orders were also **down** 20% when compared to the same quarter in 2021. Compared to 2019 (pre-covid baseline), volumes of enforcement applications were **down** 51% and enforcement orders were **down** 50%.
Warrants issued increased to 72,000	Warrants issued were **up** 100% when compared to the same quarter in 2021 and **down** 23% compared to

The Tenth Mediation Audit

A survey of commercial mediator attitudes and experience in the United Kingdom

1 February 2023

CEDR Services Ltd.
100 St. Paul's Churchyard
London EC4M 8BU

T: +44 (0)20 7520 6000
W: www.cedr.com
E: info@cedr.com

linkedin.com/company/cedr

Introduction

This report marks the tenth occasion on which CEDR (The Centre for Effective Dispute Resolution) has undertaken a survey of the attitudes of civil and commercial mediators to a range of issues concerning their personal background, mediation practice and experience, professional standards and regulation, and priorities for the field over the coming years. The primary focus of the survey is to assess how the market and mediation attitudes have changed over the past two years.

- The survey was undertaken using an internet-based questionnaire, which was open to all mediators in the United Kingdom, regardless of organisational affiliation. It was publicised by way of CEDR's website and direct e-mail to the mediator contacts both of CEDR and of other leading service providers and members of the Civil Mediation Council.

- This particular report is based upon the 328 responses that were received from mediators based in the United Kingdom. This is a statistically significant sample that represents approximately 50% of the individual membership of the Civil Mediation Council. As in any survey, not all participants answered every question.

- Alongside our survey of mediator attitudes, we conducted a parallel survey of lawyer attitudes in order to provide a client-oriented perspective to some of the questions raised, and we have cross-compared the responses from the lawyers' survey with that of the mediators' survey.

- It is important to emphasise that this is a survey of the civil and commercial mediation landscape, a field we have defined as encompassing any and all mediation activity that might reasonably fall within the ambit of the Civil Mediation Council. This reflects the background of the surveying organisation, CEDR, and the channels through which survey responses were canvassed.

- We do not, therefore, claim to cover either community or family mediation (although some of our respondents do report also being active in those fields).

- Furthermore, we do not include the statutory ACAS service or the HMCTS Small Claims Mediation Service, quite simply because the scale of their activities would each far outweigh the other findings of this survey.

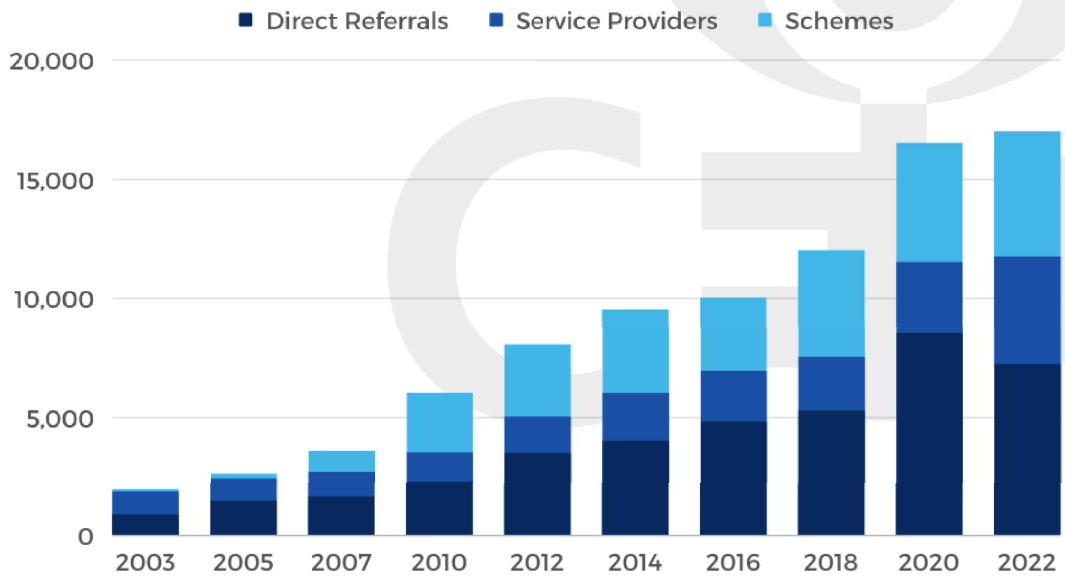
CEDR is grateful for the support not only of its members, who make our important research work possible, but also for the support and assistance of all of those who have assisted us in identifying the research themes and promoting the survey. In addition, we are grateful for the time and trouble taken by all of those mediators who have contributed their views and experience to our Audit.

The mediation marketplace

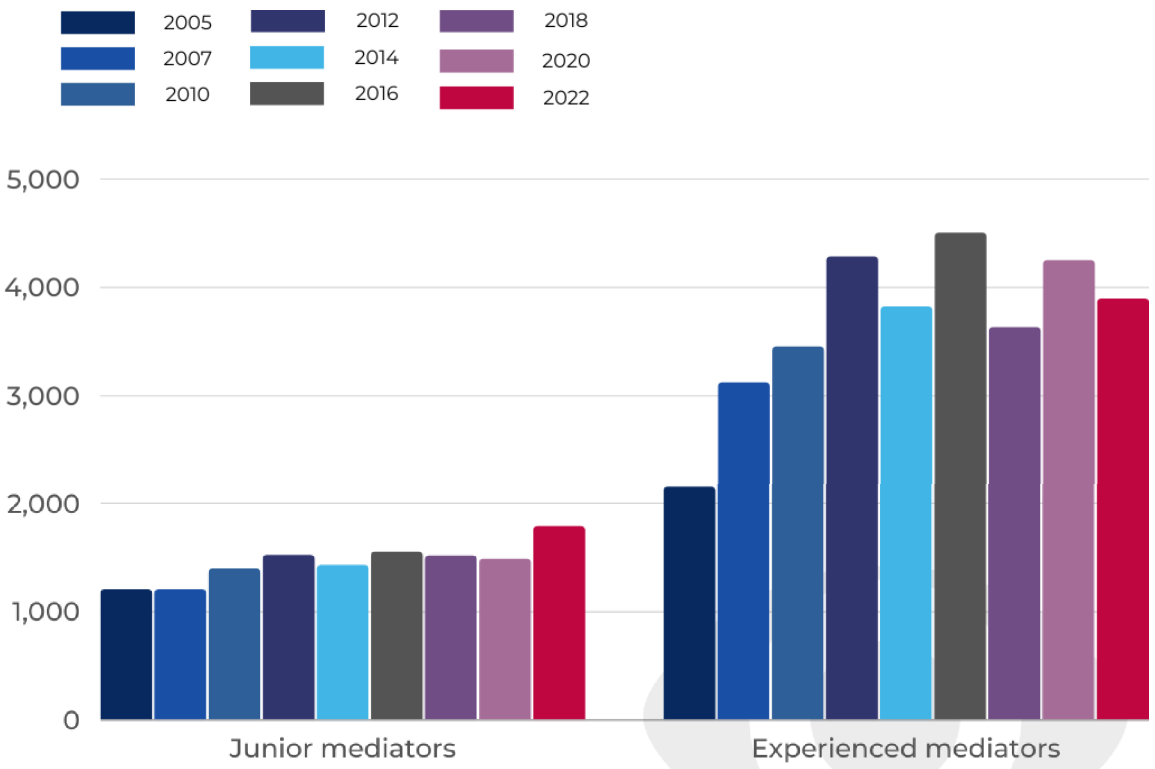
Activity levels

On the basis of mediators' reported caseloads, it is clear that the civil and commercial mediation market in England & Wales has fully recovered from the slump caused by the pandemic.

In the year to 31 March 2020 (i.e. the period immediately before the pandemic), our previous Audit estimated the overall size of the market as being in the order of 16,500 cases per annum. However, the impact of the covid-19 pandemic triggered a downturn in mediation activity, and overall activity dropped by 35% over the period March to September 2021. In the past year, however, this deficit has been recovered and our latest analysis shows that, for the year ended 30 September 2022, the total market was in the order of 17,000 cases (i.e. about 3% up on pre-pandemic levels).



Within that 17,000 figure, the latest Audit confirms the emergence of online mediation with 64% of commercial cases being conducted online. This figure is well below the 89% that we saw during the pandemic period but seems to show that the nature of the field has permanently changed.



Mediation outcomes

The overall success rate of mediation remains very high, with an aggregate settlement rate of 92% which is not significantly different from our 2020 findings.

	2022	2020	2018
Settle on the mediation day	72%	72%	74%
Settle shortly after the mediation day	20%	21%	15%
Total settlement rate	92%	93%	89%

Settlement rates amongst the Advanced mediator group have, however, slipped back from an overall 92% in 2020 to 85% this year.

Settlement rates reported by mediators were validated by the findings of our separate survey of lawyers' views.

The mediation process

We asked mediators to provide a breakdown of the number of hours they spent on a typical mediation. This revealed that the average time spent has risen slightly since our last Audit, reversing the trend seen previously. The decrease since 2018 has apparently come in the area of reading briefing materials, although other elements of the process are taking slightly longer.

	2022	2020	2018
Preparation			
Reading Briefing materials	3.9	4.0	4.8
Client Contact	2.4	2.0	2.2
Mediation			
Work on the day	7.4	6.8	7.4
Post-mediation			
Follow-up/on-going role	2.1	1.8	19
Total	15.8	14.6	16.3

A significant proportion of mediator time continues to be unremunerated – an average of 4-5 hours was unpaid, either because the mediator did not charge for all of the hours incurred or because he/she was operating a fixed fee arrangement.

Income expectations

In order to provide a baseline for any upcoming discussions about mandatory mediation and an expected increase in the number of cases if the remit was to extend into case values above £10,000, we asked mediators about their billing practices on typical lower value cases.

	Case Value		
	Under £10,000	£10,000 - £25,000	Over £25,000
Median Hourly Rate	£150	£175	£250
Average case duration	5 hours	7 hours	11 hours
Total Fee	£750	£1,225	£2,750

These figures provide some insights on working and billing practices on individual cases.However, because many mediators will work a portfolio of case values, this data may not, when taken in isolation, present an accurate view of individuals' broader aspirations.

Accordingly, our Audit also asked about mediators' overall income goals for undertaking work on cases of over £10,000. These results showed a wide disparity, with quoted daily income targets ranging from £100 per day right up to £5,000. The arithmetic mean target was £1,826 per day but, as the table below demonstrates, this average has been skewed upwards by a number of particularly high requirements that may well be unrealistic given the nature of work involved:

	Daily Income Target
First Quartile (i.e. lowest 25%)	£460
Second quartile (i.e. 26% - 50%)	£1,216
Third quartile (i.e 51% - 75%)	£2,100
Fourth quartile (i.e. 76% - 100%)	£4,179

HM Courts &
Tribunals Service

Research and analysis

HMCTS opt out mediation evaluation report

Published 21 March 2023

Applies to England and Wales

Contents

like and being unprepared for the appointment. With both users and mediators expressing in the research that user expectations of the mediation appointment often did not match the reality. Mediators are clear within the research, users coming to mediation with the right expectations, the right attitude and prepared for the appointment are vital to support a successful mediation appointment.

For mediators this lack of preparation and understanding of how the appointment would work meant that at the start of the appointment they took on the role of educator. Spending the start of the appointment answering questions and explaining what mediation is and how the appointment would work. This was particularly the case for first time users of the service. This education and question answering used up time in the limited one hour slot assigned per case.

2.8 Settlement of the dispute via mediation

When approaching settlement within the mediation appointments, mediators are clear that the approach and attitude of parties is key. For mediation to be successful both parties need to come to the appointment being flexible and open to moving from their position, without this resolution in the mediation appointment is much harder.

It was reported by users and mediators, that within the mediation appointment some are unclear what they 'should' be settling for and so are looking for guidance from the mediator. Within the appointment mediator are clear they cannot give advice on what to settle for, and that there is no obligation to settle, but they encourage the parties to consider the pros and cons of making a settlement at mediation.

This uncertainty on what claims should settle for could lead to power imbalances within mediation appointments where those who have previous experience of mediation or similar disputes, or those who have had legal advice have a better idea what cases normally settle for and so are in a stronger position.

This report suggests a number of recommendations both for the Small Claims Mediation Service and opt out mediation for consideration.

3. Introduction

3.1 Background

HMCTS seeks to help users resolve civil money disputes through the civil money claims service. Within the HMCTS Reform Programme, civil money claims are being reformed, which aims to bring new technology and modern ways of working to the way justice is administered as well as helping users resolve disputes online. You can find further information on the HMCTS Reform Programme (https://www.gov.uk/guidance/the-hmcts-reform-programme).

Within the HMCTS reforms Online Civil Money Claims (OCMC), has been developed for specified civil money claims. OCMC is continuing to be developed as part of the reform programme, at the time of this research OCMC was available for those users who did not have legal representation, to issue claims up to £10,000 in value. Since the research has been conducted, the development of OCMC has continued, at the time of publication OCMC is available for unrepresented users to issue claims up to £10,000 and for legal representatives to issue claims up to £25,000.

Specified money claims involve a wide variety of types of claims and also a variety of different users. Users include individuals, sole traders through to large organisations, both with and without legal representation. The types of issues in dispute range from unpaid bills, parking penalties, building works, unpaid invoices to other breaches of contracts. This means that although claims can be for a similar amount they can be for significantly different issues.

For all Civil Money Claims (not just those submitted using OCMC) HMCTS currently offers a free mediation service for small claims (under £10,000), this is known as the Small Claims Mediation Service (SCMS). The SCMS aims to help users resolve their money disputes without the need for a court hearing.

The mediation appointment offered is limited to one hour in length and is provided over the telephone. Mediators are HMCTS staff, who have been trained to provide mediation, they are neutral and help users to identify and resolve issues.

Within the mediation appointment the mediator conducts the mediation using a shuttle diplomacy method. This is where the mediator will phone the parties separately, so they will speak to one party, end that call, then phone the other party speak to them, end that call and then call the other party back, this will continue throughout the one-hour appointment.

This means that the mediation appointment will consist of a number of telephone calls with the aim of exploring issues in disputes and moving towards a settlement. Prior to the mediation appointment the mediator does not know details of the claim, nor do they see any documents submitted as part of the claim, their role is to listen to the views of both parties and help them to negotiate a settlement to their dispute if possible[footnote 2].

The SCMS conducts a large volume of appointments. In 2019, 15,386 mediations were conducted (14% of all cases allocated to the small claims track); of these mediations, 61% resulted in a settlement. In 2021, the service conducted 20,831 mediations (22% of all cases allocated to the small claims track); of these mediations, 55% resulted in a settlement.

3.2 How is mediation offered

The SCMS is offered to all defended civil claims allocated to the small claims track. Both parties involved in the dispute are asked if they would like to take part in free mediation. This offer is made after the defendant (the party the claim is against) has submitted a defence, as part of what's known as directions questionnaires.

IN THE COURT OF APPEAL, CIVIL DIVISION
ON APPEAL FROM THE COUNTY COURT SITTING AT CARDIFF

Case No H42YJ543

Appeal Ref: CA-2022-001778

B E T W E E N:

MR JAMES CHURCHILL

Respondent

AND

MERTHYR TYDFIL COUNTY BOROUGH COUNCIL

Appellant

Draft/SKELETON ARGUMENT ON BEHALF OF INTERVENERS: CMC, CEDR and CIARB

[References to the Interveners' Supplementary Bundle will take the form [IA/x] where X denotes the relevant page number]

A: Introduction

1. This is the skeleton argument on behalf of three interveners in the Appeal: the Civil Mediation Council ('**CMC**'), the Centre for Effective Dispute Resolution ('**CEDR**') and the Chartered Institute of Arbitrators ('**Ciarb**'), (together, the '**Interveners**').

2. The Interveners are respectfully grateful for the opportunity to make this intervention but are conscious of the limited extent to which it is appropriate for them to seek to assist the court and therefore refrain from addressing issues which are already adequately and more appropriately addressed by the parties. Their intervention is accordingly limited to the issues of principle which fall to be resolved in relation to the status of *Halsey*, and the power of the Court to order:

    a. parties to *"refer their disputes to mediation"*; and

    b. a stay of the proceedings to facilitate Alternative Dispute Resolution.

3. The CMC is a registered charity which was established 20 years ago under the Chairmanship of Sir Brian Neill. It is the recognised authority in England and Wales for all matters related to civil, commercial, workplace and other non-family mediation and liaises with the Government, the judiciary, the Civil Justice Council, the legal profession, different mediation organisations, employers, industry and other stakeholders on mediation issues. The largest mediation trainers and providers, including CEDR and Ciarb are members of the CMC. Although there is no statutory regulation of mediators, all individual mediators and mediation providers registered with the CMC are required to abide by a Code of Conduct, which makes appropriate provision for training, insurance, and accountability through a formal complaints procedure.

4. CEDR is also a registered charity which has, for more than 30 years, provided mediation and alternative dispute resolution services on a not-for-profit basis. It is a body widely regarded as setting appropriately high standards in this field as is acknowledged in the Civil Justice Council's Report on Compulsory ADR dated July 2021 ('**the CJC Report**'). It has also, for more than 20 years, produced a biannual audit, which is the most comprehensive survey of the Commercial Mediation Marketplace in the United Kingdom.

5. Ciarb is a Royal Chartered professional body and registered charity established in 1915 and awarded a Royal Charter in 1979. Its objects are to "*promote and facilitate worldwide the determination of disputes by all forms of private dispute resolution other than resolution by the court*." Ciarb trains mediators, arbitrators and adjudicators and sets professional and ethical standards. Ciarb has over 18,000 members in 150 jurisdictions, with 43 branches, including nearly 5,000 practicing mediators globally, more than 1,000 of whom practice principally in England and Wales.

6. The Interveners do not seek to express a view on the details of the dispute between the parties in this case, or to comment specifically on the arguments advanced on behalf of other organisations which have been permitted to intervene. The Interveners' intervention is limited to an important point of principle, namely the status of the *Halsey* case.

7. In summary, the Interveners respectfully submit that the Court of Appeal was led into error in its judgment in *Halsey* in relation to the application of Article 6 of the European Convention on Human Rights ('**ECHR'**) as to whether courts may order a stay for extra-judicial dispute resolution. It is respectfully submitted that was an error which this Court is now in a position to, and should, correct.

B: *Halsey*

8. In two appeals in *Halsey* (one by *Halsey* and one by *Steel*), the Court of Appeal sought to answer the question "*when should the court impose a costs sanction against a successful litigant on the grounds that he has refused to take part in an alternative dispute resolution ("ADR")?"*: see [2] of the Judgment.

9. In *Halsey* the only ground of appeal was whether the judge was wrong to award the defendant its costs, it having refused a number of invitations by the claimant to mediate. In *Steel*, there were two questions before the court. The first related to the judge's conclusion as to causation and is accordingly irrelevant for these purposes. The second was whether the judge was wrong to award the successful second defendant his costs against the first defendant where the second defendant had refused invitations by the first defendant to mediate. The issue before the court in both appeals related only to costs.

10. The Judgment of the Court by Dyson LJ contained a section headed "General encouragement of the use of ADR", followed by a section headed "The costs issue". The first section included the following comment, which was cited by DDJ Rees in this case:

> *"9. We heard argument on the question whether the court has power to order parties to submit their disputes to mediation against their will. 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. The court in Strasbourg has said in relation to article 6 of the European Convention on Human Rights that the right of access to a court may be*

> *waived, for example by means of an arbitration agreement, but such waiver should be subjected to "particularly careful review" to ensure that the claimant is not subject to "constraint": see Deweer v Belgium (1980) 2 EHRR 439, para 49. If that is the approach of the ECtHR to an agreement to arbitrate, it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6. 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.*

Article 6 ECHR

11. The Interveners respectfully submit that the Court of Appeal was led into error in respect of Article 6 ECHR, by argument which was addressed to it only in the course of oral submissions, the Court and the parties not having been given notice of it in any written submission. The Interveners respectfully support the submission that, to order parties to mediate does not, certainly in most circumstances, infringe their Article 6 rights. This is because requiring parties to mediate does not, in most circumstances, impose any obstruction to their right of access to the court, let alone an unacceptable obstruction. Requiring parties to mediate does not mean that the parties are faced with a requirement to settle their dispute.

Misplaced reliance on *Deweer v Belgium* ("Deweer")

12. In our respectful submission, it would be right for the Court now to depart from reliance on *Deweer,* save for those rare cases to which it may be relevant, for the following two reasons:

    a. Reliance on it by the Court of Appeal in *Halsey* was not fully explained and misplaced.

    b. The relevance of Article 6 ECHR has since been clarified. The law is now clear that mandating ADR alongside recourse to the courts does not offend Article 6, provided certain conditions are met.

Reliance in Halsey

13. In relation to the first point, *Deweer,* which was cited to the Court of Appeal in oral argument addressed on behalf of the Law Society, was not even directly relevant to the issues which fell to be determined in *Halsey*. It had concerned an offer made by a regulatory authority to Mr Deweer to avoid lengthy regulatory/criminal proceedings (and the immediate closure of his business until proceedings concluded) by making a payment of what was in effect a penalty.

14. It was alleged that Mr Deweer, a butcher, overpriced beef and pork which was for sale to consumers. The authority decided provisionally to close his business, as well as to impose heavy penalties if he failed to comply. What was perhaps euphemistically described as a "friendly settlement" was proposed at a fixed fee of 10,000F, with 8 days being allowed for the acceptance of that offer. The closure of his business would be terminated the day after the payment was made. As described in the CJC Report on Compulsory ADR, "*in effect, the state had inflicted a penalty on the butcher without a trial*".

15. The "friendly settlement" was therefore not something that had resulted from anything that could be recognised as mediation or any other ADR process: it was an ultimatum presented unilaterally in the context of criminal or regulatory proceedings.

16. The Court cited the Commission's opinion that there had been constraint in Mr Deweer's case, because it considered that he had waived his Article 6 rights *"only "under the threat of [the] serious prejudice that the closure of his shop would have caused him"*: see [50] and concluded that Mr Deweer's waiver of a fair trial was tainted by constraint: see [54].

17. The CJC Report, written by Lady Justice Asplin DBE, William Wood KC, Professor Andrew Higgins and Mr Justice Trower, concluded as follows on the relevance of *Deweer*:

> *"It is fair to say that the Strasbourg Court's decision was focused on the specific circumstances in Deweer, and does not obviously address the broader question of whether parties can ever be compelled to submit to ADR. Various commentators have doubted whether Deweer, properly understood, supported Lord Dyson's conclusions in that regard in Halsey. At the very*

> *least, Lord Dyson's reference to arbitration is hard to understand, as the Deweer case was not about arbitration (it merely makes an oblique reference to the Belgian courts' view of arbitration clauses). Arbitration is a "cul de sac" which removes disputes from the court process entirely, unlike the forms of ADR considered here; it raises quite different issues in terms of access to the court."*

18. It is respectfully submitted that the view set out in the CJC Report was (and is) the correct conclusion to draw as to the relevance of *Deweer*. The interveners gratefully adopt that summary; as they equally respectfully do the conclusions of that Report as briefly referred to below.

Subsequent European Case Law

19. In Joined Cases C-317-320/08, *Rosalba Alassini v Telecom Italia SpA*, ('***Alassini***') the Court of Justice of the European Union ('**CJEU**') considered the right to a fair trial under article 47 of the Charter of Fundamental Rights of the European Union ('**CFR**'), which is substantively the same right as considered by the ECtHR in *Deweer*.

20. In that case, the CJEU considered national legislation under which it was mandatory to attempt to achieve an out of court settlement as a condition for proceedings to be admissible before the courts. The question which the Court considered was *"in so far as the establishment of a mandatory settlement procedure is a condition for the admissibility of actions before the courts, it is necessary to consider whether it is compatible with the right to effective judicial protection"*: see [46].

21. The CJEU considered this to be a matter of the application of the principle of effectiveness. In the context of the specific procedure under consideration, the CJEU held that "*various factors*" showed that that mandatory settlement procedure would not make it "*in practice impossible or excessively difficult*" for an individual to exercise their right to a fair trial, for the following reasons:

    a. The outcome of the settlement procedure is not a decision which is binding on the parties concerned and does not prejudice their right to bring legal proceedings. (We note that a binding decision in this context appears to refer to a decision taken by a body as to the outcome of the case, rather than a consensual agreement between parties which the parties intend to bind them: see the use of "binding" in [10])

b. There is no substantial delay arising from the settlement procedure.

c. For the duration of the procedure, time is suspended for the purposes of limitation.

d. There were in that case no fees.

22. The CJEU also went on to make findings of wider generality. It held that:

a. It is settled case-law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided those restrictions correspond to objectives of general interest and do not involve a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed: see [63]

b. The imposition of an out-of-court settlement procedure was not disproportionate. It was not evident that any disadvantages caused by the mandatory nature of an out-of-court settlement procedure were disproportionate to the objectives pursued: see [65].

23. The features of a scheme requiring an attempt at ADR before providing access to the courts were considered again in *Menini v Banco Popolare Società Cooperativ* [2018] CMLR 15. The Court held that:

> *"61. Accordingly, the requirement for a mediation procedure as a condition for the admissibility of proceedings before the courts may prove compatible with the principle of effective judicial protection, provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the parties, and only if electronic means are not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional circumstances where the urgency of the situation so requires…"*

Principle of Effectiveness and the Costs of Mediation

24. It is noted that in *Alassini* the test of the principle of effectiveness, i.e. that the measure does not make it practically impossible or excessively difficult to exercise one's rights, was met in part because there were no fees applicable in that case.

25. It is accepted that there may be rare circumstances in which the cost of mediation could be so disproportionately high as to make it excessively difficult to exercise one's rights to litigate, if the parties are first forced into ADR. However, in the vast majority of mediation processes, the costs will not be disproportionately high compared with the expense of litigation, if they are borne by the parties at all. By way of example:

    a. CEDR's 10th Mediation Audit identified for typical lower value cases the total fee for the mediation, the average case duration and the median hourly rate. For cases with a value under £10,000, the median hourly rate was £150, the average case duration 5 hours and the total fee £750 (which we note would usually be split between the parties). For cases with a value between £10,000 and £25,000, the median hourly rate was £175, the average case duration 7 hours, and the total fee £1,225, while for cases over £25,000, the median hourly rate was £250, the average case duration was 11 hours, and the total fee £2,750.

    b. The Audit also gave an indication of mediators' earnings for a typical one day mediation, and put broadly, 59% had fees below £2,500, 32% had fees between £2,501 and £5,000, and 9% had fees of over £5,501.

    c. It is recognised that these are the fees for the mediator, not those for any lawyers instructed to attend. Costs for legal representation (if a litigant chooses to be represented in the mediation) will be additional. However, in the rare circumstances in which a mediation is not successful, the costs of engaging in the mediation will not be wasted. Rather, they are costs saved in the litigation since the work done in preparation for a mediation may be used in subsequent litigation. In addition, where a mediation is not successful, it may nonetheless result in the issues between the parties being narrowed.

26. By way of example of such a scheme, the Interveners support the automatic mediation scheme for small claims track cases, as currently proposed by the Ministry of Justice

(the '**MoJ**'). That scheme will be freely available to litigants and will be serviced by court-trained staff. An hour's telephone mediation is not the same as an in-person mediation. However, the Interveners recognise the need for proportionality of costs when mediating small claims. The MoJ scheme meets the requirements of *Alassini* in that it is easily accessible, is not necessarily binding, and is inexpensive.

27. It may also be important to note that, if the Court's decision in *Halsey* on this point is correct, a court would not be entitled to require parties to engage in any ADR procedure even if it would not result in any cost to the party whose lawyers were objecting to it.

Subsequent Judicial Comment

28. Both Lord Dyson and Sir Alan Ward, two of the three judges in *Halsey*, have subsequently commented on the case.

29. In a subsequently reported[1] speech delivered at Ciarb's Third Mediation Symposium in October 2010, Lord Dyson maintained his view that the *Halsey* decision was "on the whole correct", that the guidance in relation to costs was sound and that truly unwilling parties should not be compelled to mediate. He went on to make an important comment in respect of the *Halsey* judgment as it related to Article 6. He said this:

> *"What I would now say, however, is that ordering parties to mediate in and of itself does not infringe their art.6 rights. I rather regret, (and I wasn't alone, my two colleagues were with me) that I was tempted by the Law Society to embark upon something which it was unnecessary to embark upon, and venture some views upon art.6. What I said in Halsey was that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction to their right of access to the court in breach of art.6. I think those words need some modification not least because the European Court of Justice entered into this territory in March this year in the case of Rosalba Alassini."*

[1] Lord Dyson, '*A Word on Halsey v Milton Keynes*' (2011) 77.3 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 337, 340.

30. In *Colin Wright v Michael Wright (Supplies) Ltd & Or* [2013] 3 WLUK 769, Sir Alan Ward addressed the question in *Halsey*. In setting out the point, his judgment said:

> *"3. …Perhaps, therefore, it is time to review the rule in Halsey…, for which I am partly responsible, where at [9] in the judgment the Court (Laws and Dyson LJJ and myself), Dyson LJ said:*
>
> > *"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."*
>
> *Was this observation obiter? Some have argued that it was. Was it wrong for us to have been persuaded by the silky eloquence of the eminence grise for the ECHR, Lord Lester of Herne Hill QC, to place reliance on Deweer…?*
>
> *…Is a stay really "an unacceptable obstruction" to the parties' right of access to the court if they have to wait a while before being allowed across the court's threshold? Perhaps some bold judge will accede to an invitation to rule on these questions so that the court can have another look at Halsey in the light of the past 10 years of developments in this field."*

31. *Halsey* has also been the subject of judicial commentary from those who were not judges in the case. As cited by Sir Alan Ward, Sir Anthony Clarke also commented on *Halsey* at the CMC's Second National Conference in Birmingham on 8 May 2008, as reported[2]. The CJC Report cited his speech in respect of the status of *Deweer*:

> *"45. Sir Anthony then turned to Deweer, and the statement of the Strasbourg Court at [49] of its judgment that "any measure or decision alleged to be in breach of Article 6 calls for careful review":*
>
> > *"13. This statement is a long way away from declaring that mediation is contrary to Article 6 ECHR.""*

32. In his speech, "*Mediation: An Approximation to Justice*" at SJ Berwin on 28 June 2007, Mr Justice Lightman commented on *Halsey*, his first proposition relating to Article 6:

> *"Both these propositions are unfortunate and (I would suggest) clearly wrong and unreasonable. Turning to the first proposition regarding the European Convention, my reasons for saying this are twofold: (1) the court appears to have been unfamiliar with the mediation process*

[2] Sir Anthony Clarke, The Future of Civil Mediation, (2008) 74 Arbitration 4

> *and to have confused an order for mediation with an order for arbitration or some other order which places a permanent stay on proceedings. An order for mediation does not interfere with the right to a trial: at most it merely imposes a short delay to afford an opportunity for settlement and indeed the order for mediation may not even do that, for the order for mediation may require or allow the parties to proceed with preparation for trial; and (2) the Court of Appeal appears to have been unaware that the practice of ordering parties to proceed to mediation regardless of their wishes is prevalent elsewhere throughout the Commonwealth, the USA and the world at large, and indeed at home in matrimonial property disputes in the Family Division. The Court of Appeal refers to the fact that a party compelled to proceed to mediation may be less likely to agree a settlement than one who willingly proceeds to mediation. But that fact is not to the point. For it is a fact: (1) that by reason of the nature and impact on the parties of the mediation process parties who enter the mediation process unwillingly often can and do become infected with the conciliatory spirit and settle; and (2) that, whatever the percentage of those who against their will are ordered to give mediation a chance do settle, that percentage must be greater than the number to settle of those not so ordered and who accordingly do not give it a chance."*

English Case Law

33. The Courts have also made comments on the status of *Halsey* in recent cases. One such case is *Lomax v Lomax* [2019] 1 WLF 6527, in which the Court of Appeal considered the court's power to order Early Neutral Evaluation ('**ENE**') where one of the parties did not consent. Lord Justice Moylan distinguished Halsey and went on to comment:

> *"26. In any event, ENE does not prevent the parties from having their disputes determined by the court if they do not settle their case at or following an ENE hearing. It does not, in any material way, obstruct a party's access to the court. In so far as it includes an additional step in the process, this is not in any sense an "unacceptable constraint", to use the expression from Halsey v Milton Keynes. In my view, it is a step in the process which can assist with the fair and sensible resolution of cases."*

34. In our respectful submission, that reasoning applies equally to mediation. And, since we are all obliged to accept, as the Interveners unhesitatingly do, that this statement of principle by this Court, which was directly relevant to the issue raised in *Lomax*, is correct, it is not easy to see how the contrary view, expressed in a case to which it was not directly relevant (or even properly submitted) should be followed.

35. In *McParland v Whitehead* [2020] Bus LR 699, Sir Geoffrey Vos gave a judgment which raised the possibility of a court making an order for compulsory mediation, following the *Lomax* case.

> *"42. Finally, the court encouraged the parties to proceed to a privately arranged mediation as soon as disclosure had occurred… In this connection, I mentioned the recent Court of Appeal decision of Lomax v Lomax […] to the parties. The question in Lomax was whether the court had the power to order parties to undertake an early neutral evaluation under CPR r 3.1(2)(m). It was held that there was no need for the parties to consent to an order for a judge-led process. I mentioned that Lomax inevitably raised the question of whether the court might also require parties to engage in mediation despite the decision in Halsey […]. In the result, the parties fortunately agreed to a direction that a mediation is to take place this case after disclosure as I have already indicated."*

36. It is perhaps unnecessary for the interveners respectfully to add the submission that it is indeed right that this Court should now answer the question which it expressly noted in that case as needing to be answered.

C: Professional Commentary

37. Were the Court of Appeal to correct the obiter comments in *Halsey*, that would also be consistent with the approach taken by the Civil Justice Council. The CJC Report considered two questions:

    a. Can the parties to a civil dispute be compelled to participate in ADR? (The "**Legality Question**")

    b. If so, in what circumstances, in what kind of case and at what stage should such a requirement be imposed (The "**Desirability Question**")

38. The answers were that:

    a. parties could be lawfully compelled to participate in ADR, and

b. the authors had identified conditions in which compulsion to participate in ADR could be a desirable and effective development (recognising that compulsory ADR processes are already in place in the civil justice system in England and Wales, and are successful and accepted).

39. Taking into account the relevant case law and developments, the authors considered that where a return to the normal adjudicative process is always available, appropriate forms of compulsory ADR are capable of overcoming objectives voiced in the case law. The factors requiring consideration when compulsion is considered include the cost and time burden on the parties, whether the process is particularly suitable in certain specialist areas, confidence in the ADR provider (and the role of regulation), whether the parties need access to legal advice, the stage of proceedings and whether the terms are sufficiently clear to encourage compliance and permit enforcement.

D: Court Practice

40. As identified by the various judicial comments that have been made in respect of mandatory mediation, the courts already have significant powers which enable it to take a robust approach in making orders relating to ADR. For example:

a. The court's powers under CPR 3.1(2) are wide. CPR 3.1(2)(m) allows the court directive power to:

> *"(m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case."*

b. There is already a power under CPR 26.4, which allows for a stay of a month on a party's request to try to settle the case by ADR, and allows the court to direct a stay if the court considers a stay would be appropriate

c. The Commercial Court Guide encourages the use of Negotiated Dispute Resolution ('**NDR**'). It includes comment that "*legal representatives in all cases should consider with their clients and the other parties concerned the possibility of attempting to resolve the dispute or particular issues by NDR…*" (G1.2) and makes provision for the Court to set a date by which there is to be a

meeting between representatives with authority to settle the case if the Court *"considers that bilateral negotiations between the parties' respective legal representatives is likely to be a more cost-effective and productive route to settlement than other forms of NDR"* (G1.7)

d. CPR 44.4 identified factors to be taken into account in making decisions as to the amount of costs, which include the conduct of parties before and during proceedings, and "*the efforts made, if any, before and during the proceedings in order to try to resolve the dispute*".

E: Current Use of Mediation

41. The Interveners hope that it may assist the Court to be informed of some of the figures relating to the increasing use of mediation which reflect the context in which the question of the extent to which courts may order its use may be seen today. By way of example:

    a. In CEDR's Tenth Mediation Audit (1 February 2023), which is a survey by CEDR of civil and commercial mediators, the following statistics were identified:

        i. For the year ended 30 September 2022, the total market for civil and commercial mediations was in the order of 17,000 cases.

        ii. The comparable figures for 2003 and 2005 appear to be around 2,500.

        iii. The overall success rate of mediation is identified as having an aggregate settlement rate of 92% (which includes settlement on the day and shortly after the mediation day). That success rate is not significantly different from the findings of the Audit in 2020.

        iv. The average time spent by a mediator on a mediation is 15.8 hours. Of that a significant proportion of mediator time continues to be unremunerated, and an average of 4-5 hours was unpaid, either because the mediator did not charge for all of the hours incurred or because the mediator was operating a fixed fee arrangement.

b. It is widely recognised that there is a very real public interest in mediation being used, and where necessary ordered, in cases of alleged medical negligence. As set out in NHS Resolution's Annual Report and Accounts for the period 1 April 2021 to 31 March 2022, the following statistics were identified:

   i. The NHS introduced a claims mediation service in December 2016. The service has outperformed its target use since inception.

   ii. The proportion of claims settled without court proceedings has increased in every year since it was introduced, starting at 68% in 2017/18 and rising to 77% in 2021/22. NHS Resolution attribute this, in part, to the success of mediation in the NHS.

F: Conclusion

42. For all these reasons, the Interveners respectfully submit that the Court of Appeal in *Halsey* was led into error, and that the Court of Appeal in this case should take the opportunity to correct or clarify the obiter comments made in that case in respect of Article 6 ECHR. In the event that the Court considers that there are any other issues in relation to this appeal in respect of which the Interveners may be able to assist the Court, they of course remain willing to do so.

EDWIN GLASGOW KC CBE

edwin.glasgow@39essex.com

020 7832 1135

KELLY STRICKLIN-COUTINHO

020 7634 9085

ksc@39essex.com

39 Essex Chambers

23 May 2023

Counsel for the Interveners