

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

WITNESS STATEMENT OF IAN ANDREW GATT KC

I, Ian Andrew Gatt KC, of Stewarts Law LLP, 5 New Street Square, London EC4A 3BF, **WILL SAY AS FOLLOWS:**

1. I am a solicitor of the Senior Courts of England and Wales and a partner in the firm of Stewarts Law LLP ("**Stewarts**") solicitors for the Civil Mediation Council ("**CMC**"), Chartered Institute of Arbitrators ("**Ciarb**") and the Centre for Effective Dispute Resolution ("**CEDR**") (together the "**Interveners**"). In addition, I am a trained and CEDR accredited mediator with over 25 years' experience. I have overall conduct of this matter on behalf of the Interveners and I am authorised to make this witness statement on their behalf. This is my first witness statement in these proceedings and is made in support of an application seeking an order in the form exhibited at **IAG-1 page 7** that the Court exercises its inherent jurisdiction to permit this intervention in the appeal with claim number CA-2022-001778 (the "**Application**" and the "**Appeal**" respectively).

2. Unless stated otherwise, the facts set out below are within my knowledge or derived from my instructions and the documents that I have seen, and I believe the same to be true to the best of my information and belief. Where any facts are not within my knowledge, the source of those facts is stated.
3. Where I make reference to documents and/or information which might be confidential or privileged, it is not intended to waive any confidence or privilege and any such reference is merely indicative and as necessary for the purposes of the matters that are the subject of this witness statement.
4. I refer in this witness statement to a paginated bundle of copy documents exhibited and marked "**IAG-1**". References to page numbers in this witness statement are references to pages of Exhibit IAG-1 unless stated otherwise.
5. For the reasons set out below, the Court is invited to exercise its discretion under its inherent jurisdiction to allow the Interveners to participate in the Appeal because the Interveners are willing and able to assist the Court in its determination of key issues in the appeal which are of wider importance to the public and the administration of justice.

Background

6. As the Court will be aware, the underlying claim is a nuisance claim, issued on 21 August 2021. The Claimant sought damages for an alleged Japanese knotweed infestation in his garden, which is alleged to have emanated from the Defendant Council's neighbouring land. Those facts are of limited relevance to the intervention of the Interveners.
7. In the course of these proceedings, the Defendant applied for a stay of proceedings for the parties to engage in what was described as alternative dispute resolution ("**ADR**"¹) through the use of the Defendant's formal complaints procedure. The learned judge refused the application.
8. The Defendant applied for permission to appeal. His Honour Judge Harrison granted permission to appeal and applied to transfer the matter to the Court of Appeal under CPR 52.23.

¹ I will not attempt to define this term and only refer to the term now insofar as it is referred to by the Court of first instance.

9. The Court of Appeal accepted the transfer of the Appeal by Lady Justice Andrews' order dated 22 November 2022. The underlying proceedings are stayed until the Appeal has been determined or the Court of Appeal orders otherwise.

Interveners

10. As explained by Lady Justice Andrews in her Order dated 22 November 2022, the "case raises a very important issue relating to access to justice, namely whether a claimant who has unreasonably refused to engage in mediation in breach of the Practice Direction (Pre-Action Conduct and Protocols) can be prevented from bringing or advancing a claim in court." (**IAG-1 page 13**)
11. In her order, Lady Justice Andrews foreshadowed that "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." (**IAG-1 page 14**)
12. While the Interveners were not expressly referred to by Lady Justice Andrews as one of the few named, I believe they fall squarely within the types of bodies which might be considered well placed to assist the Court in this Appeal.

The Civil Mediation Council

13. 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.

Chartered Institute of Arbitrators

14. 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.

Centre for Effective Dispute Resolution

15. 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 by the Civil Justice Council’s reliance on Tony Allen’s work *Mediation Law and Civil Practice* 2nd Edition, in the Civil Justice Council’s Report on Compulsory ADR dated June 2021 (the “**CJC Report**”, see page 38, **IAG-1 page 17**). It has also, for more than 20 years, produced a biannual audit, which is a well-regarded comprehensive survey of the Commercial Mediation Marketplace in the United Kingdom.

Evidence

16. The Interveners are all well-established charitable organisations with relevant expertise, industry experience and evidence which they respectfully believe puts them in an exceptionally good position to assist the Court in considering, in particular, the issue described at paragraph 10 above.
17. The Interveners are, however, conscious that the Court will have the benefit of hearing submissions and having assistance from other parties on many of the issues before it. The Interveners accordingly will not seek to express a view on the underlying detail of the dispute between the parties in the Appeal, nor specifically on the arguments of other organisations which may be given permission to intervene. The Interveners specifically wish to address the Court on the status of *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 (“**Halsey**”), and the impact that decision has had, and continues to have, on extra-judicial dispute resolution.

18. In summary, if given permission to intervene, the Interveners will 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 as to whether courts may order a stay for extra-judicial dispute resolution. It is the respectful submission of the Interveners that that may have been an error which this Court is now in a position to, and should, correct. The Interveners' written and oral submissions will develop that submission (draft written submissions are exhibited at **IAG-1 page 31**). This witness statement introduces evidence relating to the efficacy of mediation that may assist the Court in considering this point.

Desirability

19. The CJC Report at page 5 considered both the legality and desirability of compulsory ADR; this statement addresses the latter. The CJC Report noted the following factors as being relevant to the question of desirability of compulsory ADR:
- *"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."*

[emphasis added] (**IAG-1 page 16**)

I will consider some of these factors.

Time burden

20. Mediations almost always necessarily take place earlier within the life of a dispute than a trial of that dispute in issued proceedings. However, a mediation does not always lead to a settlement capable of concluding proceedings whereas a trial ought to (subject of course to rights of appeal). The prospects of a mediation conclusively disposing of a

dispute are therefore necessarily lower than that of a trial. Both the speed at which a mediation might dispose of a dispute and its prospects of doing so must be relevant to the question of *time burden*.

21. HMCTS provides a free mediation service for small claims² under its scheme the SCMS. Publicly available data from the HMCTS' Opt Out Mediation Evaluation Report at **IAG-1 page 30** (the "**HMCTS Report**") explains:

"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." (Section 3.1).

22. Moreover, the Civil Justice Service Quarterly Statistics for April to June 2022 (the "**CJS Statistics**", at **IAG-1 page 21**) highlighted that, in the period April to June 2022, small claims took 50.8 weeks and multi-track/fast track claims took 75 weeks to get to trial. Mediations on the other hand are not constrained by the same limits on Court resource or availability which might lead to the times to trial highlighted above. Rather they are limited only by the availability of mediators. Given the mean time to prepare for, attend and follow up on a mediation is 15.8 working hours (see the table from the CEDR Audit at para 27 below), it is entirely conceivable that the resolution of a dispute can be reached within days of a referral to mediation compared to the considerably longer time that most litigants wait for resolution at trial.
23. The findings at paragraph 21 above suggest that, for those mediations, there were good prospects of settling, or at least the mediations were more likely than not to be successful. When coupled with the findings at paragraph 22, this suggests that if an early referral was made in those disputes, e.g. within the first 25 weeks of litigation, the speed with which a mediation can be set up and concluded could have allowed litigants to have reached a resolution in half the time it might otherwise have taken.

Cost burden

24. Participating in mediation may introduce an additional cost to a dispute. On the other hand, it also has the potential to save parties significant costs. Even in the small proportion of cases where mediation does not succeed, it would be right to acknowledge

² Small claims being those of a value up to £10,000.

that a significant proportion of the costs incurred does not have to be incurred again in the litigation. In some cases where the mediation does not succeed the issues between the parties are narrowed. It is accordingly rare, in my experience, for costs to be “wasted”.

25. An unavoidable cost of mediation is often the cost of the mediator themselves. Mediators typically charge on either a fixed fee or hourly basis. Concerns regarding the cost of mediation might be considered more relevant for lower value disputes where the mediation costs may, when considered with litigation costs, be disproportionate to the amounts in issue. CEDR’s 10th Mediation Audit dated 1 February 2023 (the “**CEDR Audit**”) provides a useful indication at page 12 of the likely cost of mediation in lower value disputes in the table below (**IAG-1 page 27**).

	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

26. It is assumed the cost to each party will, in most cases, be half of the total fee from the table above given the convention of splitting mediator’s fees equally between parties. This would mean that for disputes worth less than £10,000 the estimated average cost to a party would be of the order of £350-£400. This, however, does not include the parties’ own legal costs of preparing for and attending the mediation. Those costs may be a good example of costs which will not need to be incurred again in litigation.
27. If a fixed fee approach is taken, the parties have certainty as to their cost of participation in mediation but also, it seems, the benefit of additional time spent by a mediator, for which a party will not ultimately pay. The table below from the CEDR Audit shows that, notwithstanding the average case durations set out in the table at paragraph 22, the average time a mediator spends on a mediation is 15.8 hours. Of that, 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" (see page 8, **IAG-1 page 26**).

	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	1.9
Total	15.8	14.6	16.3

Suitability in specialist areas and confidence in provider

28. Relevant data are also available from public bodies who are experienced participants in litigation within the specialist areas in which they operate. The nature of the work of the NHS means it finds itself in specialist disputes concerning the provision of medical care and the NHS therefore represents a good example of a body participating in disputes in a specialist area.

29. The NHS introduced a claims mediation service (NHS Resolution) in December 2016 which seeks the following outcomes: (i) a reduction in harm to patients; (ii) a reduction in distress caused to both patients and healthcare staff; (iii) a reduction in the cost required to deliver fair resolution; and (iv) driving positive change. The service has outperformed its target use since inception e.g. 189 cases were mediated against a target of 50 cases. The proportion of claims settled without court proceedings has increased in every year since it was introduced, starting at 68% in 2017/2018 and rising to 77% in 2021/22. NHS Resolution attribute this, in part, to the impact of mediation. The service is not compulsory; however, the data appear to show that there is an increasing appetite to mediate disputes within what is a specialist area and that a consequence is increased settlement of disputes before issue of proceedings.

The extract below illustrates the point (page 38 of NHS Resolution’s Annual Report and Accounts for the period 1 April 2021 to 31 March 2022 at **IAG-1 page 19**):

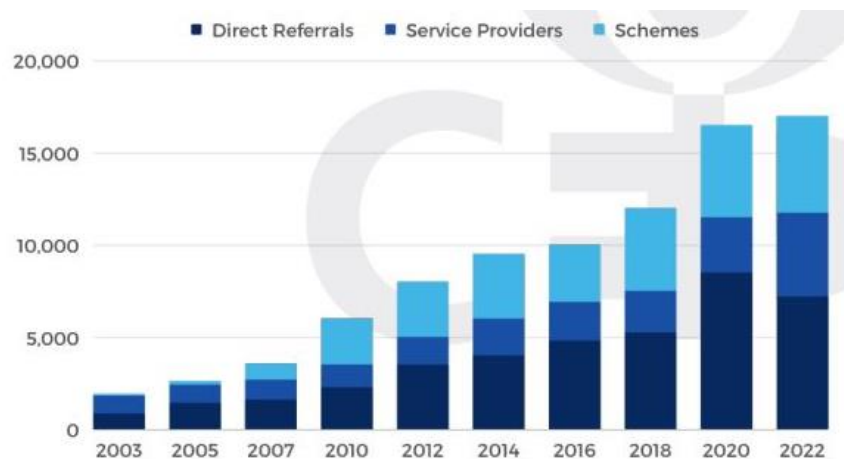
Figure 9:
Litigation rate for clinical claims (2017/18 to 2021/22)



30. The increased use of mediation services across wider areas of disputes and with providers of more general mediation services is evidenced by the CEDR Audit, which shares the following finding:

“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)” (page 3, **IAG-1 page 24**).

31. The number of mediations has increased year on year from 2003 to 2022 as illustrated by the graph below, taken from page 3 of the CEDR Audit (**IAG-1 page 24**). The data from NHS Resolution, a specialist service, are reflected in the CEDR Audit data in the context of the more general service provided by CEDR:



32. Notwithstanding the increasing frequency of mediation between parties in dispute, the settlement rates found by CEDR in respect of their mediations are impressively high with an aggregate settlement rate of 92% (see page 7 of the CEDR Audit at **IAG-1 page 25**). That rate far exceeds the rate found in the HMCTS Report of 55% or 61%

and, if it were to be combined with the time savings made possible by the average time it takes from referral to mediation of 15.8 hours (from page 8 of the CEDR Audit, **IAG-1 page 26**), a compelling argument in respect of time saving emerges and with it a cost saving for represented parties in litigation which more than not offsets the burden of mediation.

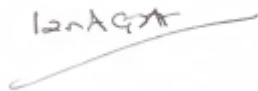
Conclusion

33. The available evidence suggests that mediation has good prospects of successfully resolving disputes at a considerably earlier stage of proceedings than otherwise might be the case. Successful mediations save parties time and money and the Court's resource. The costs of mediation of themselves are modest and when balanced against the potential benefits of mediation, can be seen to offer good value to parties in dispute. The steady increase in meditations evidences an increasing appetite for the process which reflects parties' confidence in the process and those who facilitate it.
34. For the reasons stated above, I invite the Court to make the order in the form of the draft which accompanies the Application.

STATEMENT OF TRUTH

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone 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.

Signed:

A handwritten signature in black ink, appearing to read 'L. A. G. T.', written over a horizontal line.

Dated: 23 May 2023