

# **The Role of Mediation in Civil Justice in Scotland**

## **Overview – England & Wales**

**Dr Anna Howard**

*“In my new role as Head of Civil Justice, I intend to try to make sure that **the provision of ADR is at the heart of all parts of the civil justice firmament ... I want to see ADR integrated into every stage of what we call the dispute resolution process. The focus ought to be on resolution rather than dispute.**”*

Sir Geoffrey Vos, “The Relationship between Formal and Informal Justice”, 26 March 2021 at 5 & 8

# Terminology

- *“There is perhaps a linguistic problem: why do we keep on talking about **Alternative** Dispute Resolution? Dispute resolution should be an integrated whole. Mediated interventions should be part and parcel of the process of resolving disputes wherever they arise in our society ... There is nothing alternative about ... mediation”... What I hope to achieve is take the “alternative” out of ADR”*

Sir Geoffrey Vos, “The Relationship between Formal and Informal Justice”, 26 March 2021 at 37 & 38

# Terminology

- NDR – Negotiated Dispute Resolution (The Commercial Court Guide)
- Effective dispute resolution (e.g. Vos at 40)
- Non-court-based dispute resolution (*Churchill*)
- Mediation’s prominent position:

*“strong judicial promotion of mediation has elevated it as the pre-eminent ADR procedure in the resolution of civil disputes.”* Masood Ahmed, “Moving on from a judicial preference for mediation”, (2019) 70(3) Northern Ireland Legal Quarterly 331, 333

# Court's power to order parties to mediate

- *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416
- ***“The court can lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process provided that the order made does not impair the very essence of the claimant’s right to proceed to a judicial hearing, and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost.”*** (at 74)

# ***DKH Retail Ltd and others v City Football Group Ltd [2024] EWHC 3231***

- Court ordered the parties to mediate, against the defendant's wishes
- *“Experience shows that mediation is capable of cracking even the hardest of nuts”* (at 38)
- *“The range of options available to the parties to resolve the dispute through mediation **goes beyond the binary answer a court could provide.** There may be solutions other than yes or no.”* (at 40)
- *“**Postscript:** on 13 January 2025 the parties notified the court that they had settled their dispute.”* (at 44)

# Cost consequences for unreasonable refusal to mediate

- *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576
- “The general rule is that the unsuccessful party is ordered to pay the costs of the successful party (CPR 44.3(2)(a)). The cases in which the question of displacing this rule have been discussed have usually been concerned with the refusal of mediation by the successful party” (at 5)
- Identified non-exhaustive list of factors relevant to whether a party has unreasonably refused mediation (at 16)

# Cost consequences for unreasonable refusal to mediate

- Silence in response to offer to mediate is, as a general rule, unreasonable conduct - *PGF II SA v OMFS 1 Ltd* [2013] EWCA Civ 1288
- No refusal, but party frustrated mediation “by delaying and dragging its feet” - *Thakkar v Patel* [2017] EWCA Civ 117
- January 2026: *Smith and others v Campbell and others* [2026] EWHC 144 (CH) – successful party “primarily responsible for the lack of early-stage ADR”. One of the factors that led to no order as to costs

# Court Rules - Civil Procedure Rules

- Changes to CPR following *Churchill*
- Came into force on 1 October 2024
- “game-changing for civil justice” (Tony Allen)

# Civil Procedure Rules

- CPR 1.1 (The overriding objective)
- (1) These Rules are a procedural code with **the overriding objective of enabling the court to deal with cases justly and at proportionate cost.**
- (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable -
- (f) **promoting or using alternative dispute resolution**

# Civil Procedure Rules

## CPR 1.4 (Court's duty to manage cases)

- (1) The court must further the overriding objective by actively managing cases
- (2) Active case management includes –
- (e) **ordering or encouraging** the parties to use, and facilitating the use of, **alternative dispute resolution**

## CPR 3.1 (The court's general powers of management)

- (2) ... the court may –
- (o) **order the parties to engage in alternative dispute resolution;**

# Civil Procedure Rules

## CPR 44.2 (Court's discretion as to costs)

- Court can take into account parties' conduct when exercising its discretion as to costs (CPR 44.2(4)(a))
- Conduct includes:
- *“whether a party failed to comply with an order for alternative dispute resolution, or unreasonably failed to engage in alternative dispute resolution”* (CPR 44.2(5)(e))

# Family Procedure Rules

- **Family Procedure Rules – Part 3: Non-Court Dispute Resolution**
- Under section 10(1) of the Children and Families Act 2014, parties are required to attend a **Mediation Information and Assessment Meeting (MIAM)** before making a court application for certain family law proceedings
- *“A MIAM is a short meeting that provides information about mediation and other methods of non-court dispute resolution, as options for resolving disputes. A MIAM is conducted by a trained mediator who will consider and explain the potential benefits of different methods of non-court dispute resolution.”* (Practice Direction 3A – at 3)

# Mandatory mediation

- Following Ministry of Justice's consultation on increasing the use of mediation in the civil justice system (July 2022 – October 2022), pilot mandatory mediation scheme introduced for civil claims up to £10,000 as of 22 May 2024 (to run until 21 May 2026)
- Free one-hour telephone mediation
- Data?
- December 2024 – December 2025: 5728 small claims mediations
- 32.2% settled
- <https://www.gov.uk/government/statistical-data-sets/hmcts-management-information-december-2025>

# Mandatory mediation

- *“we also aim later to integrate mediation within the resolution of higher value claims in the County Court: within the fast-track (£10,000-25,000) and multi-track (over £25,000). The integration of mediation within higher value claims will involve referring parties to external mediators, rather than those employed by HMCTS.”*

Government’s response to consultation on “Increasing the Use of Mediation in the Civil Justice System” at 13

# Mandatory mediation

- Family disputes
- Government ruled out mandatory mediation for family disputes (see Government Response, “Supporting Earlier Resolution of Private Family Law Arrangements” (January 2024) at p.18)
- Government funding of **Family Mediation Voucher**, launched in March 2021
- Voucher up to £500 - see <https://www.gov.uk/guidance/family-mediation-voucher-scheme>

# Family Mediation Voucher

- Data?
- *“The scheme [family mediation voucher scheme] has proven popular, and we have now **invested almost £8.7m in it**, with 13,268 vouchers approved as of 20 November 2022. Family Mediation Council survey data from 2,800 cases completed under the scheme suggests that **65% of separated parents reached whole or partial agreement** and did not go on to attend court, and a further 3% only attended court to secure a consent order to formalise their agreement... Mediator surveys further suggested 50% of participants would not have attempted mediation without the financial incentive offered by the scheme.”*

Government’s response to consultation on the Singapore Convention on Mediation, 2 March 2023, at 6.29

# Looking ahead – Digital Justice System

*“we are now on the brink of a revolution in dispute resolution. We are no longer fixated on court-based systems, but we are in the process of creating **a truly holistic Digital Justice System.**”*

*“The vision of the future that lies behind ... the digital justice system ... is that anyone with an issue or dispute, individual, or business, should be able, in this technological era, to go online to be directed to the dispute resolution process that is most appropriate for their problem.”*

Sir Geoffrey Vos “Driving System Change and Addressing Injustice”, 21 June 2023, at 4 & 5.

# Looking ahead - Digital Justice System

- *“In civil, family and tribunals justice, we are already establishing a digital justice system .... A single data set for every dispute will enable early resolution by mediation, ombuds determination, arbitration or, if necessary, transmission to the online court-based dispute resolution platforms that are already established.*

*Sir Geoffrey Vos, “Justice for all, justice for the accused”, 5 February 2026 at 32*

- Alternative - Integrated – Integral?