

advice services alliance

alternative dispute resolution

policy paper

Alternative Dispute Resolution

Policy Consultation Paper

June 2003

**advice
services
alliance**

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Alternative Dispute Resolution

Issues for the advice sector and for government

June 2003

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1 Introduction

- 1.1 Over recent years the government has promoted ADR not only as one way of resolving disputes, but as the first and most appropriate way of resolving disputes. Increasingly provision is being made to restrict access to legal aid and to court procedures for those who have not first considered ADR, and to apply cost penalties to those who unreasonably refuse to engage in it. Provisions were dormant in the Civil Procedure Rules from 1998, and the first case which publicly drew attention to them (Cowl v. Plymouth) was in December 2001¹. Funding Code requirements to try ADR have been in place since 2000, but ASA is not yet aware of any cases as yet where parties have actually been refused legal aid for representation because the LSC considered ADR a more appropriate way to resolve the dispute.
- 1.2 ADR does provide a wide range of options for dispute resolution, and as Lord Woolf pointed out in the 1996 report "Access to Justice", it is usually appropriate that courts should be a last resort rather than a first resort when considering how best to resolve a dispute. However, it is important that these significant changes to the way justice is accessed in this country do not slip into the legal system unnoticed and unchallenged. The advice sector works with some of the most disadvantaged and socially excluded people and communities, and it is vital that they are not further disempowered by restricting access to enforcement of their legal rights through the courts. That is why the advice sector should be thinking, debating and consulting on these issues now.
- 1.3 This consultation paper addresses 6 key issues:
- In which types of dispute is ADR appropriate?
 - What is the role of ADR in the litigation process?
 - Should ADR ever be compulsory?
 - How are quality standards for ADR best ensured?
 - Should more ADR be funded by the Government?
 - How should people get to know about ADR?
- 1.4 Responses on some or all of these questions are encouraged from anyone who has a view on these issues. **Responses should be sent to Val Reid at ASA by the end of August 2003 at the latest. ASA intends to hold a national forum to discuss these questions on September 18th 2003. If you would be interested in receiving an invitation to this event, please let ASA know.** Following the forum, ASA will produce a position paper outlining the Advice Sector view on the ADR policy issues raised here.
- 1.5 Responses should be sent by post or email to:
- ✉ Val Reid, ASA, 12th Floor New London Bridge House, 25 London Bridge Street, London SE1 9ST
- ✉ val.reid@asauk.org.uk
- 1.6 This consultation paper can be found on the ASA website on www.asauk.org.uk

¹ See appendix B for a summary of the key cases relating to ADR and the Civil Procedure Rules.

What is ADR?

All definitions are taken from "Advising on ADR – the essential guide to appropriate dispute resolution" published by ASA in 2000, pgs 10-16.

1. **Alternative Dispute Resolution (ADR)** is a generic term used to describe a range of procedures designed to provide a way of resolving a dispute as an alternative to court procedures. ADR is sometimes referred to as "appropriate dispute resolution" as the preferred option should be the process most appropriate to the case, the parties and the issues involved.

2. The most common and widely used forms of ADR are mediation and ombudsmen schemes, and these are the two main ADR options considered in this paper. Some issues discussed are applicable to ADR generally, and some relate specifically to mediation or to ombudsmen – the text should make it clear.

3. **Mediation** involves an impartial, independent third party helping disputing parties to reach a voluntary, mutually agreed resolution. The disputants, not the mediator, decide the terms of the agreement. The three most common types of mediation available in the UK are:

- Neighbour mediation
- Family mediation
- Civil/commercial mediation

Mediation is also available in disputes about special educational needs, clinical negligence, housing disrepair, tenancy deposits and restorative justice. There is an ongoing debate about whether there is a distinction between mediation and conciliation (as used, for example, in the ACAS conciliation procedure). ACAS conciliation is conducted by phone and letter, and does not involve a round table meeting between the conciliator and the two parties. The Disability Conciliation Service also uses the term conciliation rather than mediation. Those that argue that there is a distinction suggest that a conciliator is more pro-active than a mediator in suggesting solutions and offering guiding opinions to the parties. However, this distinction, if it does exist, is currently neither clearly defined nor widely understood.

4. **Ombudsmen** are impartial "referees" who adjudicate on complaints about public and private organisations. Generally Ombudsmen serve as a last resort when complaints cannot be or are not resolved through the internal complaints procedure of the organisation complained about. There are two main kinds of Ombudsmen in the UK:

- Public sector ombudsmen including the Parliamentary Ombudsman, the Local Government Ombudsman and the Health Service Ombudsman (in Scotland the three Ombudsmen have been merged to form a single Public Services Ombudsman)
- Private sector ombudsmen, including the Financial Ombudsman Service, the Pensions Ombudsman and the Independent Housing Ombudsman

5. There are a number of other ADR procedures which are used mainly in commercial disputes, including:

- **Early Neutral Evaluation** (where an independent third party evaluates the claims made by each side and issues an opinion – either on the likely outcome or on a particular point of law)
- **Expert Determination** (where an independent third party evaluates the case and issues a binding decision)
- **Med-Arb** (where mediation is attempted first, and if no agreement results, the dispute will go to arbitration where a binding decision will be issued)
- **Arbitration** (where a mutually appointed third party with either legal or technical expertise issues a binding judgement)

2 Background

2.1 Lord Woolf produced a review of the civil justice system in 1996, "Access to Justice", which set out principles for "a new landscape in civil justice". His aim was that "...people will be encouraged to start court proceedings to resolve disputes only as a last resort, and after using other more appropriate means when these are available". Since then a number of factors have contributed to give alternative dispute resolution procedures a higher profile in the civil justice system.

- 1998 the Civil Procedure Rules (CPR) introduced the requirement for courts and parties to consider the appropriateness of mediation or some other form of alternative dispute resolution (ADR), and gave courts the power to impose costs penalties if either party refused to do this²
- 2000 the Funding Code introduced the condition that applications for legal aid for representation could be refused if there are ADR options which should be tried first, and also gave Legal Aid contract holders the power to claim the costs of ADR as a disbursement³
- 1999 – 2002 six pre-action protocols for specific types of dispute encourage attempts at settlement, including consideration of ADR, before beginning court proceedings⁴
- 2001 - 2002 a number of court cases have stressed the importance of considering ADR where appropriate, and by implementing the CPR provisions, costs have been awarded against parties who have refused to do this⁵ or who have "unreasonably" refused mediation
- 2003 the 30th update of the CPR includes the requirement that parties to any dispute should follow a "reasonable" pre-action procedure intended to avoid litigation, before making any application to court. This procedure should include "genuine and reasonable negotiations with a view to settling the claim economically and without court proceedings". Once again, cost penalties can be applied to those who do not comply⁶

2.2 None of this legislation or case law referred to applies in Scotland. The issues, therefore, for England and Wales are about whether the current policies should be continued or changed. For Scotland, the question is what can be learned from developments in England before making radical changes to legal services in that jurisdiction.

2.3 In March 2001 the Lord Chancellor issued a statement outlining the government's commitment to attempting to resolve all disputes involving government departments

² S1.4 (2.e) Active case management includes "... encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate, and facilitating the use of such procedure".

44.5 (3(a) (ii)) Factors to be taken into account when deciding costs include "... the efforts made, if any, before and during the proceedings in order to try to resolve the dispute". (Parts 1 and 44 Civil Procedure Rules.)

³ Funding Code 2000, criterion 5.4.3 "An application for legal representation or Support Funding may be refused if there are complaint systems, ombudsman schemes or forms of ADR which should be tried before litigation is pursued".

⁴ Current protocols include personal injury, clinical negligence, construction and engineering, defamation, professional negligence and judicial review.

⁵ See appendix B for a summary of these cases and their significance

⁶ See paragraph 4.2 of the protocols practice direction (PPD) on:
www.lcd.gov.uk/civil/procrules_fin/contents/practice_directions/pd_protocol.htm

through ADR wherever possible. All Government contracts now include a mediation option in the procedure for resolving disputes, and recent answers given to parliamentary questions indicate that use of ADR by government departments is increasing. The original statement indicated that the government intended to set an example by using ADR in this way, but no similar statement has been issued by the Local Government Association with regard to local authority disputes, and a recent survey⁷ indicated that ADR is very rarely considered or used when resolving such disputes.

⁷ Further details on www.nabarro.com/uploads/files/238.pdf

3 In which types of dispute is ADR appropriate?

- 3.1 Discussions with advisers, agencies and network representatives, and informal feedback during ASA's 2002 ADR training workshops, indicate that there is a view in the advice sector that there are certain types of dispute for which mediation seems most appropriate; the most obvious are family, neighbour and commercial disputes, where mediation provision is already the most easily available. In these types of dispute the parties have:
- some degree of parity in negotiating – two individual parents, two neighbours, or two commercial organisations
 - an investment in an ongoing relationship of some kind, which could benefit from a co-operative rather than an adversarial approach to dispute resolution
 - a desired outcome which is not necessarily appropriate to a court order, such as an apology, an explanation or a change in behaviour
- 3.2 However, in family mediation it has been accepted for many years that it is essential that there is some form of initial screening to try to ensure that individuals who have been victims of domestic violence are not put in a position where they are trying to negotiate face to face with an abusive ex-partner, as such inequality of bargaining power is unlikely to be appropriate for mediation.
- 3.3 This same concern about inequality is a factor in considering whether mediation is appropriate in other types of dispute. In mediation there is an assumption that the parties are responsible for suggesting, discussing and deciding on solutions to the problem, and that the neutral mediator is responsible only for managing the process of the mediation. There is also therefore an assumption that the parties are competent to negotiate with each other, and to agree to options which will be in their best interests, or refuse options which would put them at a disadvantage. A number of questions have been asked within the advice sector about the development of some types of mediation, where there is a significant inequality between the parties. For example, is mediation appropriate in:
- Disputes about clinical negligence, where a patient without medical information and without access to professional advice, is negotiating with a doctor or other medical personnel on whom s/he may be dependent for future healthcare?
 - Disputes about special educational needs provision, where a parent without legal advice or representation is negotiating with representatives of a school or local education authority on which s/he is dependent for a child's education?
 - Housing disputes, where an individual tenant is negotiating with a representative of the local authority on which s/he is dependent for housing, and where there may be a risk of homelessness?
 - Employment disputes, where an individual who may have been a victim of sexual harassment or workplace bullying is negotiating with a representative of a large organisation on which s/he is dependent for a job?
 - Welfare benefits disputes?
 - Cases where there are mental health issues?
- However, mediators argue that in many cases where one party seems to have less bargaining power, a skilled mediator can enable him or her to negotiate with the apparently stronger party, and that the threat of court action or of a tribunal hearing can redress the balance to some extent.
- 3.4 Power imbalance is not the only factor to take into account when evaluating the most appropriate method for resolving disputes. Other factors include:

- Consistency: unlike court hearings, mediated agreements are based on the decision of the individual parties, and remain confidential. They cannot therefore be used to assess the likely outcome of other similar cases. How important is it in an individual case to be able to predict the likely outcome?
- Precedent: settlements proposed by ombudsmen, or negotiated through mediation, are not binding on other cases, even if they appear similar. Are there cases which involve a significant principle of law, in which it is important to set a precedent which can be relied on in future litigation? Precedent contributes towards consistency in court decision-making, which can also mean that in many cases the resources needed for the dispute are less.
- Urgency: does the client need an immediate solution to prevent homelessness or deportation for example? If so, emergency court proceedings are likely to be more appropriate than mediation or an ombudsman investigation.
- Outcome: court proceedings have a limited number of potential settlements, focussing on financial compensation or the requirement to perform a particular action. Mediated agreements, or settlements proposed by an ombudsman, have a much wider range of options.

3.5 The ASA resource book "Advising on ADR" proposed a series of questions to help clients identify the most appropriate process for resolving their dispute⁸. These questions involve exploring the outcomes which the client may wish to achieve, reality testing what is practical and achievable, and clarifying what is important to the client about the way the dispute is resolved. However, the case of *Hurst and Leeming* (May 2002)⁹ set legal precedents for very restricted reasons for refusing to mediate which would be accepted by a court. In effect, the judge decided that the only justifiable reason for refusing to mediate was where, objectively viewed, mediation had no realistic prospect of success, a reason which he believed was "not easily sustainable in any case". There is a tension here between the approach of the advice sector, which aims to evaluate the factors involved in each case and help a client choose the best dispute resolution process for their specific circumstances, and the approach of the courts in these cases, which increasingly appears to start from a presumption that mediation is normally appropriate, and refusal is difficult to justify. Cases where such decisions have been taken are rare so far, but they involve both commercial cases where the disputants are large organisations, and also cases where the dispute is between an individual or individuals and a large organisation (*Dunnet v. Railtrack, Cowl and others v. Plymouth City Council*¹⁰). In *Dunnet* the cost penalty was applied to the large organisation, but in *Cowl* it was the individuals who were penalised for not agreeing to mediation. It is important that the principles involved are debated before being applied more widely.

3.6 The Funding Code specifies that an application for legal representation or support funding may be refused "if there are complaint systems, ombudsman schemes or forms of ADR which should be tried before litigation is pursued." The CLS APP 1 form asks for details of ADR options tried, or alternatively for reasons why ADR is not appropriate. The implication is that the LSC could refuse funding if ADR has not been tried, or if the reasons are considered inadequate. Although this provision has not yet been implemented, as far as ASA is aware, it seems appropriate that the principles involved here are debated in the context of the other measures to promote ADR which are noted in this paper.

3.7 There is no commonly accepted guidance or checklist on the characteristics of cases which would help advisers, clients or courts identify the criteria which would indicate whether a case is more suitable for mediation, for referring to an ombudsman, or for legal

⁸ Doyle, M. (2000) *Advising on ADR – the essential guide to appropriate dispute resolution*, ASA pg. 21-30

⁹ See appendix B for details of cases

¹⁰ See Appendix B for details of cases

proceedings. One of the consultation questions in the LCD consultation paper on ADR in 1998¹¹ asked whether such a checklist should be created. There was no consensus either for or against in the responses, and no such checklist has been created.

Section 3: In which types of dispute is ADR appropriate? Questions 1 - 6
1. Would it be useful to undertake research into outcomes and satisfaction levels for clients with similar problems using different methods of dispute resolution, in order to make a comparison?
2. Would it be useful for research to be undertaken into the views and experience of advisers and agencies in referring clients to different types of dispute resolution? (There might be a distinction between the views of clients and the views of their advisers as to the effectiveness of different options.)
3. Who should decide whether a case is suitable for mediation, ombudsmen or the judicial process - the client, the legal adviser, the courts or the LSC? What safeguards should/could there be against clients making an inappropriate decision?
4. Should there be a presumption in favour of mediation in cases where the parties are of approximately equal status, and a presumption against mediation where there is inequality of bargaining power?
5. Should there be a commonly agreed checklist or guidelines to help advisers and their clients identify cases most suitable for litigation, mediation or for ombudsman referral, or should it be left to the courts to decide through developing case law?
6. If a checklist were to be created, ASA believes that it should outline the factors which advisers should consider in order to help the client make an informed decision about appropriate dispute resolution. It should not be too prescriptive, as there are too many individual variables in each case which need professional judgement. What key factors should be included?

¹¹ LCD. (November 1999) *Alternative dispute Resolution – A Discussion Paper*, 4.13

4 What is the role of ADR in the litigation process?

4.1 At present people can consider ADR at a number of key points in their decision-making process:

- Before taking any advice – if they have enough personal knowledge of the options and access to relevant information
- When they consult a legal adviser – if the adviser knows enough about it to suggest it as an option
- Before they make an application for court – providing they know about or are advised about the pre-action protocols and procedures. Some pre-action protocols (such as the clinical disputes protocol) specifically require mediation and other ADR options to be considered. The general pre-action procedures outlined in the April 2003 CPR require parties to conduct “genuine and reasonable negotiations with a view to settling the claim economically and without court proceedings”
- When they apply for legal aid for representation
- When they make an application to court – if the court runs a mediation scheme or promotes consideration of mediation options to applicants
- During negotiations with the other party or their representative, either before or during court proceedings – if either party suggests it and the other party agrees
- During the court process – if the judge considers it appropriate, and suggests it to the parties

4.2 The effectiveness of these potential information points depends on knowledge and information about ADR being available to the general public, legal advisers and court staff, and also on cost-effective and accessible ADR schemes being available (see part 8).

4.3 It is important that advisers know enough about mediation and ombudsman schemes to be able to advise clients appropriately at the stage where they are considering their options, in order to promote the best way forward for the client and avoid potential cost penalties at a later stage. However, knowledge about ADR is patchy throughout the advice sector (see part 8).

4.4 It is vital that referral to mediation or ombudsman schemes does not become perceived as or used as a cheaper or quicker route to resolution while by-passing adequate legal advice. Although mediation can be a good way to resolve some disputes, issues are often complex, and problems often come in clusters. ADR is not a substitute for good legal advice which can help clients identify the range of problems affecting them, and the best remedy available for each problem.

4.5 It is also important that legal advice continues to be available to clients during the process of mediation, in order to protect their rights and ensure that they are not disadvantaged by attempting to resolve the dispute directly with the other party. This is particularly important where there is a significant power imbalance, such as that between an individual tenant and a local authority housing department. In family law, legal aid payment to solicitors is available for “help with mediation” - that is, for ongoing legal advice during the mediation process. Legal aid funding is not currently available to solicitors and legal advisers for legal advice during other types of mediation.

4.6 There is also a need to make clear for those considering mediation or other types of ADR whether they still have access to courts or tribunals if they are unable to resolve the dispute, or are unhappy with the agreement reached in mediation. It is important that encouragement to use ADR does not become pressure to avoid litigation. The Human

Rights Act (1998) article 6 (1) states that “in the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing.” It is important that cost, eligibility for public funding, case law or procedural rules do not make it more difficult for individuals to get access to a fair and public hearing as opposed to a private dispute resolution process.

- 4.7 Currently, in most types of mediation parties are still able to use the judicial process if they are unsatisfied with the agreement reached; however, clarity and consistency between different schemes is lacking. In family mediation the process of negotiation is privileged and confidential, and if a written agreement is reached at the end of the process it is not legally binding. Agreements reached in community mediation are not legally binding either, but mediated agreements in civil and commercial cases are considered to be legally enforceable contracts. In the Disability Conciliation Service scheme, if parties are happy with the agreement reached through conciliation they waive their right to court if they want their agreement to represent a full and final settlement of their claim; in Special Educational Needs Mediation the process is confidential until an agreement is negotiated, at which point, if the parties are happy with the agreement, it becomes legally binding; in ACAS conciliation an agreement is legally binding once a COT3 form has been signed.
- 4.8 Whether mediation is suggested by a court, or available through a court-sponsored mediation project is inconsistent throughout the country, often depending on the interests of the local judges and the initiative of local mediation providers. Parties in different areas do not get equal opportunities to consider mediation, as this will depend on the knowledge and views of individual judges or court staff. Some courts have started court-based mediation schemes, but this is on a very ad-hoc basis.¹² There is no nation-wide court policy on this issue, and discussion of mediation as an option is not an automatic step in all court procedures.
- 4.9 A recent Scottish delegation to observe mediation in Maryland, USA, reported positively on a system where mediation was an automatic step in the court process, and therefore part of the mainstream legal system.¹³ Some people within the advice sector consider that this provides a safeguard for parties as courts can check that agreements reached during mediation do not significantly disadvantage an individual without legal representation. However, some people within mediation believe that mediation provided on court premises or as part of the judicial process compromises the independence of mediation and its principle of voluntary participation.

¹² Details of the Birmingham, Leeds and Manchester court mediation schemes can be found on the Association of Northern Mediators website on www.northernmediators.co.uk/schemes.html

¹³ Report on the Scottish Mediation website on www.scottishmediation.org.uk/about/news.asp

<p align="center">Section 4: What is the role of ADR in the litigation process? Questions 7 - 12</p>
<p>7. How can the advice networks best help advisers to inform and advise clients consistently about ADR at the stage where options are considered?</p>
<p>8. How can the advice sector best continue to make the point that ADR is not an alternative to legal advice?</p>
<p>9. How can the government safeguard, through policy, procedures and funding arrangements, the important principles that it will</p> <ul style="list-style-type: none"> • promote and resource legal advice as well as ADR? • ensure access to a fair and public hearing for all where ADR is not appropriate or is rejected by the parties?
<p>10. How can some clarity best be reached and generally communicated on the legal status of mediated agreements?</p>
<p>11. Is it appropriate for mediation to be attached to the court process, or does this compromise its independence? If it is appropriate, should the Court Service have a consistent, nationally applied procedure for encouraging parties to consider mediation? Should provision of court-linked mediation schemes be consistent throughout England and Wales? Should this be a priority for government funding?</p>
<p>12. In many cases mediation or ombudsmen can help parties to resolve some aspects of a dispute, but not all the issues involved. Is it appropriate to explore a more flexible relationship between mediation, ombudsmen and the courts, so that an ADR option could be used to help parties clarify the issues, explore possible resolutions, agree some issues, and then move on to the court or to a tribunal to have outstanding disagreements resolved by a third party? Should courts be able to refer appropriate cases to mediation or to ombudsman schemes? How would this be organised and funded?</p>

5 Should ADR ever be compulsory?

5.1 Currently it is not compulsory to undertake mediation or to make a complaint to an ombudsman before taking a dispute to court. However, the requirements of the Civil Procedure Rules and recent court decisions have in effect made **consideration** of ADR options compulsory, and the provisions of the Funding Code appear to have the potential to make **trying** ADR compulsory for legally aided clients.

5.2 The government are clearly promoting ADR as the first option for dispute resolution, but without:

- Defining exactly what is meant by ADR
- Providing research evidence to demonstrate its effectiveness or cost benefits in different types of dispute
- Making clear and consistent changes to court procedures in order to clarify what is expected of parties at each stage of the legal process, and ensure consistency

The result is that there is a kind of quasi-compulsion at a very early stage for those on legal aid. There is also, in effect, an element of compulsion throughout the pre-hearing stages for all who might stand to lose out in cost penalties by refusing an offer of mediation by the other side.

5.3 Public promotion of mediation by the government began with the provisions of the Family Law Act (1996), and the Green Paper and White Paper that preceded it. The FLA promoted family mediation as a way of resolving residence, contact, financial and property disputes arising out of separation and divorce. This promotion was based on a major study carried out by Newcastle University in the early 1990s, demonstrating that agreements reached through mediation had a better chance of being implemented, and of lasting longer,¹⁴ and also on the Lord Chancellor's belief that there was a greater chance of "saving saveable marriages" if parties went to mediators rather than to solicitors to begin divorce proceedings. The Act introduced a new process for divorce which included a compulsory period of time for resolving disputes, using mediation where possible (though this part of the Act was never implemented). Section 29 of the Act (which became part of the Funding Code when the act was shelved) made it compulsory to meet with a mediator to consider whether family mediation was appropriate to resolve the dispute before legal aid would be granted, but not compulsory to mediate.¹⁵

5.4 This promotion of family mediation has in the last few years widened into a policy of promoting not only other types of mediation, but also all "ADR", as an alternative to court, though there has been no further government sponsored research to evaluate its effectiveness.

¹⁴ Walker, J., McCarthy, P. and Timms, N. (1994) *Mediation: the making and remaking of cooperative relationships*. A summary of the findings is available from a Joseph Rowntree press release on www.jrf.org.uk/pressroom/releases/021096.asp

¹⁵ The Union Internationale des Avocats (UIA) congress in Argentina in 2000 debated whether mediation should be compulsory in certain circumstances, and the report of this meeting includes a summary of experiences in other jurisdictions: www.uianet.org/english/e_summary_tgarby.htm

Section 5: Should ADR ever be compulsory? Questions 13 - 15

13. Should the advice sector support compulsory consideration of mediation or ombudsman schemes before access to legal aid or to court is granted? If so, are the current procedures an appropriate way to ensure that this happens?

14. What evidence does the government need to provide, or what research does it need to commission, to justify its policy of promoting ADR as the first choice for dispute resolution?

15. Are there any circumstances or types of cases in which **use** of mediation or ombudsmen should be made compulsory?

6 How are quality standards for ADR best ensured?

6.1 If mediation and ombudsman schemes are going to be increasingly used by the public, and if advisers are going to increasingly refer clients to such schemes, then it is important for there to be an accessible and easily understandable form of quality standard for ADR.

6.2 There is currently no single standard for mediation services, or for mediators, against which the quality of the service or of the mediation can be assessed. Some of the main tools for checking the quality of mediation providers and ombudsman schemes are summarised here:

- The LSC published their Mediation Quality Mark (MQM) in December 2002, but this covers only family mediation and community mediation services. So far, all not-for-profit and private sector providers who have a contract with the LSC to provide family mediation are quality marked, and the process of application for the quality mark for community mediation services began in January 2003. Individual family mediators providing mediation under LSC contracts also undergo a professional accreditation process through the UK College of Family Mediators
- Mediation UK, the umbrella group for not-for-profit community mediation services, provided a programme of accreditation for services, but it was suspended when work began on the LSC MQM, and only 10% of services are accredited. Some Mediation UK services are intending to apply for the LSC MQM, but others have identified lack of resources as a problem in meeting the quality mark requirements. Mediation UK also provides accreditation for individual mediators, and the LSC and Mediation UK have agreed a target of ensuring that 75% of mediators in quality marked services will be accredited within 3 years
- Major national commercial mediation providers such as the Centre for Effective Dispute Resolution (CEDR), the ADR Group and the Chartered Institute of Arbitrators have their own training and practice standards for mediators, but there are no common national criteria for assessing quality of mediators or service provision

6.3 Currently most public and private sector ombudsman schemes are members of the British and Irish Ombudsman Association, which has four key criteria for recognising a scheme:

- independence of the Ombudsman from those whom the Ombudsman has the power to investigate
- effectiveness
- fairness
- public accountability

However, BIOA does not audit schemes against these criteria, and has no powers to investigate or punish those that do not comply, other than by refusing BIOA membership. The Funeral Ombudsman scheme was recently forced to close as a result of the withdrawal of resources by two major trade organisations, bringing the independence of ombudsmen funded by those they have powers to investigate into question.

6.4 Decisions by public sector ombudsmen are subject to Judicial Review, though few cases have been given permission to proceed to JR in recent years. For example, from 1970 to date only twelve applications for leave for Judicial Review of decisions by the Parliamentary Ombudsman have been made, and only four of those have been successful. Private sector ombudsmen schemes believe that they are not subject to judicial review, though this has not yet been tested in the courts. There is no other procedure for checking the quality of decision-making by ombudsmen.

- 6.5 A recent European Union Green Paper on ADR asked for responses on a number of issues, including mandatory minimum quality standards for providers and practitioners. Responses indicated that some form of EU minimum standards for initial and ongoing training for mediators should be considered, but there are as yet no EU proposals for how this could be organised or funded, or at what level the standards should be set.

Section 6: How are quality standards for ADR best ensured? Questions 16 - 20
16. Does the advice sector have a watchdog role in monitoring clients' experience of mediation and ombudsman schemes in order to contribute to some form of quality assessment? How could such information be collated and evaluated?
17. Should the MQM be extended beyond family and community mediation? If not, how can the quality of all types of mediators and mediation providers be easily assessed by advisers and the public?
18. Should there be government funding to encourage all not-for-profit mediation providers to meet MQM (or other) standards? What about private sector providers?
19. Should there be legislation to require all mediation providers to meet MQM (or other) standards?
20. Should private sector ombudsman schemes be subject to judicial review? In what other ways can the quality of ombudsman schemes be effectively monitored? Should there be an ombudsman for ombudsmen?

7 Should more ADR be funded by the government?

- 7.1 The Government is promoting ADR as a way of attempting to resolve all types of disputes before making an application to court. However, ADR provision is currently very patchy in terms of geography, is less available in certain types of dispute than others, and is funded on a fairly ad hoc basis.
- 7.2 **Geography:** Mediation UK is the umbrella group for community mediation services, which are available throughout the country. Both for-profit and not-for-profit family mediation services are also available throughout the country, though neither community or family mediation providers are as accessible as solicitors or advice agencies, and attending a meeting at mediation service premises may involve a long journey for clients. The Funding Code provides an exemption from the compulsory meeting with a mediator in family cases for those who have to travel more than 90 minutes. Mediation UK estimates that community/neighbour mediation services are currently only available to approximately 60% of the population; some community mediation services are only available to the tenants or residents of the local authorities that fund the service. Some schemes are available only in certain areas, such as the Southwark Arbitration Project, or the IHO tenancy deposit mediation scheme which is currently being piloted in five geographical areas.
- 7.3 Ombudsman schemes deal with investigations by phone and written submissions, therefore geography is not an issue for clients.
- 7.4 **Type of dispute:**
- Commercial: Mediation in commercial disputes is available through a number of national mediation providers, though because of the cost it is not usually viable in small value disputes. Some courts (such as Central London County Court, Exeter, Leeds, Birmingham and Manchester) provide mediation for court applicants at a subsidised cost, though the take-up of this option is still very low
 - Community: Community mediation services are provided by not-for-profit services under Mediation UK, most services are primarily funded by local authorities
 - Consumer: Traders which are members of trade associations or ombudsman schemes provide access to a variety of dispute resolution procedures. Mediation is not widely used - one consumer mediation scheme in Leicestershire has been funded by the CLS Partnership Innovation Budget, and provides advice, information and mediation for consumer disputes
 - Discrimination: the Disability Conciliation Service is run by Mediation UK and funded by the DRC. It provides conciliation for disputes arising under part III (goods and services) and part IV (education) of the Disability Discrimination Act. Employment disputes involving disability discrimination are still dealt with through ACAS. There is no established nation-wide provision for gender and race discrimination disputes
 - Education: Local Education Authorities are required to offer an independent disagreement resolution option for parents in dispute with the authority about provision for special educational needs. In many parts of England and in Scotland local community mediation services, family mediation services and other providers, often in partnerships covering LEA areas, have contracts with LEAs to provide mediation. The Local Government Ombudsman will also investigate maladministration causing injustice with regard to SEN decisions, and the DCS can offer conciliation with regard to disputes under part IV of the DDA covering discrimination in access to education services
 - Employment: ACAS offers conciliation, arbitration and a tribunal system, but mediation in employment disputes is not common. A number of local authorities have been

piloting in-house mediation schemes for employees' grievance procedures, but this is not widespread, and there is also a question about the neutrality of in-house mediators in such schemes. Commercial mediation providers offer mediation in employment disputes, and during the last year 7% of CEDR mediations have involved employment issues. The new Employment Act (2002) will require all employers to make provision for consideration of some kind of conciliation or mediation option within their internal grievance and disciplinary procedures, with the potential for cost penalties at tribunal stage for those who fail to do so. This requirement has not yet been implemented.

- Family: family mediation is available through private sector solicitor mediators and not-for-profit mediation services. All nfp family mediation providers and some private sector providers have LSC contracts to provide legally aided mediation to eligible parties.
- Health care: The clinical disputes pre-action protocol issued by the LCD recommends the consideration of mediation. Some commercial mediation providers offer mediation in clinical negligence and other health care disputes. A pilot scheme for mediation in clinical disputes was set up by the NHS in 1998; the results were open to different interpretations, and the take-up of the scheme was low.¹⁶ The LSC also funded a new pilot project starting in June 2002 for Action for Victims of Medical Accidents (AVMA), CEDR and the NHS Litigation Authority to develop training for mediators and lawyers in clinical negligence disputes, and to establish a panel of specialist mediators in this area. A government white paper on NHS disputes is awaited.
- Housing: there are a number of limited ADR schemes linked to housing issues. The Independent Housing Ombudsman and at least one CAB-run community mediation service provide mediation on tenancy deposit disputes in a limited number of geographical areas. The major problem with the IHO tenancy deposit scheme is that it is voluntary for landlords, and therefore many tenants do not have access to the scheme. Southwark Arbitration Tribunal deals with disputes about disrepair for Southwark residents only, so is very limited in its geographical availability. The LGO will investigate complaints of maladministration from local authority housing tenants, and the IHO will investigate a wide range of complaints about private landlords who are members, and all registered social landlords (who are required to be members)
- Welfare benefits: ADR options are rarely used in this type of dispute.

7.5 **Funding:** Public funding for mediation is not currently organised on a clear or consistent basis.

- Currently family mediation is available to legally aided clients through LSC contracted family mediation services, but LSC contracts are not available to community mediation services.
- Community mediation services are usually funded by Local Authorities, and mediation is therefore usually free to the user. However, this funding is very vulnerable to funding cuts imposed by LAs, and community mediation services have little long term security. LA funding also means that the neighbour mediation service is often restricted to council tenants or local residents.
- Commercial or other mediation costs to clients can be claimed as a disbursement for legally aided clients under the Funding Code, but the cost of commercial mediation and non-subsided family mediation can be high for those not eligible for legal aid.
- Some courts run mediation schemes with subsidised mediation provision (see above), and a pilot LawWorks scheme (in London and Birmingham) provides pro bono mediation for those not eligible for legal aid, but this is only available in certain areas.
- In Scotland, the Scottish Executive funds family and community mediation services, as well as the Edinburgh in-court mediation project.

¹⁶ Overview of the scheme and its results on www.doh.gov.uk/mediation/executive_summary.htm

- Ombudsman schemes are funded by the state (public sector) or the trade organisations concerned (private sector) and are therefore free to the user.
- Court fees are set by the Court Service, with the stated intention of eventually reflecting the real cost of the service. In court cases, there is an established principle that the loser of the case is responsible for the costs of the action for both parties; in mediation, each party is usually responsible for their own costs.

This lack of consistency in costs and public funding means that a decision about which is the best dispute resolution scheme may well be dominated by cost rather than appropriateness for the client.

- 7.6 An ASA survey conducted in 2002 into mediation provision by the advice sector found that only four advice agencies (all CABx) in England and one in Scotland currently provide a mediation service. Citizens' Advice has clear guidelines for bureaux about potential provision of mediation services, in particular regarding the problem of a potential conflict of interest between an adviser and a mediator, and the need for "arm's length" provision of mediation. ASA also found in the 2002 survey a degree of confusion between advice giving, negotiation and mediation in a number of independent advice agencies.¹⁷ ASA believes that the advice sector is not, and should not be, a major supplier of mediation services.

Section 7: Should more ADR be funded by the Government? Questions 21 - 23
21. ASA believes that the advice sector should not be a major provider of mediation services. Is this view supported by advisers, agencies and networks?
22. Should community mediation services be funded by the government in some way? As most neighbour disputes do not come within the scope of Legal Aid funding, how could this best be done?
23. There is a capped budget for Community Legal Service funding for legal services including mediation. Bearing this in mind, and in the light of answers to questions in sections 3 and 4 of this paper, would it be appropriate for Government promotion and funding of mediation to be directed to mediation in certain types of dispute? Which types of dispute would be the most appropriate and why?

21. ASA believes that the advice sector should not be a major provider of mediation services. Is this view supported by advisers, agencies and networks?

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¹⁷ See *Mediation Provision in the Advice Sector* – an ASA briefing published in January 2003. This is available on the ASA website on www.asauk.org.uk

8 How should people get to know about ADR?

8.1 There are two main ways that people might get to know about ADR options:

- General knowledge: this would be effective if there was sufficient education for the general public about ADR, and adequate information widely available on the specific options, so that individuals knew enough to make an informed decision themselves, or to ask their legal adviser for further advice when needed
- Targeted information at the point of need: this would mean that the places where people go when they have a dispute or a justiciable problem, and the workers who provide advice and information, were provided with enough information about ADR options to properly advise clients and help them make an informed decision about how best to proceed with resolving their dispute

8.2 There is very little general knowledge about mediation or ombudsmen schemes. For example, research reviewed in an LCD paper of 1997 indicated that only 47% of those asked had heard of the Local Government Ombudsman, and other schemes had a much lower awareness rating.¹⁸ An unpublished survey carried out for the National Consumer Council by a research group called RSGB Omnibus in March 2003 showed that only 56% of those questioned had heard of “ombudsman schemes that operated in the UK,” and only 37% of those knew anything about what they actually did. Research undertaken by MORI for the Government White Paper “The Ground for Divorce” in 1990 revealed that over half of those questioned had never heard of family mediation, and only 10% knew much about it.¹⁹ Hazel Genn, in *Paths to Justice* (1999)²⁰ found that the results of the study:

“ . . . demonstrated very clearly how little impact the development of mediation, conciliation and other ADR techniques has had on the way members of the public seek to resolve their justiciable problems, or on the suggested strategies offered by those providing advice.”

8.3 The LSC provides a series of leaflets about legal issues, written by the Consumers’ Association. Leaflet number 23, co-written with ASA, covers “Alternatives to Court”, and was updated at the end of 2002. The new edition was published in April 2003, but has not yet been updated on the website.

8.4 Government websites such as *Just Ask!*, and the ASA website *Advicenow* provide some links to sites giving information about mediation or ombudsman schemes, but this information is not uniformly organised or prioritised in an easily accessible way.

Section 8: How should people get to know about ADR? Questions 24 - 25
24. Bearing in mind that there is a capped budget for the CLS, should the government be putting more resources into a general education and information campaign about ADR? If so, how could this best be done?
25. What further role could ADR providers play in increasing public knowledge about mediation and ombudsman schemes?

¹⁸ Goriely, T. and Williams, T. (1997) *Resolving Civil Disputes: choosing between out-of-court schemes and litigation. A review of the Literature*, LCD research series No. 3/97 p.35.

¹⁹ Quoted in: Davis, G. (December 2000) *Monitoring Publicly Funded Family Mediation*, LSC p.223

²⁰ Genn, H. (1999) *Paths to Justice – what people do and think about going to law*, Hart Publishing p.261.

8.5 Targeted information at the point of need would mean that the most common places where people go to get information and advice to deal with potential disputes should be provided with adequate information about ADR. Hazel Genn²¹ found that around 60% of people with a non-trivial problem obtained some kind of outside advice. Her findings identify the following sources of advice:

- Solicitors (24%)
- CABx (21%)
- Other advice agency (2%)
- Ombudsman (1%)
- Law Centres (0.4%)

However, it is far from clear that there is adequate information about ADR options consistently available throughout the advice sector.

8.6 The ASA's ADR project was set up in 1998, funded by the Nuffield Foundation, with the aim of providing information and policy guidelines to the advice sector about ADR. In 2000 ASA published "Advising on ADR", a resource book for advisers and advice agencies on ADR issues.²² It received very positive reviews, and was acclaimed by experts in the field of ADR as a much-needed resource. In his introduction to the book, Lord Woolf wrote that the guide would "encourage and enable advisers to make more appropriate referrals, and to be proactive in identifying where an ADR process might provide a better resolution for their client". A survey in 2002 indicated that nearly 100% of those who had bought the resource book found it fairly or very useful for their work. In order to continue the process of information and education, throughout 2002 ASA ran training workshops on ADR throughout the country, based on the resource book, and aimed at advice agency workers. The training workshops had very good evaluations from those who had attended; 74% of participants thought that overall the course was excellent, and a further 25% thought it was good. However, sales of the book were disappointing, and the take-up of the ADR training opportunities was limited.

8.7 ASA interprets these figures as reflecting a lack of knowledge about ADR within the advice sector, and a still limited understanding of its significance. Anecdotal evidence from the ADR workshops confirmed this:

- Those attending the workshops (a majority were CAB workers) were asked to evaluate their knowledge of ADR issues before attending the training, on a scale of 0 – 5: 63% started with a knowledge base of 0, 1 or 2
- Knowledge of ombudsmen schemes was good in individuals and bureaux that had used them successfully in the past, but not always accurate and often not up to date about timescales and remedies
- Few bureaux or agencies had any systematic procedure for finding and keeping current information about local, regional or national ADR providers. Where local or national providers sent a supply of leaflets these were made available to clients. No bureaux or agencies included ADR issues in their team meetings or in-house training plans
- None of the national advice networks currently includes training on ADR issues in its training programmes for advice workers

8.8 ASA is currently developing a website which will make the key information from the resource guide "Advising on ADR" available on the internet to advice agency workers and to the public. It will also contain up-to-date links with the national websites of ADR providers. This will be the first website to provide an overview of all ADR provision in the

²¹ *ibid* p.83

²² Doyle, M. (2000) *Advising on ADR: The essential guide to appropriate dispute resolution*, ASA

UK, a point which Lord Woolf made about the guide when it appeared in book format. It is hoped that this will provide an easily accessible and free resource to the advice sector, and a single portal where advisers can find information and guidance about ADR options, as well as details of providers. ASA plans to launch the website in 2004.

Section 8: How should people get to know about ADR? Questions 26 - 31
26. How can the advice networks best disseminate relevant information to local bureaux and agencies about ADR in an accessible way?
27. What role should the government play in supporting advisers in being well-informed about ADR?
28. What are the best ways for ombudsmen schemes and mediation providers to work with the advice sector (and lawyers) to provide information and education on their services?
29. What kind of training would best help advisers to understand the issues? Who should provide it? How should it be funded?
30. What should be the ongoing roles of the ASA ADR project?
31. What would you like to see included on the ASA ADR website?

8.9 The Community Legal Service was introduced in April 2000, and one of the tasks given to Community Legal Service Partnerships was mapping local legal services provision and providing a referral protocol to ensure a “seamless service” so that clients can be referred to the most appropriate service for their need. The guidance issued by the LSC for CLSPs provided a definition for legal services which included:

- *The provision of help in preventing, or settling, or otherwise resolving, disputes about legal rights and duties*²³

However, mediation was pretty much invisible in the rest of the CLSP guidance, and has remained an insignificant factor in the mapping and needs analysis activities of most CLSPs. ASA is aware of only two Regional Legal Services Committees that have been involved in mapping ADR provision in their region. Some CLSP referral protocols refer specifically to mediation, but usually only where there is an active mediation provider involved in the local partnership.

Section 8: How should people get to know about ADR? Question 32
32. How could ADR information and options be better incorporated into the CLS?

²³ Guidance and Information for CLSPs Issue 1: December 2000 p.1. This definition is taken from the Access to Justice Act 1998.

9 Appendix A

Glossary of terms and contact details

ACE	Age Concern England	www.ace.org.uk
ASA	Advice Services Alliance – umbrella group for advice networks	www.asauk.org.uk
BIOA	British and Irish Ombudsmen Association	www.bioa.org.uk
CEDR	Centre for Effective Dispute Resolution	www.cedr.co.uk
CLS	Community Legal Service	www.justask.org.uk
Court Service	LCD funded agency responsible for the court system	www.courtservice.gov.uk
DCS	Disability Conciliation Service	www.dcs-gb.net
ECODIR	Electronic consumer dispute resolution	www.ecodir.org
Financial Ombudsman Service	Ombudsman for financial institutions including banks, insurance companies and building societies	www.financial-ombudsman.org.uk
IHO	Independent Housing Ombudsman	www.ihos.org.uk
LCD	Lord Chancellor's Department	www.lcd.gov.uk
LGO	Local Government Ombudsman	www.lgo.org.uk
LSC	Legal Services Commission	www.legalservices.gov.uk
Mediation UK	Umbrella group for community mediation services	www.mediationuk.org.uk
NCC	National Consumer Council	www.ncc.org.uk
NCVO	National Council for Voluntary Organisations	www.askncvo.org.uk
PCA	Parliamentary Commissioner for Administration	www.ombudsman.org.uk
PPD	Protocol Practice Directions	www.lcd.gov.uk/civil/procrules_fin/contents/practice_directions/pd_protocol.htm

10 Appendix B

Key court cases December 2001 – May 2003

These are cases where using or refusing mediation has been a significant factor. All of these reports are taken from the ADR Update which ASA publishes on a quarterly basis, and which provides information on developments in ADR. Published editions are all available on the ASA website on www.asauk.org.uk

10.1 The need to consider ADR before entering the judicial process

A **Court of Appeal** judgement emphasised the need for claimants and their advisers to consider alternative dispute resolution where appropriate, and is in line with the Government's policy of increasingly encouraging potential litigants to avoid court action where possible.

The Times Law report on Tuesday 8th January 2002 covered the case of Cowl and Others v. Plymouth City Council. The Appeal Court was considering an appeal against the High Court's decision to reject an application for Judicial Review to quash a decision by the City Council to close a residential care home. A significant factor in the appeal being dismissed was the applicants' failure to take up an offer of use of a statutory complaints procedure, or to consider other methods of Alternative Dispute Resolution.

The Appeal Court made the point that insufficient attention was paid to the paramount importance of avoiding litigation wherever possible. Lord Woolf suggested that in similar cases, courts might need to hold inter-partes hearings "at which the parties can explain what steps they have taken to resolve the dispute without the involvement of the court."

"Particularly in the case of such disputes, both sides must by now be acutely conscious of the contribution alternative dispute resolution could make to resolving disputes in a manner that both met the needs of the parties and the public, and saved time, expense and stress... Today, sufficient should be known about Alternative Dispute Resolution to make the failure to adopt it, in particular when public money was involved, indefensible."

Although these comments were made in the context of judicial review cases, it will be interesting to see whether they are taken up by the courts in cases generally.

- Court of Appeal
- Cowl and Others v. Plymouth City Council
- Before Lord Woolf, Lord Chief Justice, Lord Justice Mummery, and Lord Justice Buxton
- Judgement December 14th 2001
- Times Law Reports January 8th 2002

10.2 The need to consider ADR and not merely to flatly turn it down

This case concerned a dispute between the claimant who owned a field next to a railway line, where she kept horses, and Railtrack. Railtrack replaced an existing gate which automatically shut by itself leading from the field to the line, with a gate which did not automatically shut by itself. As a result, the gate was left open, and three horses strayed on to the line and were killed. The dispute about liability was taken right through to the Court of Appeal, and in fact the defendant, Railtrack, won at the appeal stage, and the appeal was dismissed. However, at the hearing at which permission to appeal was granted, the court stated that the parties should attempt alternative dispute resolution (ADR). The defendant (Railtrack) refused outright to consider ADR, and though Railtrack effectively won the case at appeal, they were denied their costs of the appeal.

The Judges' reason for this was that Railtrack had flatly refused to consider ADR, contrary to the requirements of the Civil Procedure Rules. CPR 1.4 states that the court should encourage the parties to use ADR, and CPR 1.3 states that the parties are required to help the court in furthering this objective. In the notes to that rule in the Autumn 2001 edition of the White Book Service 2001, the editors write on page 18:

“The encouragement and facilitating of ADR by the court is an aspect of active case management which in turn is an aspect of achieving the overriding objective. The parties have a duty to help the court in furthering that objective and, therefore, they have a duty to consider seriously the possibility of ADR procedures being utilised for the purpose of resolving their claim or particular issues within it when encouraged by the court to do so. The discharge of the parties' duty in this respect may be relevant to the question of costs because, when exercising its discretion as to costs, the court must have regard to all the circumstances, including the conduct of all the parties (r.44.3(4), see r.44.5).”

Parties and their lawyers and legal advisers should therefore recognise that they have a duty to consider ADR, especially where this has been suggested by the court itself. Flatly refusing to consider ADR, as Railtrack did in this case, places the party at risk of adverse consequences when the court decides about costs, as the Civil Procedure Rules require courts to take into account the conduct of the parties (CPR 44.3 (4) + (5)) including attempts to try to resolve the dispute (CPR 44.5 (3)(a)(ii)) when making decisions about costs.

In the light of this case, and the recent case of *Cowl v Plymouth City Council* it seems increasingly important that legal advisers encourage clients to consider ADR before proceeding with court action. ADR might well be an appropriate way to resolve the dispute: if it is not, or if the other party is unwilling to consider it, then of course court proceedings are suitable. However, it is important that legal advisers should record the fact that such a discussion has taken place, and the main reasons for whatever decision has been taken.

- Court of Appeal, Civil Division
- *Dunnett v Railtrack plc* (in railway administration)
- Neutral citation number: [2002] EWCA Civ 303
- Judge: Brooke, Robert Walker and Sedley LJJ
- Hearing date: 22nd February 2002
- Legislation considered: Civil Procedures Rules (CPR 1.3, 1.4)

10.3 A Judge's views on justifiable reasons for refusing to mediate

The Case of *Hurst v. Leeming* was heard in the Chancery Division of the High Court on May 9th 2002. It concerned a claimant who was suing a barrister for professional negligence, following a number of failed attempts to sue the solicitors who had advised him, and who had originally instructed the barrister. The judge, Mr Justice Lightman, had a "frank exchange of views" with the claimant about the merits of the case, and told him frankly that the action had no merit and must be dismissed. In considering the issue of costs, the claimant suggested that as he had proposed mediation, and the defendant had turned it down, no costs should be awarded against him.

In the case of *Dunnett v. Railtrack*, Railtrack won their case at Appeal on legal grounds, but were penalised on costs because they "flatly refused" to consider mediation, despite the recommendation of the judge. The decision was based on the Civil Procedure Rules, which require courts to take into account the conduct of the parties (CPR 44.3 (4) + (5)) including attempts to try to resolve the dispute (CPR 44.5 (3)(a)(ii)) when making decisions about costs.

However, in this case, the judge decided that the defendant was justified in refusing mediation, even though the professional negligence pre-action protocol encourages both sides to consider it, and requires parties refusing to mediate to state their reasons. A number of reasons for refusing mediation were put forward by the defendant, and some of them were rejected by the judge. For example, he said that:

- The fact that heavy costs had already been incurred was not a justification for refusing mediation, though it was a factor to take into account
- The fact that a party believes they have a watertight case is not a justification for refusing mediation (as in *Dunnett v. Railtrack*)
- The critical factor was whether, objectively viewed, mediation had any realistic prospect of success. In this specific case it was appropriate to take into account the state of mind of the claimant who was, in the view of the judge, "obsessed" and "disturbed" and incapable of a balanced evaluation of the facts. The defendant was justified in believing that by reason of the character and attitude of the claimant, mediation had no real prospect of getting anywhere

It is important to note that the judge went on to say "that is not a view which is easily sustainable in any case", and that it was the specific facts of this case which meant that costs penalties for the defendant who refused mediation were not appropriate. Mr Justice Lightman referred to both *Cowl v. Plymouth* and *Dunnett v. Railtrack* in his judgement, as setting a precedent that parties should consider mediation, and that those who refuse mediation without good and sufficient reasons may be penalised. He went on to make it clear that "mediation is not in law compulsory, but alternative dispute resolution is at the heart of today's civil justice system, and any unjustified failure to give proper attention to the opportunities afforded by mediation, and in particular in any case where mediation affords a realistic prospect of resolution of dispute, there must be anticipated as a real possibility that adverse consequences may be attracted."

In the light of this case, and the two recent cases referred to in the course of this judgement, it is vital that legal advisers encourage clients to consider ADR before proceeding with court action, and indeed at any stage during the court proceedings when it is suggested either by the other party, or by the judge. Mediation, or another form of dispute resolution may or may not be appropriate, depending on the circumstances of the case, and the attitude of the parties. It is clear that judges will accept valid reasons for not

wanting to proceed with ADR, but that these reasons must be fully justifiable if the party wishes to avoid a potential cost penalty. Legal advisers should also ensure that the process of discussing the option of ADR, the decision taken about whether to proceed, and the reasons if refusing, should all be clearly recorded on the case file, in order to protect both the client and themselves if it becomes an issue at a later stage of the proceedings.

- High Court of Justice, Chancery Division
- Hurst v. Leeming
- Neutral citation number: [2001] EWHC 1051 (CH)
- Judge: Mr Justice Lightman
- Hearing date: 9th May 2002
- Legislation considered: Civil Procedures Rules (CPR 1.3, 1.4)
- Cases considered: Cowl v. Plymouth City Council and Dunnett v. Railtrack

10.4 Two cases in 2003 confirm the risks of refusing ADR

In March 2003, the case of Leicester Circuits Ltd v Coates Brothers plc was heard in the Appeal court. As in the case of Dunnett v Railtrack an applicant who won his case at appeal was made to pay a substantial part of the costs of the case because they withdrew from an agreed mediation at the insistence of their insurers. The judge said that withdrawal from mediation, just because you think you are in the right, or that it might not succeed, is contrary to the spirit of the Civil Procedure Rules. The argument that mediation was merely a “form of negotiation which came to nothing” was equally unacceptable. He stated that “the whole point of having mediation, and once you have agreed to it, proceeding with it, is that the most difficult of problems can sometimes be, indeed often are, resolved”. The costs of the case from the date of the “unexplained withdrawal” from mediation should therefore be paid by the party who withdrew. “We do not for one moment assume that the mediation process would have succeeded, but certainly there is a prospect that it would have done if it had been allowed to proceed. That therefore bears on the issue of costs”.

In another case, in May this year, the court imposed costs penalties on the Ministry of Defence in a dispute about the meaning of a clause in a tenancy lease. In the Royal Bank of Canada Trust Corporation Ltd v Secretary of State for Defence, the landlord had offered to try to resolve the matter through ADR, but the MOD, the tenant in this case, refused on the grounds that a point of law needed to be established. In fact the MOD won the case, but again were penalised on costs because of their refusal to mediate, particularly bearing in mind the government pledge that departments would use ADR to resolve disputes wherever appropriate, and wherever the other side agreed. In fact, the original pledge by the Lord Chancellor did specify that there may be “disputes where a legal precedent is needed to clarify the law or where it would not be in the public interest to settle”, but it seems from this case that the courts are increasingly restrictive in deciding what is or isn't an appropriate reason to refuse to mediate.