



COMPULSORY ADR

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INTRODUCTION

1. We have been asked by the Civil Justice Council (CJC) to report on the issues in relation to compulsory ADR. This request is not made in the context of any specific proposals for the introduction or extension of compulsory ADR but in order to inform possible future reform and development in this area. The views expressed here are those of the authors. The report has been shared with the Judicial ADR Liaison Committee and we are grateful for their very helpful input.¹

2. This report addresses two questions:

- **Can the parties to a civil dispute be compelled to participate in an ADR process? (The “legality” question)**

This is fundamentally a question of the law of England and Wales and human rights law in particular.

- **If the answer is yes, how, in what circumstances, in what kind of case and at what stage should such a requirement be imposed? (The “desirability” question)**

We will suggest factors which, in our view, could point to compulsion being appropriate and others which may militate against it. We will not attempt a full review of every possible application of ADR or of compulsion to participate.

We have set out a short summary of our conclusions below.

3. The debate over compulsion has been dominated by the Court of Appeal decision in *Halsey v Milton Keynes* [2004] 1 WLR 3002. In *Halsey*, the Court of Appeal reviewed the role of mediation, in particular, in the civil justice system. Rules were developed around the principle established in *Dunnett v Railtrack plc* [2002] 1 WLR 2434, of penalising victorious parties in costs if they had unreasonably refused to mediate. In

¹ The report and its conclusions have the support of the individual members of the Committee but obviously the organisations and professional bodies whom they represent have not yet responded officially. We hope they will do so in due course.

the course of the judgment, Dyson LJ (as he then was)² who gave the judgment of the Court answered both of the questions posed above (both the “legality” question and the “desirability” question) with a resounding “no”.

4. In relation to the “legality” question, Lord Dyson said this:

“It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court...”

5. In relation to the “desirability” question, he said this:

“...Even if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it. ...If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process. ...if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it. ...the court's role is to encourage, not to compel.”

6. The remainder of this report is structured as follows:

- **Section II** outlines the key concepts applicable to this report, including what we mean by “ADR” and “compulsion” and frames the key issues which fall to be considered in determining whether and how it may be introduced.
- **Section III** addresses the “legality” question. It summarises the cases, extra-judicial commentary and academic literature which consider the decision in **Halsey** and the lawfulness of compulsory ADR more generally. It also identifies areas of civil justice where, despite **Halsey**, a form of compulsory ADR (or

² Although Lord Dyson was a Lord Justice of Appeal at the time that he gave the judgment of the court in *Halsey*, became a member of the Supreme Court and subsequently, was Master of the Rolls, we will refer to him in the remainder of this report as Lord Dyson.

something close to it) has been adopted. It concludes with a brief discussion of where the law stands on the legality of compulsory ADR.

- **Section IV** addresses the “desirability” question. It considers the key arguments made against compulsory ADR (other than legality), including concerns as to its efficacy when participation is not voluntary, and objections based on the relationship between ADR and the court’s constitutional role in developing the law and dispensing justice.

Executive Summary

7. To summarise our responses to the two key questions outlined above:
 - **The legality question:** we have concluded that parties can lawfully be compelled to participate in ADR.
 - **The desirability question:** we think we have identified conditions in which compulsion to participate in ADR could be a desirable and effective development. In doing so we recognise that the compulsory ADR processes which are already part of the civil justice system in England and Wales at a number of points are successful and are accepted.
8. In our view, appropriate forms of compulsory ADR, where a return to the normal adjudicative process is always available, are capable of overcoming the objections voiced in the case law and elsewhere and could be introduced.
9. The rules of civil procedure in England and Wales have already developed to involve compulsory participation in ADR at a number of points. These compulsory processes are both successful and accepted.
10. Provided certain factors are borne in mind in designing the scheme, a procedural rule which requires parties to attempt ADR at a certain point or points, and/or empowers the court to make an order to that effect, is, in our opinion, compatible with Article 6 of the European Convention on Human Rights. The factors requiring consideration whenever compulsion is being considered will include:

- the cost and time burden on the parties;
 - whether the process is particularly suitable in certain specialist areas of civil justice;
 - the importance of confidence in the ADR provider (and the role of regulation where the provider is private);
 - whether the parties engaged in the ADR need access to legal advice and whether they have it;
 - the stage(s) of proceedings at which ADR may be required; and
 - whether the terms of the obligation to participate are sufficiently clear to the parties to encourage compliance and permit enforcement.
11. It is appropriate to permit sanctions for breach of a rule or order requiring participation in ADR. If ADR is no longer “alternative” or external to civil justice, then parties can surely be compelled to participate in ADR as readily as they can be compelled to disclose documents or explain their cases. The sanction for failure to participate may be to prevent the claim or defence continuing, either by making the commencement of proceedings conditional on entering ADR, or empowering the court to strike out a claim/defence if a party fails to comply with a compulsory ADR order at a later stage in the proceedings. Any strike-out could be set aside if there was a valid reason for non-compliance.
12. This is consistent with the use of initial prompts towards settlement in an online procedure and the active role of a case officer or judge in seeking to facilitate settlement.
13. We do not make detailed proposals for reform in this paper, but make three specific observations on the form compulsory ADR might take:

- First, where participation in a suitable and effective form of ADR occasions no expense of time or money by the parties, making it compulsory will not usually be controversial.
- Second, we foresee that greater use of compulsory judge-led ADR processes will prove acceptable, given they are free and appear effective in the contexts in which they are already compulsory.
- Third, compulsory mediation may be considered, provided it is sufficiently regulated and made available where appropriate in short, affordable formats.

II. FRAMING THE DEBATE: WHAT IS COMPULSORY ADR?

14. Perhaps because the compulsion debate has been framed against the decision in *Halsey*, it is customary to think of compulsion in the context of case management in High Court proceedings and mediation as the relevant form of ADR. But it is clear that the question can arise in a huge variety of different types of dispute, involve different forms of ADR and different forms of “compulsion”. Given the variety of contexts in which the question can arise, it is plainly difficult to identify a single simple answer to the questions: how, where, when and in what circumstances is compulsory ADR permissible and/or desirable?

Types of dispute

15. Whether and how the use of ADR can be encouraged or required will vary widely depending on the context, the value of the claim, the different subject matters in dispute and, to some extent, upon whether the parties are likely to be advised or represented. What works in employment cases may not be appropriate in disputes between neighbours, family disputes, commercial court claims or possession proceedings.

Types of ADR

16. We define ADR broadly as including any dispute resolution technique in which the parties are assisted in exploring a settlement by a third party, whether an agent external to the court process (e.g. a mediator) or a judge playing a non-adjudicative role. This might also be through an online system or a combination of an online system and a mediator available as necessary. In such a system the parties at all times

retain the ability to decline to settle and return to the adjudicative process if they choose to do so.³ Within that definition, the most relevant ADR processes will include:

- The archetypal mediation conducted usually over the course of a day by a neutral individual (who may be a commercial provider or may even be a judge).
- Short-form telephone mediations, typically time-limited, as under the Small Claims Mediation scheme.
- Evaluative appraisals, typically, but not necessarily, conducted by a judge, in the form of Early Neutral Evaluations (*ENEs*) and Financial Dispute Resolution hearings in the Family Court.
- Ombudsmen performing a function which may blend elements of conciliation with an evaluation. (Where the ombudsman's recommendation is binding on one or both sides, as it is in several consumer contexts, then as with arbitration the schemes are likely to raise different constitutional questions and to be governed by statute).
- Online processes. These may be as simple as blind bidding systems. They may involve more sophisticated tools such as AI, and may be more proactive in generating or suggesting solutions. These systems may be available *ad hoc*, or they may be built into online court systems and be available and accessible throughout the court process. Online systems may also incorporate stages at which traditional mediation is conducted by a neutral third party.

17. It will be obvious that these processes vary widely as to: (i) the cost and time burden they place on the parties; (ii) the nature and extent of the court's involvement; (iii) the kind of neutral third party who might be involved; and (iv) the kinds of solutions and

³ This definition excludes arbitration even though arbitration is sometimes listed as a form of ADR. Arbitration is an adjudicatory process in its own right and represents a permanent diversion from the court process. It culminates in an award from which there is typically only a very limited right of appeal. Arbitration therefore inevitably raises different issues in relation to constitutionality.

remedies that the process can provide (and the extent to which that differs from what is on offer in ordinary court proceedings).

Forms of compulsion and timing

18. Compulsion need not simply involve the exercise of a case management power by a judge in a given case. Compulsion can equally well be achieved by simply mandating participation in ADR as an automatic requirement for commencing or proceeding with litigation.
19. Thought must also be given to the stage of proceedings at which parties may be required to attempt ADR. In some areas of civil justice, it might be appropriate to make ADR a pre-condition to issuing a claim, or a compulsory part of the early stages of the procedure: such early-stage ADR may promote swift and cost-efficient resolution of the dispute. In other kinds of cases – particularly legally and factually complex claims – it may be that ADR can only sensibly take place later in the process, for example after the case has been pleaded, after at least some disclosure has taken place, or even after the exchange of witness statements. On the other hand, these are the very cases in which costs can rapidly outstrip the sums in issue.
20. Moreover, a “hard-and-fast” procedural rule might be workable only in some areas; in others, it may be better to leave it up to the court or tribunal to decide precisely if and when to make an order compelling parties to enter ADR. As Sir Geoffrey Vos, the Master of the Rolls, has recently commented, in some cases it might be appropriate to direct parties towards ADR more than once in the same set of proceedings.⁴

⁴ *The Relationship between Formal and Informal Justice*, speech to Hull University, Sir Geoffrey Vos MR, 26 March 2021 (at [46]). See [here](#).

III. CAN THE PARTIES TO A CIVIL DISPUTE BE REQUIRED TO PARTICIPATE IN AN ADR PROCESS WITHOUT THEIR CONSENT?

21. Before we can embark on any significant reform in this area, it is important to answer the obvious preliminary question: can parties lawfully be forced to participate in ADR without their consent?
22. In this section, we examine the way this question has been answered in the courts of England & Wales, juridical commentary and the academic literature. We focus in particular on Article 6 of the Convention, which is generally perceived to be the key potential impediment to compulsory ADR across the civil justice landscape. We also identify the specific contexts in which, exceptionally, some form of compulsory ADR has already been adopted in certain kinds of proceedings. Finally, we draw the strands together and discuss the current status of the law.

Halsey and Deweer

23. As we have already mentioned, the “legality” question was addressed in ***Halsey***, in the context of the mediation of a High Court action and was answered in the negative. We note that the views expressed did not strictly form part of the Court’s reasoning. The full citation from the Article 6 part of the Judgment in ***Halsey v Milton Keynes General NHS Trust*** [2004] 1 WLR 3002 is as follows (at [9]):

“It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court. The court in Strasbourg has said in relation to article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms that the right of access to a court may be waived, for example by means of an arbitration agreement, but such waiver should be subjected to “particularly careful review” to ensure that the claimant is not subject to “constraint”: see Deweer v Belgium (1980) 2 EHRR 439, para 49. If that is the approach of the European Court of Human Rights to an agreement to arbitrate, it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6.”

24. As this quotation makes clear, Lord Dyson’s conclusion on the Article 6 issue relied heavily on the European Court of Human Rights’ decision in **Deweer**. It is therefore helpful briefly to outline the facts of that case and the Strasbourg Court’s conclusions.
25. Mr Deweer was a Belgian butcher who faced a prosecution over a breach of trading regulations. He was told that if he paid a fine, he could avoid the prosecution and also avoid the immediate closure of his shop. Mr Deweer paid the fine, but brought proceedings against the Belgian authorities alleging that his rights under Article 6 had been denied because he had not been given a fair trial. The Strasbourg Court agreed. It found (at [49]-[54]) that although a party could (in principle) waive his right to a criminal or civil trial by entering into an agreed settlement, Mr Deweer’s waiver had been procured by constraint, and was not voluntary. The consequences of having his business closed were so severe that the butcher had no practical alternative but to agree to pay the 10,000 francs; in effect, the state had inflicted a penalty on the butcher without a trial.
26. It is fair to say that the Strasbourg Court’s decision was focused on the specific circumstances in **Deweer**, and does not obviously address the broader question of whether parties can *ever* be compelled to submit to ADR. Various commentators have doubted whether **Deweer**, properly understood, supported Lord Dyson’s conclusions in that regard in **Halsey**. At the very least, Lord Dyson’s reference to arbitration is hard to understand, as the **Deweer** case was not about arbitration (it merely makes an oblique reference to the Belgian courts’ view of arbitration clauses). Arbitration is a “cul de sac” which removes disputes from the court process entirely, unlike the forms of ADR considered here; it raises quite different issues in terms of access to the court.

Subsequent case-law in England Wales

27. A series of judgments from the Court of Appeal took different views on the status of **Halsey**. In **Ghaith v Indesit Co UK Ltd** [2012] EWCA Civ 642, Longmore LJ, in a postscript to his judgment which criticised the parties for failing to mediate prior to the hearing of the appeal, noted that there was a new mediation pilot in the Court and said (at [26]): “the Court has ... decided that any claim for less than £100,000 will be

the subject of compulsory mediation.” However, this comment is something of an outlier. The **Halsey** orthodoxy was swiftly reaffirmed by Lloyd LJ in **Swain Mason v Mills & Reeve** [2012] EWCA Civ 498 at [76]: “*In Halsey, the Court of Appeal was concerned to make clear that parties are not to be compelled to mediate.*”

28. Thereafter, Sir Alan Ward gave the leading judgment in **Wright v Michael Wright (Supplies) Ltd** [2013] C.P. Rep. 32, in which he queried whether **Halsey** required revision.

“3. ... [The first instance judge] attempted valiantly and persistently, time after time, to persuade these parties to put themselves in the hands of a skilled mediator, but they refused. What, if anything, can be done about that? ... You may be able to drag the horse (a mule offers a better metaphor) to water, but you cannot force the wretched animal to drink if it stubbornly resists. I suppose you can make it run around the litigation course so vigorously that in a muck sweat it will find the mediation trough more friendly and desirable. But none of that provides the real answer. Perhaps, therefore, it is time to review the rule in Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002, for which I am partly responsible, where at [9] in the Judgment of the Court (Laws and Dyson L.JJ. and myself), Dyson L.J. said:

“It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court.”

Was this observation obiter? Some have argued that it was....

Does CPR r.26.4(2)(b) allow the court of its own initiative at any time, not just at the time of allocation, to direct a stay for mediation to be attempted, with the warning of the costs consequences, which Halsey did spell out and which should be rigorously applied, for unreasonably refusing to agree to ADR? Is a stay really “an unacceptable obstruction” to the parties’ right of access to the court if they have to wait a while before being allowed across the court’s threshold? Perhaps some bold judge will accede to an invitation to rule on these questions so that the court can have another look at Halsey in the light of the past 10 years of developments in this field.”

29. The White Book notes that in some cases, the courts have drawn a distinction between orders for compulsory mediation and orders which direct parties to *attempt* mediation.⁵ Thus, in **Uren v Corporate Leisure (UK) Ltd** [2011] EWCA Civ 66 Smith LJ

⁵ White Book 2021 Vol. II, paragraph 14-7.

remitted an action for retrial in the High Court and stated (at 73): “*I would also direct that, before the action is listed for retrial, the parties should attempt mediation.*”

Moreover, in **Mann v Mann** [2014] EWHC 537 (Fam), Mostyn J considered the implications of **Halsey** and Sir Alan Ward’s comments in **Wright** in deciding whether to order a stay for a specified period, expressly for the parties to consider mediation. He accepted that he could not compel the parties to mediate, but such an order – even when supported by an “Ungley” order which made clear that an unreasonable refusal to participate in the ADR would attract a costs sanction – did not amount to unlawful compulsion (see [16]-[17], [36]). Norris J applied the same logic to boundary disputes in **Bradley v Heslin** [2014] EWHC 3267 (Ch), stating at [24]:

“The Court cannot oblige truly unwilling parties to submit their disputes to mediation: but I do not see why, in the notorious case of boundary and neighbour disputes, directing the parties to take (over a short defined period) all reasonable steps to resolve the dispute by mediation before preparing for a trial should be regarded as an unacceptable obstruction on the right of access to justice.”

30. The court’s power to make an order for a stay of its own motion is embedded in CPR 26.4, which provides that if a court considers a stay for the parties to attempt ADR is appropriate, it will “*direct that the proceedings, either in whole or in part, be stayed for one month, or for such other period as it considers appropriate*” (CPR r.26.4(2A)).⁶
31. More recently, in **Lomax v Lomax** [2019] 1 WLR 6527, the Court of Appeal considered **Halsey** in the context of an appeal concerning the court’s power to order ENE where one party did not consent. The case turned on the interpretation of CPR 3.1(2)(m), which makes express provision for the court to order ENE. It may:

“take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case.”

32. Lord Justice Moylan (with whom Rose and McCombe LJ agreed) gave the leading judgment. At [21], Moylan LJ noted that it was put to the court that, following **Halsey**,

⁶ Similarly, in proceedings started at the County Court Business Centre and the County Court Money Claims Centre, authority to stay proceedings for up to 28 days for ADR is expressly granted to Legal Advisers (Paragraph 15, Schedule to Practice Direction 2E).

the court had no power to order a party to submit their dispute to ADR if they did not consent. However, he distinguished **Halsey** at [25] on the basis that it dealt only with the power to order parties to submit to mediation. He went on:

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

33. Although he had implied that mediation, as opposed to ENE, might not be compellable, Moylan LJ noted further that *“the court’s engagement with mediation has progressed significantly since **Halsey v Milton Keynes** was decided”*, and extolled the virtues of compelling parties to engage in some form of ADR:

“29. Looking at the issue more generally, as I have already described, the great value of a judge providing parties with an early neutral evaluation in a case has been very well demonstrated in financial remedy cases. Further, the benefits referred to above have been demonstrated not only in cases where the parties are willing to seek to resolve their dispute by agreement and are, therefore, willing to engage in an FDR. In my experience and that, I would suggest, of every other judge who has been involved in financial remedy cases, the benefits have also been demonstrated frequently in cases in which the parties are resistant or even hostile to the suggestion that their dispute might be resolved by agreement and equally resistant to the listing of an FDR. As Norris J said in Bradley v Heslin [2014] EWHC 3267 (Ch) at [24]:

‘I think it is no longer enough to leave the parties the opportunity to mediate and to warn of costs consequences if the opportunity is not taken. In boundary and neighbour disputes the opportunities are not being taken and the warnings are not being heeded, and those embroiled in them need saving from themselves.’”

34. At [31] he concluded that the court could order ENE even against a party’s will, and allowed the appeal.

35. Although Moylan LJ noted Lord Dyson’s conclusions on Art. 6 in **Halsey** at [11] of his judgment, he did not address the Article 6 issue at any great length. Nonetheless, it is notable that at [26] of his judgment, he considered the implications of a compulsory

ENE order for the parties right of access to the court, and concluded that it was not an “unacceptable constraint” on that right.

36. Last year, in *McParland v Whitehead* [2020] Bus LR 699,⁷ the then Chancellor, Sir Geoffrey Vos gave a short judgment following a Disclosure Guidance Hearing under the new Disclosure Pilot regime. He raised the possibility that, following *Lomax*, a court may make an order for compulsory mediation (although such an order was not necessary in the instant case):

“42. Finally, the court encouraged the parties to proceed to a privately arranged mediation as soon as disclosure had occurred... In this connection, I mentioned the recent Court of Appeal decision of Lomax v Lomax [2019] 1 WLR 6527 to the parties. The question in Lomax was whether the court had the power to order parties to undertake an early neutral evaluation under CPR r 3.1(2)(m). It was held that there was no need for the parties to consent to an order for a judge-led process. I mentioned that Lomax inevitably raised the question of whether the court might also require parties to engage in mediation despite the decision in Halsey v Milton Keynes General NHS Trust [2004] 1 WLR 3002. In the result, the parties fortunately agreed to a direction that a mediation is to take place in this case after disclosure as I have already indicated.”

Subsequent European Decisions

37. *Rosalba Alassini* [2010] 3 C.M.L.R. 17⁸ was a preliminary reference to the Court of Justice from Italy. Customers brought proceedings against two telephone companies, seeking damages for breach of contract, under the EU Universal Service Directive.⁹ The telephone companies contended that the actions were inadmissible as the applicants had not first attempted mediation in accordance with the Italian implementing legislation. The Italian law made such legal actions conditional on a prior attempt to achieve an out-of-court settlement. If the parties declined to submit to mediation, then they would forfeit their legal right to bring proceedings before the Court.

⁷ Master McCloud has provided detailed guidance on the procedure for conducting judicial ENE in the Queen’s Bench Division in *Telecom Centre (UK) Limited v Thomas Sanderson Limited* [2020] EWHC 368 (QB).

⁸ Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, judgment of 18 March 2010 ECLI:EU:C:2010:146.

⁹ Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive) [2002] OJ L108/51.

38. The Italian court made a preliminary reference to the Court of Justice, which asked whether the Italian law complied with Article 6 and Universal Services Directive.¹⁰ The Court first considered whether the Italian legislation contravened the principle of effective judicial protection of rights under EU law. It held that it was compliant with that principle:

- “52. As regards the principle of effectiveness, it is admittedly true that making the admissibility of legal proceedings conditional upon the prior implementation of an out-of-court settlement procedure affects the exercise of rights conferred on individuals by the Universal Service Directive.*
- 53. However, various factors show that a mandatory settlement procedure, such as that at issue, is not such as to make it in practice impossible or excessively difficult to exercise the rights which individuals derive from that directive.*
- 54. First, the outcome of the settlement procedure is not binding on the parties concerned and thus does not prejudice their right to bring legal proceedings.*
- 55. Secondly, the settlement procedure does not, in normal circumstances, result in a substantial delay for the purposes of bringing legal proceedings. The time-limit for completion of the settlement procedure is 30 days as from the date of the request and, on expiry of the deadline, the parties may bring legal proceedings even if the procedure has not been completed.*
- 56. Thirdly, for the duration of the settlement procedure, the period for the time-barring of claims is suspended.*
- 57. Fourthly, there are no fees for the settlement procedure before the Co.re.com. In the case of the settlement procedures before other bodies, there is nothing in the documents before the Court to suggest that they entail significant costs.”*

39. The Court then turned to Article 6, and whether the Italian legislation was a proportionate restriction on the right to a fair trial of the customers seeking to claim from the telephone companies. It concluded that it was proportionate, given the legitimate cost- and time-saving aims:

¹⁰ Rosalba Alassini, [21].

- “61. ... it should be borne in mind that the principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in arts 6 and 13 of the ECHR and which has also been reaffirmed by art.47 of the Charter of Fundamental Rights of the European Union ...
62. In that regard, it is common ground in the cases before the referring court that, by making the admissibility of legal proceedings concerning electronic communications services conditional upon the implementation of a mandatory attempt at settlement, the national legislation introduces an additional step for access to the courts. That condition might prejudice implementation of the principle of effective judicial protection.
63. Nevertheless, it is settled case law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed...
64. However, as the Italian Government observed at the hearing, it must first be noted that the aim of the national provisions at issue is the quicker and less expensive settlement of disputes relating to electronic communications and a lightening of the burden on the court system, and they thus pursue legitimate objectives in the general interest.
65. Secondly, the imposition of an out-of-court settlement procedure such as that provided for under the national legislation at issue, does not seem—in the light of the detailed rules for the operation of that procedure, referred to in [54]–[57] of this Judgment—disproportionate in relation to the objectives pursued. In the first place, as the Advocate General stated in point 47 of her Opinion, no less restrictive alternative to the implementation of a mandatory procedure exists, since the introduction of an out-of-court settlement procedure which is merely optional is not as efficient a means of achieving those objectives. In the second place, it is not evident that any disadvantages caused by the mandatory nature of the out-of-court settlement procedure are disproportionate to those objectives.
66. In the light of the foregoing, it must be held that the national procedure at issue in the main proceedings also complies with the principle of effective judicial protection, subject to the conditions referred to in [58] and [59] of this Judgment”.

40. In *Menini v Banco Popolare Società Cooperativ* [2018] C.M.L.R 15,¹¹ the Court of Justice provided further detail in relation to what it considered to be the necessary features of a scheme which renders access to the courts conditional on attempting ADR:

“60. ... the ADR procedure must be accessible online and offline to both parties, irrespective of where they are.

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

The wider discussion of *Halsey*

41. In a speech to the solicitors’ firm SJ Berwin in June 2007,¹² Mr Justice Lightman described Lord Dyson’s comments in Art. 6 in *Halsey* as “wrong and unreasonable”, for two reasons:

“(1) the court [in Halsey] appears to have been unfamiliar with the mediation process and to have confused an order for mediation with an order for arbitration or some other order which places a permanent stay on proceedings. An order for mediation does not interfere with the right to a trial: at most it merely imposes a short delay to afford an opportunity for settlement and indeed the order for mediation may not even do that, for the order for mediation may require or allow the parties to proceed with preparation for trial; and (2) the Court of Appeal appears to have been unaware that the practice of ordering parties to proceed to mediation regardless of their wishes is prevalent elsewhere throughout the Commonwealth, the USA and the world at large, and indeed at home in matrimonial property disputes in the Family Division.”

¹¹ Case C-75/16, judgment of 14 June 2017, ECLI:EU:C:2017:457.

¹² *Mediation: An Approximation to Justice*, Mr Justice Lightman, 28 June 2007, at [8].

42. Lightman J's criticisms were echoed in a speech by Lord Phillips (then Lord Chief Justice) which he made at the International Centre for Dispute Resolution in New Delhi in March 2008.¹³

"The facts of Deweer are a long way away from the imposition of a mediation order. That case demonstrates that a coerced agreement that involves waiving the right to trial will infringe Article 6.

Does it follow from Deweer that it is contrary to the citizen's right to have his dispute resolved by a court to compel him first to try to reach an agreement by mediation? I think that it depends what you mean by 'compel'. This involves considering the sanctions if the litigant does not comply with the court order to attempt mediation. It is of the essence of mediation that the parties are prepared to consider foregoing their strict legal rights. What of the litigant who simply refuses to contemplate this? Who when the court orders him to attempt mediation simply says 'no I won't'. If you commit him to prison for contempt of court then you can truly say that you are compelling him to mediate. What if you say – unless you attempt mediation you cannot continue with your court action. In quite a lot of jurisdictions mediation is ordered by the court on this basis.

I think that if a litigant in Europe was subjected to such an order, refused to comply with it and was consequently refused the right to continue with the litigation, the European Court of Human Rights at Strasbourg might well say that that he had been denied his right to a trial in contravention of Article 6. ... Whether such a scenario is a very likely is another matter. Experience shows that where a court directs the parties to attempt mediation they usually comply."

43. Thus, Lord Phillips' view was that compulsory ADR *might* infringe Article 6, depending on the sanctions for non-compliance: an order preventing a party continuing with its case if it did not attempt ADR might cross the line.
44. In a speech to the Civil Mediation Council National Conference a few months after Lord Phillips' speech,¹⁴ Sir Anthony Clarke MR also opined on **Halsey** and Article 6. He turned first to Lightman J's point that compulsory ADR was a feature of other legal regimes in Europe and elsewhere, which he felt was "*clearly right*":

¹³ *Alternative Dispute Resolution: An English Viewpoint*, speech by Lord Phillips of Worth Matravers of 29 March 2008, pp13-15.

¹⁴ *The Future of Civil Mediation*, speech by Sir Anthony Clarke MR, 8 May 2008.

“9. ... A number of European states such as Belgium and Greece, both signatories to the Human Rights Convention, have introduced compulsory ADR schemes without, as far as I am aware, any successful Article 6 challenges. Equally, Germany’s federal states can legislate to require litigants to either engage in court-based or court-approved conciliation prior to the formal commencement of litigation. The European Union itself acknowledges in Article 3.2 of its Directive on Mediation that the encouragement it offers to mediation is made ‘without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not impede the right of access to the judicial system. . .’ Equally, compulsory ADR schemes have been introduced in a number of US jurisdictions. For instance, New York has established mandatory arbitration in claims coming before a trial court where an official arbitration programme has been established for claims of a certain value. Similar schemes have been introduced in other states, for instance California. The federal district courts can also require parties to mediate disputes under a power granted by section 652 of the Alternative Dispute Resolution Act (28 USC).

10. Taken together, what could be described as the European and US approach to ADR, appears to demonstrate that compulsory ADR does not in and of itself give rise to a violation of Article 6 or of the equivalent US constitutional right of due process. This suggests, admittedly without hearing argument, that the Halsey approach may have been overly cautious. This was not a point that was investigated in detail in Halsey and (who knows) may be open to review – either by judicial decision or in any event by rule change.”

45. Sir Anthony then turned to **Deweer**, and the statement of the Strasbourg Court at [49] of its judgment that “any measure or decision alleged to be in breach of Article 6 calls for careful review”:

“13. This statement is a long way away from declaring that mediation is contrary to Article 6 ECHR.”

46. Ultimately, some years later (in a speech in 2010), Lord Dyson concluded that his comments on Article 6 in **Halsey** had been wrong, although he defended his overall decision:¹⁵

“What I said in Halsey was that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction to

¹⁵ A word on *Halsey v Milton Keynes*, speech by Lord Dyson given at the CI Arb’s Third Mediation Symposium in October 2010, and published in the journal *Arbitration* (2011, 77(3), 337-341).

their right of access to the court in breach of art.6. I think those words need some modification not least because the European Court of Justice entered into this territory in March this year in the case of Rosalba Alassini.”

47. Lord Dyson went on to discuss the European Court of Justice’s decision in *Rosalba Alassini*,¹⁶ to which we have referred above. As we mentioned, the Court held that Italian telecoms legislation which required customers suing phone companies to attempt mediation did not breach Article 6. Lord Dyson also noted Article 5(2) of the EU Mediation Directive,¹⁷ which provides that Member States may make mediation compulsory provided it does not prevent parties from exercising their right of access to justice. On that basis, Lord Dyson conceded: *“it is clear that in and of itself compulsory mediation does not breach art. 6.”*
48. Accordingly, Lord Dyson accepted that some of Lord Clarke’s criticisms of the decision in *Halsey* were well-founded, but suggested that there could still be circumstances in which compulsory ADR would breach Article 6:

“[Lord Clarke] said “we can safely say that there may well be grounds for suggesting that Halsey was wrong on the Article 6 point”. He put that in a typically restrained way, but it is interesting to see that he based that conclusion on two points; the first was a European point that compulsory mediation existed in other Member States, and secondly an understanding of mediation, unlike arbitration, as forming part of court proceedings. I see the force of these points which have now been reinforced as I say by recent developments in Europe. It is undoubtedly true that compulsory mediation exists in the legal order of the Council of Europe Member States and indeed other common law jurisdictions, but this is not in itself proof that ordering parties to mediate or forfeit their access to the court would not breach art.6 and I emphasise, “or forfeit their access to the court”. That would be a very strong thing to do. As far as I am aware this issue has not been litigated in other jurisdictions. As regards the second point made by Lord Clarke, that mediation is an integral part of the civil procedure rights process, I would say that it all depends on the nature of the court’s order for mediation. In his view, at worst, an order to mediate delays the trial if mediation is unsuccessful. I think that the form of compulsory mediation which Lord Clarke appeared to be describing, namely where courts order parties to mediate, but do not penalise them for not taking part in the mediation (so that at worst the trial is delayed) would certainly not fall foul of art.6. If Lord Clarke was suggesting that mediation does not breach art.6 because it is an integral part

¹⁶ *Rosalba Alassini v Telecom Italia* [2010] 3 C.M.L.R. 17.

¹⁷ Directive 2008/52/EC of the European Parliament and Council on certain aspects of mediation in civil and commercial matters.

of civil procedure process, I would say that this does not necessarily mean that an order for mediation involves no breach of art.6. It all depends on the terms of the court order for mediation.”

49. Indeed, later in his speech he sought to minimise the implications of *Rosalba Alassini*:

“... it is one thing to compel parties to consider mediation, it is quite another to frogmarch them to the mediation table, specifically, if the result of a refusal to be frogmarched is to deny them access to the courtroom. The Judgment of the ECJ in Rosalba Alassini does not rule that compulsory mediation will never breach art.6. I am of the view that in some circumstances where, for example, the costs of mediation were very high (and it is interesting that in the Rosalba Alassini case the compulsory mediation was free) compelling a party to mediate could still perhaps be considered a denial of access to justice.

...

“The ECJ has settled the art.6 issue for cross-border cases. Its decision has not settled the question of whether compulsory mediation coupled with a denial of access to the court would breach art.6. But I accept that it would appear to have settled the art.6 issue in a case where there is merely a preliminary step which the parties are required to go through which, if unsuccessful, would leave them free to litigate; and as I said earlier, I would no longer adhere to what I said about art.6.”

50. Lord Dyson concluded that overall, his view had not changed since **Halsey** and he continued to believe that ADR should not be compulsory.

51. Lord Neuberger took a similar line to Lord Dyson in a 2015 speech to the Civil Mediation Conference in 2015.¹⁸ Whilst he did not refer expressly to the Article 6, he did suggest that compulsory mediation could interfere with a fundamental constitutional right of access to the courts, if it was used as a substitute for litigation:

“9. The right of access to courts is fundamental and, like all rights, it has to be genuinely available to all. And so mediation must not be invoked and promoted as if it was always an improved substitute for litigation. People plainly should have the constitutional right to refuse to agree terms because they want their day in court: by the same token, they have the same constitutional right to refuse to mediate if they want their day in court. The delivery of justice is a fundamental constitutional function of any civilised government: it is not just a service, while the provision of mediation is just a service – and, I must emphasise, that in

¹⁸ Keynote Address: A View From On High, Civil Mediation Conference 2015, Lord Neuberger, 12 May 2015.

no way denigrates mediation. Indeed, in practical terms, although I have characterised it as a disadvantage, it can be said to be an advantage, because the constitutional role of the courts leads to significant constraints on litigation which do not apply to mediation (or indeed to arbitration): the requirement for public hearings, the relatively inflexible rules and the constraint on remedies are but three examples.”

Academic Discussion

52. Recent academic opinion appears to favour the view that provided parties retain the right to proceed to court at all stages participation in ADR can be made compulsory without any breach of Article 6.¹⁹ A slightly different view is taken by Shipman in *Compulsory Mediation: The Elephant in the Room* (CJQ 2011 30(2), 163-191), which concludes a lengthy analysis by suggesting that provided sanctions for non-compliance are proportionate and considered there should be no breach of Article 6.

Existing examples of compulsion to use ADR in the civil justice system in England & Wales

53. It seems to us important as context for this paper to note that at a number of points – despite the fact that the views expressed in *Halsey* have not subsequently been doubted by any appellate court – litigants are already to a greater or lesser extent being compelled to take part in ADR. As the CJC Working Party on ADR observed:²⁰

“If compulsory ADR represents a constitutional rubicon then it does seem to have been crossed a number of times already.”

54. A detailed summary of existing procedural rules which establish some form of compulsion – or at least encouragement – to engage in ADR is set out in **Appendix I**. In brief summary, the following are worthy of note:

- **Early Neutral Evaluation (ENE) hearings:** ENE involves a neutral individual with relevant legal expertise – typically a judge – convening a hearing in which s/he expresses an opinion about a dispute (or one element of it). As noted at

¹⁹ Ahmed, *A more principled approach to compulsory ADR* (JPIL 202, 4, 277-289. Feehily, *Creeping Compulsion to mediate, the Constitution and the Convention* (NILQ 69(2): 127-146).

²⁰ ADR and Civil Justice, Interim Report, October 2017, para 8.5.8.

paragraph 31 above, in the contentious probate case *Lomax v Lomax* the Court of Appeal held that under CPR 3.1(2)(m), the Court has the power to order the parties to attend an ENE without their consent, in an appropriate case (and ENE is particularly likely to be appropriate in financial remedy cases).

- **Financial Dispute Resolution (FDR) appointments:** FDR is a court-assisted negotiation process in family cases, where the parties appear before a District Judge in a without prejudice meeting/hearing, intended to facilitate settlement between parties and “*reduce the tension that inevitably arises in family disputes*”.²¹ It is a standard – and compulsory – part of the procedure to be followed when a party makes an application for a financial remedy under Part 9 FPR, and usually takes place following the first directions hearing. Both parties must attend the FDR unless the Court orders otherwise.
- **The new RTA Small Claims Protocol:** from May 2021, claimants in very low-value (less than £5,000) personal injury claims arising from road traffic accidents must follow a new pre-action protocol. Before initiating a claim, the claimant must provide certain information via a new, dedicated online portal, and – in cases where liability is admitted – the defendant’s insurer must make a settlement offer within a set time frame. The Protocol makes clear that parties are expected to attempt to settle the claim, and failure to follow the Protocol by either party will result in costs consequences in any related litigation. Moreover, the claim can move back and forth between the portal and the court. Where the parties at different stages of the process fail to reach an agreement within the portal – for instance on liability – the case goes back to the court. Then, if the court determines there is liability, the default setting is that the case has to return to the portal.²²

²¹ Paragraph 6.1, Family Practice Direction 9A.

²² See PD27B, paragraph 2.16(2), which provides: “Where the court finds that the defendant was either liable in full or in part and does not reallocate the claim under sub-paragraph (3) below, the court— (a) will stay the proceedings and direct that the parties use the procedure set out in sections 7, 8 and 9 of the RTA Small Claims Protocol to progress the claim”. Thus, the court will direct the parties to use the portal to progress the claim: essentially a form of order that the parties must submit to engage in ADR.

- **ACAS Early Conciliation:** a person may not present an application to institute Employment Tribunal proceedings (of almost all types) without first obtaining an early conciliation certificate from ACAS. This is not truly *compulsory* ADR: the individual is required only to provide contact information to ACAS, and may refuse to engage in any conciliation process from the outset. However, it amounts at least to compulsory initial contact with an ADR provider.²³ Indications are that ACAS is frequently successful in developing a substantial engagement with the parties. Sometimes the ACAS involvement can continue over weeks or months and ACAS remain available throughout the life of any proceedings.
- **Mediation Information and Assessment Meetings (MIAM):** A MIAM is a short meeting²⁴ conducted by a trained mediator, intended to provide information to litigants about mediation as a means of solving disputes. Before making certain applications in family proceedings (including private law applications relating to children and proceedings for a family remedy), an applicant must attend a MIAM. The MIAM process is more demanding of litigants than the ACAS process: the applicant is obliged to meet with a trained mediator, and his/her application will not be progressed without that taking place (unless one of the limited exemptions such as that for cases with a risk of domestic violence applies). However, like the ACAS process, it is obviously not a full-blown mediation. Only the applicant is required to attend (the respondent is merely “expected” to participate and generally does not do so). The mediator provides information about the process and together with the party considers whether mediation would be useful or appropriate in the immediate case.
- **Localised small claims “DRH²⁵” hearings:** Certain County Court hearing centres in Hampshire, Dorset, Wiltshire and Romford have established a process whereby cases in the small claims track are called in for a compulsory

²³ The Employment Tribunals in England and Wales also run a judge led facilitative mediation for complex cases in addition to the pilot commenced in Birmingham which is referred to below.

²⁴ During the Covid-19 pandemic, MIAMs have generally been conducted via videoconference in lieu of an in-person meeting.

²⁵ “DRH” stands for Dispute Resolution Hearing.

conciliation and case management hearing led by a District Judge (akin to an ENE). Attendance is compulsory, and parties who do not attend may have their claims struck out. For the moment, this is a localised strategy which is still far from universal across the County Court jurisdiction. However, these so-called “DRH hearings” appear to have enjoyed success at least in certain hearing centres (such as Birmingham, where settled rules and standard paperwork have been developed). The hearings are within the scope of a review by a working party of the Civil Justice Council chaired by HH Judge Cotter, which has recently published its interim report.²⁶

- **West Midlands Employment Tribunal pilot:** Since July 2020, Tribunal Judge Lorna Findlay has overseen a pilot ADR scheme for employment cases listed for trial lasting more than 6 days. A 2-hour ADR hearing is listed six weeks after the exchange of witness statements, in which a judge trained in mediation (who will not conduct the trial) seeks to narrow the issues and facilitate settlement. If the parties do not reach agreement at the hearing, the judge may also list the matter for a longer judicial mediation hearing. Like the ENE hearing ordered in *Lomax*, these hearings constitute a judge-led form of ADR that is “baked in” to the ordinary court process; albeit they occur somewhat later in the proceedings. The pilot is ongoing and has been extended to a number of other regions.
- **Court of Protection:** we understand that compulsory DRH hearings are held in the Court of Protection in property and affairs cases on a similar model to FDRs in family proceedings.

55. As Sir Anthony Clarke MR noted in extra-judicial comment (see paragraph 44 above), various jurisdictions, within the Council of Europe and beyond, have adopted forms of compulsory ADR. The lessons which may be learned from experiences in other jurisdictions are considered in Section III below. However, it is worth briefly outlining the key features of such schemes, which – at least in their present form – do not

²⁶ *The Resolution of Small Claims: Interim Report*, Civil Justice Council, April 2021.

appear to have encountered significant issues in terms of parties' Convention or constitutional rights of access to the courts:

- **Italy:** Italian judges have the power to order parties to attempt mediation in any civil dispute, requiring them to file a request for mediation with an accredited mediator within a set time-frame. Moreover, in some kinds of civil disputes – including certain real estate and family matters – parties are required to attend an “initial mediation session” as a pre-condition for pursuing their claim. This consists of a meeting with a mediator in which s/he explains the mediation process and its benefits, and is similar to MIAMs in English family proceedings, albeit under the Italian system, both parties are required to attend (and the court may impose financial sanctions for non-attendance).²⁷
- **Ontario:** the Ontario Mandatory Mediation Program applies to most kinds of civil disputes initiated in the state (excluding family matters). Absent a court order to the contrary, parties are required to attempt a mediation, convened by an approved mediator, within 90 days of the filing of the first defence. If a party refuses to participate, they will likely be liable for the wasted costs of the mediation and may be subject to further sanctions by the court.²⁸
- **Australia:** At the Federal level, the Civil Dispute Resolution Act 2011 (Cth) requires parties to take “genuine steps” to resolve their dispute before commencing proceedings (although it does not specify what those “steps” must involve but rather sets out a non-exhaustive list of as to what *may* constitute genuine steps). Courts in all Australian jurisdictions have the power to refer parties to mediation without their consent, and in some States, parties to certain kinds of disputes are required to attempt ADR before they are permitted to commence proceedings. The courts have the power to impose

²⁷ *Italy's 'Required Initial Mediation Session': Bridging The Gap between Mandatory and Voluntary Mediation*, Leonardo D'Urso, International ADR Vol. 3, 4 April 2018 (available [here](#)).

²⁸ [Public Information Notice - Ontario Mandatory Mediation Program - Ministry of the Attorney General \(gov.on.ca\)](#), accessed 25 March 2021.

costs sanctions on parties who refuse to mediate, and may even sanction those who attend a mediation, but fail to participate in good faith.²⁹

- **Greece:** Since 2010, there have been several attempts to legislate for compulsory mediation in Greece. The current law finally came into force in 2020, making it compulsory for parties to attend an information session with a mediator (similar to a MIAM) in any claim with a value of over EUR 30,000, and certain specific disputes (including trademark disputes and some family proceedings) irrespective of value. Failure to comply can result in the action being declared inadmissible and/or costs sanctions.³⁰

Discussion: where does the law now stand on whether parties can be compelled to participate in ADR?

56. The firm views briefly expressed in *Halsey* about Article 6 have proved to be the beginning of a debate rather than the conclusion. It would be helpful if the issue were to be addressed afresh by an appellate court and/or the legislature as soon as possible so that procedural reform can proceed with some certainty. What follow here are the views of the authors.
57. It is, we think, now accepted that the Strasbourg authority cited in *Halsey* does not mean that compelling parties to engage in ADR will necessarily violate Article 6. Moreover, there is a tension between treating an order to mediate as a breach of Article 6 but then giving the court power when dealing with costs to penalise a party financially for unreasonably failing to mediate. That was an approach which Lord Dyson held to be permissible in *Halsey*,³¹ and has been followed in other cases,³² although in our experience, the use by courts and tribunals of their powers to impose costs sanctions for unreasonable conduct has been mixed. However, one might view

²⁹ [Commercial mediation in Australia | Commercial mediation – a global review | Linklaters](#), accessed 25 March 2021.

³⁰ [Mandatory mediation in Greece – the saga continuous - Kluwer Trademark Blog \(kluweriplaw.com\)](#), accessed 25 March 2021.

³¹ [2001] 1 WLR 3002, [16]-[19].

³² See, for example *Garritt Critchley v Ronnan* [2014] EWHC 1774 (Ch) where the court held that an unreasonable refusal to engage in mediation justified an order for indemnity costs. See, generally, the discussion in the White Book 2021 Vol. II at paragraph 4-14.

the distinction between orders for compulsory ADR, which are unlawful under *Halsey*, and orders which require parties to attempt ADR under threat of costs sanctions, an approach which Lord Dyson held to be permissible, and which was considered permissible in *Mann v Mann* and *Bradley v Heslin*, to be a relatively fine one.

58. The authors of this report suggest that any form of ADR which is not disproportionately onerous and does not foreclose the parties' effective access to the court will be compatible with the parties' Article 6 rights. If there is no obligation on the parties to settle and they remain free to choose between settlement and continuing the litigation then there is not, in the words of Moylan LJ in *Lomax*, "an unacceptable constraint" on the right of access to the court. We think that the logic of the *Lomax* decision is capable of applying to other forms of ADR as well as ENE.
59. The logical corollary of the above analysis is that an order for participation in an ADR process that was disproportionately expensive or took an excessively long time, or was otherwise burdensome would obstruct access to the court and breach Article 6. We note that in *Rosalba Alassini* the Court of Justice attached importance to the fact not only that the parties retained a free choice as to whether to settle or not but also that the ADR process was free and caused no delay to the ultimate resolution. The Court did not suggest those were *pre-conditions* for compliance with Article 6, and we would not go that far: what matters is that any cost and delay is *proportionate*.
60. Subject to that important proviso, we think the balance of the argument favours the view that it is compatible with Article 6 for a court or a set of procedural rules to require ADR.
61. Nevertheless, the issue of sanction requires special consideration. The theme of some of the arguments against compulsory mediation is that parties might be struck out or sanctioned for failing to comply and that sanction would breach Article 6. Both Lord Phillips and Lord Dyson have suggested that in order to stay on the right side of the Article 6 line, courts could order parties to engage in ADR, but refrain from penalising them if they do not take part.

62. In our view, that approach is overly cautious; a voluntary obligation is not a *legal* obligation. Courts and tribunals routinely make orders requiring parties to do things that they would prefer not to do such as give disclosure and answer requests for further information. Complying with such orders is a condition of continuing their claim or defence. Defaulting parties are liable to be struck out if they are guilty of serious disregard of such orders. What the “no-sanction compulsory ADR” approach contemplates is a situation in which only orders of the court directed to the successful completion of a contested trial are worthy of sanction.
63. That is not attractive. ADR can no longer be treated as external, separate, or indeed alternative to the court process. For our part, an order that is made requiring participation in ADR should be enforced and parties who fail to attend in breach of such an order should be sanctioned. If the parties failed to attend an FDR presumably they could be sanctioned.³³ If the **Lomax** parties had failed to appear at the Early Neutral Evaluation, presumably they would have been sanctioned.³⁴
64. Further, it is no great step from the kind of order made in **Mann v Mann** and **Bradley v Heslin** (which, as noted in paragraph 29 above, stayed proceedings for a specific period and directed the parties to take all reasonable steps to attempt ADR) to an order compelling the parties to do so. The **Mann** and **Bradley** orders were supported by the threat of costs sanctions for non-compliance, and it would seem odd if that tool were not equally available to a court if it went one step further and required the parties to enter into an ADR process.
65. The issue is less stark where the participation in ADR is not compelled by a specific order of the court, but rather is a required procedural step under the rules applicable to the particular procedure. If you fail to attend a MIAM in family proceedings or fail to contact ACAS in employment proceedings the claim is simply not allowed to proceed further. This is a matter of sequencing to a large extent. The “defaulting” party is denied its remedy as surely as if it had issued and then been struck out. It is

³³ Anecdotally, we gather that in most cases if a party fails to attend (which may well happen because they have left the jurisdiction) the matter is simply listed for final hearing.

³⁴ We are aware of one case in which a party attended a mediation without its insurers in breach of an agreed mediation order. They were made to pay the costs of the wasted exercise.

somewhat academic whether the sanction for not engaging in ADR is categorised as a punishment and whether the obligation stems from a court order or procedural rules. In all cases the obligation is a precondition to obtaining a binding adjudication from the court.

66. In our view, we do not understand how orders could be made for ADR against the background that it was understood by all that no consequence followed, or sanction applied, if the order was disregarded.
67. Moreover, there seems no reason why the sanction for non-compliance with an order or a procedural rule should not be striking out the claim/defence. As we note above, there are a number of (presently limited) circumstances in which litigants are liable to be denied access to court if they disregard a rule or a direction of the court for participation in ADR. The most striking of the examples listed above and in Appendix I is the mass listing of small claims cases for review and ENE in certain County Courts (the so-called DRH hearings) where non-attendance (which occurs fairly frequently) is dealt with by striking out the claim (or defence as appropriate). We are not aware that this has given rise to unease in the professions or more widely. There are a range of procedures under the CPR where automatic sanctions, and judgments in default, can be set aside by courts exercising their discretion, including when there is a good reason for the non-compliance. Such procedures could be adapted to deal with the obligation to participate in ADR as well. In meritorious cases where a case has been struck out for non-attendance at a DRH we understand that the Birmingham practice is that the strikeout should be set aside. If appropriate a costs sanction could always be substituted.

Beyond Article 6: are there other legal impediments to compulsory ADR?

68. Thus far, this report has focused very much on whether compulsory ADR can comply with Article 6. That echoes the debate about compulsory ADR that has played out in the caselaw and elsewhere, which – as discussed above – has focused on the same issue.

69. The authors are not aware of any other legal principle – whether in legislation or at common law – which may impede the introduction of compulsory ADR generally. In 2015, Lord Thomas LCJ (speaking extra-judicially) raised a question as to whether diverting too many disputes away from the courts would be compliant with principles articulated in the Magna Carta,³⁵ but his concerns were directed primarily at procedures which removed the role of the court from disputes entirely (like arbitration). There is nothing in his reading of the Magna Carta that would suggest that introducing compulsory ADR as an essential part of the court procedure would contravene fundamental principles about the proper provision of justice through the court system.
70. However, clearly there may be some kinds of disputes, and some forms of ADR processes, where the mechanics of introducing compulsory ADR would require amendments to primary legislation. Pre-commencement obligations may also require a statutory basis, given the limits on the court’s pre-action jurisdiction. Issues may also arise in Tribunal jurisdictions, which are creatures of statute and where aspects of the procedural rules may be embedded in primary legislation. The issue will require jurisdiction-by-jurisdiction analysis.

³⁵ *The Legacy of the Magna Carta: Justice in the 21st Century*, Lord Thomas LCJ, speech to the Legal Research Foundation, 25 September 2015 (at [17]-[21]).

IV. IN WHAT CIRCUMSTANCES, IN WHAT KIND OF CASE AND AT WHAT STAGE SHOULD ADR BE IMPOSED?

71. If as we suggest above unwilling parties could lawfully be required to participate in ADR, then should rule-makers or individual judges impose such requirements and if so when?

The general debate

72. Much of the debate about the desirability of compulsion is focused on compulsory mediation. Before reviewing that debate, we would re-emphasise that this is only part of the picture.
73. For the most part, the discussion is reflected in the passages quoted already in relation to the Article 6 issue. After the Article 6 passage in **Halsey** quoted above (see paragraph 23) Lord Dyson goes on to say this as to the desirability of compelling parties to mediate:

“10. If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process. If a judge takes the view that the case is suitable for ADR, then he or she is not, of course, obliged to take at face value the expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR. But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it.”

74. Indeed, parties’ reluctance in the face of compulsory ADR appears to have scuppered a previous pilot, the Automatic Referral to Mediation (or “ARMS”) scheme, trialled in the Central London County Court in 2004-5. 1,232 randomly selected claims were referred to mediation under the threat of costs sanctions for failure to comply, although parties were given the right to apply to the court for an opt-out albeit with a warning that this would only rarely be granted. Despite that warning, parties in

around 80% of the cases that were referred to mediation objected, requiring considerable District Judge time to deal with opt-out applications. Only 172 cases were actually mediated, with a settlement rate of 53%.³⁶

75. The failure of the ARMS pilot scheme has been attributed to an unfamiliarity with the mediation process.³⁷ In truth it operated less as a compulsory scheme than as an opt-out scheme. It may be that 15 years later, unfamiliarity will pose somewhat less of a problem. But there are still major challenges ahead in ensuring that sufficient information about and understanding of the relevant form(s) of ADR is available to litigants.
76. In his *Review of Civil Litigation Costs Final Report* dated 1 December 2009,³⁸ Lord Justice Jackson noted that whilst ADR was not appropriate in every case, it was a “*highly efficacious means of achieving a satisfactory resolution of many disputes*” and was under-used. However, ultimately he came out against making ADR compulsory, recommending instead that judges should merely *encourage* ADR (particularly mediation) by directing the parties to consider it and imposing costs sanctions for unreasonable failures to engage:

“3.4 ... In spite of the considerable benefits which mediation brings in appropriate cases, I do not believe that parties should ever be compelled to mediate. What the court can and should do (in appropriate cases) is (a) to encourage mediation and point out its considerable benefits; (b) to direct the parties to meet and/or to discuss mediation; (c) to require an explanation from the party which declines to mediate, such explanation not to be revealed to the court until the conclusion of the case; and (d) to penalise in costs parties which have unreasonably refused to mediate. The form of any costs penalty must be in the discretion of the court. However, such penalties might include (a) reduced costs recovery for a winning party; (b) indemnity costs against a losing party, alternatively reduced costs protection for a losing party which has the benefit of qualified one way costs shifting.”³⁹

³⁶ See *ADR and Civil Justice: Interim Report*, the Civil Justice Council ADR Working Group, October 2017 (available [here](#)).

³⁷ *Ibid.* paragraph 8.9.

³⁸ Available [here](#).

³⁹ Pages 361-62

77. Six years later, Lord Justice Briggs noted that the courts continued to resist compulsory ADR in his *Civil Courts Structure Review: Interim Report* of December 2015, and suggested this was “as it should be”:⁴⁰

“2.86. The relationship between the civil courts and the providers of ADR has undergone fundamental development during the last thirty years but, save in certain respects (described below), it has now reached a relatively steady state. I would describe it as “semi-detached”. The civil courts do a reasonable amount to encourage parties to settle their disputes by an appropriate form of ADR, but do not as yet act as primary providers of it, save in certain modest respects. Thus most judges will, at the case management stage, provide a short stay of proceedings to give the parties space to engage in ADR. The courts penalise with costs sanctions those who fail to engage with a proposal of ADR from their opponents. But the civil courts have declined, after careful consideration over many years, to make any form of ADR compulsory.

2.87. This is, in many ways, both understandable and as it should be. First, the civil courts exist primarily, and fundamentally, to provide a justice service rather than merely a dispute resolution service. As I have said, the fact that the civil courts will provide and enforce a just outcome to civil disputes within a reasonable time is a fundamental foundation for the effectiveness and approximation to justice of the dispute resolution services available from ADR providers, for the reasons given earlier in this chapter.

78. Those “reasons” were as follows:

“2.23. ... the availability of an affordable recourse to an expert, experienced and impartial court for the obtaining of a just and enforceable remedy in reasonable time remains an essential guarantor of the rule of law, for at least six main reasons. First, the very existence of access to civil justice forms an essential constitutional foundation for respect for civil rights, and the performance of civil duties, in a law-abiding national culture. It is in short the guarantor of the rule of law in the civil context. Secondly, the higher civil courts continue to develop and declare the law, against an increasingly complex background of domestic and European legislation. Thirdly, the court strictly upholds and applies the law, whereas other ADR systems frequently use different criteria, such as the fair and reasonable test applied by the Financial Ombudsman Service. Fourthly, the court underpins most forms of voluntary ADR. Mediation would potentially yield justice to the richer, more powerful or risk-tolerant litigant if the weaker party could not refuse an unjust offer by saying: “see you in court”. Early neutral evaluation would be meaningless unless it was a reliable prediction of the just outcome in court. Fifthly, there are gaps in the effectiveness of ADR and regulation which can only be filled by a

⁴⁰ Available [here](#).

court, as a last resort. Finally the court is the place for enforcement of agreements to settle disputes made during ADR.”

79. This echoes concerns raised by Professor Hazel Genn in her 2008 Hamlyn Lectures,⁴¹ who cautioned against over-zealous attempts to divert civil and commercial disputes into private dispute resolution (including compulsory ADR). She concluded:

“The challenge is in understanding that, in civil justice at least, there is an interdependency between the courts as publicisers of rules backed by coercive power, and the practice of ADR and settlement more generally. Without the background threat of coercion, disputing parties cannot be brought to the negotiating table. Mediation without the credible threat of judicial determination is the sound of one hand clapping. A well-functioning civil justice system should offer a choice of dispute resolution methods. We need modern, efficient civil courts with appropriate procedures that offer affordable processes for those who would choose judicial determination. This is not impossible. But it requires recognition of the social and economic value of civil justice, an acknowledgement that some cases need to be adjudicated, and a vision for reform that addresses perceived shortcomings rather than simply driving cases away.”⁴²

80. Drawing together the strands, this commentary points to a number of potential concerns about the introduction of compulsory ADR. First, there is a risk it might not work, either because the parties are simply intransigent or because they do not know enough about it, and are therefore unlikely to engage in the process. Second, at a more fundamental level, there is a concern that pushing more disputes into ADR undermines the value of the adjudicative system, which is the foundation on which the effectiveness any form of ADR ultimately relies.
81. In our view, these concerns are not decisive. As to the first point, querying the efficacy of compulsory ADR: much has been written about the effect of compulsion on settlement, without a clear picture emerging. Professor Genn’s analysis of the failed ARMS pilot scheme led her to conclude that *“parties are more likely to settle at mediation if the parties enter the process voluntarily rather than being pressured into the process”*.⁴³ However, the practical concerns raised by Professor Genn and the others quoted above appear to be rooted largely in principled objections to the idea of

⁴¹ Genn, H 2008 *Judging Civil Justice*, Cambridge University Press (available [here](#)).

⁴² *Ibid*, p.125.

⁴³ *Ibid*, p113.

compulsory ADR, rather than empirical evidence of failure. A more recent Civil Justice Council report on ADR⁴⁴ noted the difficulty of measuring the success of compulsory ADR, but took a more positive view:

“7.19. The much-debated question whether evidence from overseas experience shows settlement rates suffering in compulsory systems is very difficult to answer definitively.

7.20. In Lord Woolf's interim report he noted that the evidence from the United States suggest that mediation was less effective where it was compulsory. Indeed supporters of the principle of voluntariness will often assert that settlement rates suffer where the parties do not attend of their own volition. Intuitively this may seem not unlikely.

7.21. But other evidence suggests that there may be no real difference in settlement rates. Thus in Maine one study showed that 43% of compulsory and 42% of voluntary cases settled. There is also an oft-cited body of Australian statistics from a set of schemes, four of which were voluntary (for example the New South Wales Department of Fair Trading Scheme) and four of which were mandatory (for example the New South Wales Farm Debt Mediation Act). The schemes show various settlement rates between 70% and 90% but there was no correlation between voluntariness and success. But none of these are scientific experiments and comparisons are very difficult between schemes with different subject areas.

7.22. Ultimately a better guide for us may be the limited domestic experience of members of the working party who have mediated with parties who attend unwillingly (often because of an ADR clause in a contract). This shows that in a surprisingly large number of cases they are in fact drawn into the process, become engaged and frequently settle.”

82. Anecdotally, mediators also report that settlement rates did not suffer in the period after the decision in **Dunnett** (where the court first held it could penalise victorious parties in costs where they unreasonably refused to mediate).
83. Lack of public familiarity can be said to weigh in favour of introducing compulsion rather than against it. Greater education about the process and its advantages are essential. But few litigants will find the concept of an FDR or DRH hearing a familiar or

⁴⁴ See *ADR and Civil Justice: Interim Report*, the Civil Justice Council ADR Working Group, October 2017 (available [here](#)).

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

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

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

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

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

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

87. Looking, as we must, at ADR more widely it is inescapable that compulsion to participate is now an accepted and successful part of the system, at a number of points. It has been introduced in response to particular challenges in particular jurisdictions and has not been the subject of either legal challenge or public or professional disquiet. The introduction of these measures has not been surreptitious but equally has not attracted melodrama. Some of the compulsory ADRs, such as perhaps MIAMs, have their critics in various respects and may well be capable of improvement. But we would suggest that it is not the element of compulsion that is the focus of that criticism.
88. The overseas experience of compulsion, which we have touched upon in paragraph 55 above, shows that in jurisdictions not dissimilar to England and Wales (such as Ontario) there are now long-established and successful arrangements for participation in ADR to be the default in all cases across a wide range of civil disputes.
89. ADR also appears to enjoy widespread uptake and success in certain online marketplaces. For example, the auction platform eBay operates an online “Resolution Centre”, which provides a form of private arbitration⁴⁶ to buyers and sellers using its platform to resolve disputes arising from issues such as (for example) a buyer’s failure to pay, a seller’s failure to deliver a product and inaccurate product descriptions. Strictly speaking, the eBay process is not compulsory ADR: it is not a pre-requisite to, and nor does it displace, a party’s right to initiate ordinary proceedings against the counterparty.⁴⁷ However, it will often be the only realistic option for resolving the low-value disputes that typically arise on the eBay platform, given the costs (and potential jurisdictional issues) of issuing court proceedings. More broadly, it is worthy of note as an example of a simple ADR procedure which appears to have enjoyed very significant

⁴⁶ [Resolution Centre - eBay](#). Details on how eBay’s dispute system works are available [here](#), but in brief, parties are encouraged to communicate with each other to resolve disputes. If the complaint is not resolved within 3 business days, it can be escalated to eBay, which will assess the information provided by the parties in relation to the complaint and come to a decision within 48 hours. That decision can be appealed to a final decision-maker within eBay.

⁴⁷ See [User Agreement | eBay](#) (accessed 25 March 2021).

take-up amongst eBay users: a 2014 article⁴⁸ suggested the eBay Resolution Centre processes more than 60 million claims per year globally.⁴⁹

Our approach: the relevant factors

90. As we stated in section II the question posed here is not a single question but a myriad of different questions. We do not seek here to set out a comprehensive set of prescriptive factors or requirements.
91. We think it is critical to look at those areas in which elements of compulsion have been introduced successfully and are accepted in our jurisdiction. Why have they been successful and what lessons can we draw?
92. In the course of future reforms it seems to us that certain critical questions will arise when we consider putting greater pressure on parties to participate in ADR or compelling them to do so. We consider each in turn below.

Is the form of ADR proposed or required too burdensome or disproportionate in terms of cost or time?

93. This issue has already arisen in the context of the Article 6 discussion, but it is worth reiterating that litigants should not be required to engage in ADR which is a disproportionate burden on their time or resources.
94. It need not be. At the extreme, consider an online process that simply prompted the party at an appropriate stage or stages, to consider settlement and consider making a blind bid or communicating an offer to the other side. It might also extend to suggestions made by the case officer or the supervising judge at later stages. Those could be compulsory: the party would have to address those questions before they could continue with the claim or to defend it. However, the time spent will be minimal

⁴⁸ *eBay's De Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers*, Del Duca, Rule and Rimpfel, *Arbitration Law Review* 2014 Vol. 6, 10.

⁴⁹ In another context again, the International Chamber of Commerce (*ICC*) has encouraged commercial parties towards mediation by published a series of model clauses for commercial contracts in which parties agree to mediate under the ICC's Mediation Rules before commencing court or arbitration proceedings. Of course, this is not compulsory mediation *per se*, but encourages parties to make firm commitments in that regard at the outset of their commercial relationship. See [here](#).

and the costs burden almost nil. The starting point for all of these discussions is obviously that ADR should reduce the ultimate burden in terms of cost and time imposed by disputes on individuals, businesses and the community.

95. Of the existing examples of compulsion listed above only a MIAM imposes a direct cost on the parties. Any subsequent mediation takes place privately and the cost falls upon the parties, but the compulsory MIAM session is obviously short and limited in scope; that represents a conscious decision not to require the parties to engage in a full mediation process. Legal aid is available in some circumstances.
96. The others, all forms of ENE, FDR, DRH, ACAS etc are free to the parties, although if the parties are legally represented there may well be an additional cost, and participation will involve a time cost for the parties themselves (which may be significant in complex disputes).
97. Privately provided mediation services cause more difficulty in this regard, unless they are publicly funded. Unless that is the case, the fees may represent a disproportionate cost in many low value cases. But if fixed cost mediation schemes continue to develop for use in low value claims this objection may lose its force.
98. In overseas systems which have a compulsory initial mediation meeting – such as Italy – that meeting is very low cost but any full-blown mediation which ensues will require a fee.⁵⁰ In other jurisdictions, such as Ontario, there is a roster of approved mediators who will carry out the compulsory mediation at set rates.⁵¹

Are particular specialist jurisdictions better suited to compulsion than general litigation?

99. In some kinds of cases, the value of a neutral third party may lie primarily in their impartiality and ability to manage emotionally charged situations. FDRs and ACAS conciliation are good examples of specialist areas where a group of particular issues repetitively arise, where the emotional level may well be high and the resistance to

⁵⁰ See paragraph 55 above. There is a small administrative fee for the initial mediation session (40 Euros for claims below a value of 250,000 Euros, and 80 Euros above).

⁵¹ [Public Information Notice - Ontario Mandatory Mediation Program - Ministry of the Attorney General \(gov.on.ca\)](http://www.gov.on.ca).

compromise considerable. Boundary and neighbour disputes may well belong in the same category, as noted in *Bradley v Heslin*. Contentious probate may also be an example. An experienced neutral person, whether a judge, an ACAS official or a specialist mediator can be hugely effective in these cases and yet some element of compulsion may be needed to achieve appropriate uptake.

Is there sufficient confidence in the neutral person, the ADR provider?

100. If we are going to compel participation in an activity, we need to be confident as to who is providing the service and what is involved. Many of the overseas systems that compel mediation have court rosters of approved mediators who can be engaged if the parties fail to agree on their own choice.⁵²
101. Where the neutral or the ADR process involved is court-sponsored or is indeed a judge it is plainly easier to justify compulsion. ACAS conciliators are highly trained specialist employees.
102. The one compulsory form of ADR which is privately provided is the MIAM. Permission to conduct MIAMs is the subject of strong regulatory requirements as to training and experience. Indeed, family mediation itself, which is not compulsory, is actually a less heavily regulated activity.
103. Mediation in general civil disputes has historically been less regulated, but the Civil Mediation Council has taken steps to establish a scheme of regulation which allows mediators to demonstrate their professional status.⁵³ The Council also operates a complaints system. We think that if mediation is to be compulsory, more systematic regulation is required.

Do the parties taking part in the ADR have access to legal advice?

104. Linked to the previous question of confidence in the neutral is the issue of access to legal advice. In low-value cases where the parties are unrepresented there may be a concern that some forms of ADR will leave them without any legal input to assist

⁵² Such as Ontario: see paragraph 55 above.

⁵³ See: [Membership – Civil Mediation Council](#).

either with assessing the position or concluding a valid settlement agreement. One of the early lessons of the possession ADR pilot⁵⁴ has been that because no legal advice is available during the mediation, duty solicitors are reluctant to advise clients to mediate under the pilot scheme and litigants-in-person were very reluctant to take part.

105. The advantage of a hearing like the DRH is obviously that the Judge is available and trusted. But formal legal training is not always essential to success: Small Claims Mediators⁵⁵ are not trained lawyers but do achieve satisfactory (and binding) settlements in a large number of their cases.

At what stage should ADR be required?

106. A fundamental principle for the design of any new process or rule must be the need to protect vulnerable parties.

107. The pre-action protocols emphasise that litigation should be a last resort and encourage the parties to consider whether negotiation or some other form of ADR might enable them to settle their dispute. It might be suggested that there were risks in being too prescriptive about requiring ADR before proceedings have commenced, as requiring parties to put significant effort into ADR could be disproportionate in those cases which are in truth going to be undefended. On the other hand, there may be some value in requiring parties to engage in some form of ADR, broadly defined, before embarking on litigation. We note the CJC is currently conducting a review of pre-action protocols, and we would not wish to pre-empt the outcome of that review. We note the new RTA Small Claims Protocol (see paragraph 54 above) prompts parties to attempt settlement in cases where liability is admitted through the online portal before they initiate court proceedings. A similar approach could be adopted in other

⁵⁴ A free, voluntary mediation scheme launched in February 2021 to address the significant backlog in possession disputes arising from the Covid-19 pandemic. See [here](#).

⁵⁵ A free, voluntary mediation service offered by HMCTS as set out in CPR 24.4A. The scheme is available for all County Court claims that would be allocated to the small claims track – i.e. claims of up to £10,000 – except road traffic accident, personal injury and housing disrepair claims. A referral to the Small Claims Mediation Service is made where all parties indicate they agree to mediation (CPR 24.4A(4)), and a referral results in an automatically stay (CPR 24.4A(5)). See [Small claims mediation service - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

cases which are, or will be, administered via an online portal. Moreover, in the Family Division there are proposals for introducing an “ante-room” to facilitate discussions before proceedings commence.

108. Thereafter we think there is much to be said for early ENE in all cases other than the most complex, combined with a straightforward requirement of participation in ADR at an appropriate stage of the procedure.

109. Compulsion through ad hoc case management can cater for the case where it can be said that, for example, one side is manifestly so unreasonable that mediation is unlikely to succeed. But that flexibility comes at a cost. Parties will often be tempted to resist ADR to emphasise to the other side their belief in the strength of their case. Procedural wrangling adds cost.

110. In an online system the option to try to settle the case can be offered at virtually all stages of the process. Why should the parties not be prompted to consider the possibility of making offers throughout their engagement?

111. If, however what is being discussed is the imposition of an obligation to take part in a particular form of ADR such as a mediation under threat of sanction then that would need to be required at a specific stage.

How do we cope with perfunctory performance?

112. It is obviously vital when it comes to rule-making or making orders in this area that there is clarity as to what does and does not constitute compliance with a duty to participate. We have to acknowledge the risk that parties will not fully engage with whatever process they have to participate in, that they simply “sit on their hands”. We have to acknowledge too that there are difficulties with making judgments on the level of participation where the process is likely to be protected by without prejudice privilege. What will constitute compliance with the court’s order will depend upon the type of ADR being considered.

113. Moreover, careful thought must be given to the sanctions the court may impose in response to perfunctory performance. Similar considerations to those set out in

paragraphs 61-67 above, in relation to sanctions for a complete failure to comply, apply here. The most obvious sanction is strike-out, with the flexibility to impose a costs sanction instead, either of which may be preceded by an “unless” order in appropriate cases. However, there may be other responses to perfunctory compliance that the court should consider, and its response may depend on the context and the stage of proceedings.

CONCLUSION

114. This paper is plainly not an overall review of the role of ADR in civil justice. The recognised need to promote the use of ADR has to be met on a number of different fronts.
115. Inside the courts the existing nudges and prompts leading the parties towards ADR still have a significant role to play. No doubt cost penalties against those who unreasonably refuse ADR will continue to play an important part. Continued and, if possible, increased funding and support for the Small Claims Mediation scheme is absolutely vital.
116. Outside the court system there is plainly a need for significant public legal education about ADR, however elusive that goal can sometimes seem. The need for a proper online resource to be available to the public detailing the various different forms of ADR and the ways of accessing them is, we think, now well recognised. There remains too the clear need for the provision and delivery of appropriate, proportionate and trustworthy ADR services.
117. This paper therefore deals with the relatively narrow but nonetheless, significant question of compulsion.
118. We think that introducing further compulsory elements of ADR will be both legal and potentially an extremely positive development. We will not make detailed proposals for reform as these require a wider perspective than is possible here. But we have sought in Section IV to develop a set of principles relevant to the use of compulsion. We would make three specific observations:
- 1) Where participation in ADR occasions no expense of time or money by the parties (as with answering questions in an online process as to a party's willingness to compromise) it is very unlikely that the compulsory nature of the system will be controversial – as long as the ADR is otherwise useful and potentially productive.

2) Judicial involvement in ENE, FDR and DRH hearings is proving highly effective and these are of course available free to the parties. Again as long as they seem appropriate for the particular type of case being considered and can be resourced within the court system, we cannot see that compulsion in an even wider range of cases will be unacceptable.

3) We think that as mediation becomes better regulated, more familiar and continues to be made available in shorter, cheaper formats we see no reason for compulsion not to be considered in this context also. The free or low-cost introductory stage seems the least likely to be controversial.

119. Above all, as long as all of these techniques leave the parties free to return to the court if they wish to seek adjudicative justice (as at present they do) then we think that the greater use of compulsion is justified and should be considered.

Lady Justice Asplin DBE
William Wood QC
Professor Andrew Higgins
Mr Justice Trower

We would like to acknowledge the considerable assistance we have received from Michael Quayle, Lady Justice Asplin's judicial assistant, and from the Civil Justice Council secretariat.

APPENDIX 1: EXISTING PROCEDURAL RULES REQUIRING PARTIES TO ENGAGE IN ADR

Early Neutral Evaluation

A1. As already noted at paragraph 31 of the main body of this report, the Court of Appeal in *Lomax v Lomax* [2019] 1 WLR 6527 held that under the CPR the Court has the power to order the parties in an appropriate case to attend an ENE. CPR 3.1(2)(m) empowers the Court to “take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case.” The overriding objective of course includes at CPR 1.4 a duty actively to manage cases by inter alia:

“(e) encouraging the parties to use an alternative dispute resolution(GL)procedure if the court considers that appropriate and facilitating the use of such procedure;

(f) helping the parties to settle the whole or part of the case;”

A2. The Court had the encouragement that this particular form of ADR is specifically mentioned in the relevant rule (while for example mediation is not) and clearly felt that in this category of case compulsion was merited. As Moylan LJ put it at [29]:

“In my experience and that, I would suggest, of every other judge who has been involved in financial remedy cases, the benefits have also been demonstrated frequently in cases in which the parties are resistant or even hostile to the suggestion that their dispute might be resolved by agreement and equally resistant to the listing of an FDR.”

A3. ENE under CPR 3.1(2)(m) represents the best example of the current law recognising compulsory ADR at the discretion of the court. Unlike the other examples listed in this Appendix, the CPR does not specify the stage of proceedings at which the parties must engage in an ENE; the court may simply make an ENE order where it considers it appropriate (whether on the application of one of the parties or its own volition). However, clearly the court will only be able to make an ENE order once the claim has

at least been issued (rather than as a pre-requisite to commencing litigation, like the ACAS conciliation process).

Financial Dispute Resolution appointments

- A4. FDR is a court-assisted negotiation process in family cases, where the parties appear before a District Judge in a without prejudice meeting/hearing, intended to facilitate settlement between parties and “*reduce the tension that inevitably arises in family disputes*”.⁵⁶ It is a standard – and compulsory – part of the procedure to be followed when a party makes an application for a financial remedy under Part 9 FPR, which arises at a predetermined juncture in the process and requires both parties to comply.
- A5. Pursuant to r. 9.15(4) FPR, the court has a duty to order an FDR appointment at the first “appointment” after the application is made:

“(4) The court must direct that the case be referred to a FDR appointment unless—

- (a) the first appointment or part of it has been treated as a FDR appointment and the FDR appointment has been effective; or*
- (b) there are exceptional reasons which make a referral to a FDR appointment inappropriate.”*

- A6. Seven days prior to the FDR appointment, the parties must file with the court details of all offers and proposals (and responses made), whether “open” or “without prejudice” (r. 9.17(3) FPR). Both parties must personally attend the FDR appointment unless the court orders otherwise (r.9.17(10) FPR). At the FDR appointment, the parties “*must use their best endeavours to reach agreement on matters in issue between them*” (r.9.17(6) FPR). Pursuant to paragraph 6.3 of Practice Direction 9A:

“Courts will therefore expect –

- (a) parties to make offers and proposals;*
- (b) recipients of offers and proposals to give them proper consideration;*
and

⁵⁶ Paragraph 6.1, Family Practice Direction 9A.

(c) *(subject to paragraph 6.4), that parties, whether separately or together, will not seek to exclude from consideration at the appointment any such offer or proposal.*⁵⁷

A7. The Family Justice Council has published detailed guidance on best practice for FDR appointments.⁵⁸ This provides further detail on the expectations of parties during the hearing, including the following:

“28. Practitioners must remember that, at FDR stage, there is still a continuing duty of full and frank disclosure of all material facts (including where disclosure of such facts may be adverse to the disclosing party) and that this duty remains throughout the life of the proceedings. It is important for practitioners to remember, and for lay clients to be made aware, that failing to comply with this duty can lead to cost penalties and/or an application to set aside any consent order subsequently made.”

A8. The FPR and the Practice Direction are largely silent on the role of the judge during the FDR appointment. However, the Family Justice Council Guidance suggests (at [29]) that the judge should outline the principles to be applied, identify key facts, identify the issues between the parties, and (where appropriate) express an opinion as to the probable outcomes of the remaining issues.

A9. If the FDR appointment does not result in a settlement, the parties are expected to keep trying to engage to find a resolution. Paragraph 6.5A of the PD 9A provides:

“Where at a FDR appointment a settlement is not reached, the parties have an obligation to make open proposals for settlement in accordance with rule 9.27A. The normal direction would be that each party must file and serve their open proposals within 21 days of the FDR appointment. The court must consider whether it is appropriate to give any further directions about the filing and service of open proposals.”

⁵⁷ Paragraph 6.4 provides that this requirement does not apply to offers made during “non-court dispute resolution”, so it follows that parties are only obliged to consider “open” offers.

⁵⁸ Family Justice Council, *Financial Dispute Resolution Appointments: Best Practice Guidance* (December 2012). Available [here](#).

The new RTA Small Claims Protocol

- A10. The new Small Claims Protocol came into force in May 2021, and applies to low-value (below £5,000) personal injury claims arising from road traffic accidents.⁵⁹ It requires claimants to use a new dedicated online portal for such claims (see <https://www.officialinjuryclaim.org.uk/>).
- A11. The new pre-action protocol applicable to these claims⁶⁰ provides detailed information regarding the process claimants and defendants (or rather “compensators”, i.e. insurers) must follow before a claim is issued, and the information the parties must provide using the new portal.
- A12. Notably, the pre-action protocol makes clear that parties are expected to try and settle the claim: see, for example, paragraph 8.1(1): *“This section explains— (a) the steps both the claimant and the compensator must take to try to settle the claim”*. See also paragraph 8.1(4): *“The parties are reminded that court proceedings are a last resort. It is expected that the parties will try to negotiate settlement of claims without starting court proceedings.”*
- A13. This aim is firmly embedded in the pre-action rules themselves. In cases where liability is admitted, paragraph 8.7(1) of the protocol requires that proposed defendant *“must make an offer to settle the claim”* within 20 days of the claimant providing the requisite information (including a medical report). Following receipt of that offer, a claimant may accept or reject the offer, or make a counter-offer. Parties may make up to 3 offers each through the online portal (paragraph 8.1(3)). If no offer is made in time, or no offer nor counter-offer is accepted, the claimant may commence court proceedings (paragraph 8.19).
- A14. The claimant is required to comply with the protocol before initiating proceedings. If it is necessary to issue proceedings protectively, due to limitation issues, the claimant must immediately apply for a stay in order to complete the steps in the protocol

⁵⁹ The new rules are brought into force under the Civil Procedure (Amendment No. 2) Rules 2021. They amend CPR 26.6, 27.2 and introduce a new Practice Direction 27B and a new pre-action protocol, the RTA Small Claims Protocol.

⁶⁰ Available [here](#).

(paragraph 5.6). If a claimant issues a claim without complying with the RTA Small Claims Protocol, that will impede the claimant's ability to recover costs (new CPR r. 45.29M).

A15. It is also worth noting that the new Practice Direction 27B introduced in respect of the RTA Small Claims Protocol provides for claims to move back and forth between the court and the portal. Where the parties fail to reach an agreement within the portal at a particular stage of the process – for instance on liability – the issue goes back to the court for the issue to be resolved. Then, if the court determines there is liability, the default setting is that the case has to return to the portal, paragraph 2.16(2) PD 27B, which provides:

“(2) Where the court finds that the defendant was either liable in full or in part and does not reallocate the claim under sub-paragraph (3) below, the court— (a) will stay the proceedings and direct that the parties use the procedure set out in sections 7, 8 and 9 of the RTA Small Claims Protocol to progress the claim”.

A16. Thus, to move the claim back to the portal, the court will direct the parties to use the portal to progress the claim: essentially a form of order that the parties must submit to engage in ADR.

A17. The RTA Small Claims Protocol constitutes something close to compulsory ADR. It might be described as “asymmetrical” given there is a requirement at least on one party – the defendant's insurer – to make a settlement offer in relevant claims. However, the consequences of failing to observe the Protocol are limited to costs sanctions (rather than e.g. strike-out), and its scope is narrow: it applies only to very low value claims in which liability is admitted.

ACAS Early Conciliation

A18. ACAS Under s.18A(4) ETA 1996, a person may not present an application to institute Employment Tribunal proceedings (of almost all types) without an early conciliation

certificate. Section 13 of the ET1 claim form includes a box for the claimant to provide the certificate number.⁶¹ That certificate is obtained from ACAS as follows.

- A19. The process that must be followed is set out in the Early Conciliation Rules.⁶² The proposed claimant need provide only their name and address (and the name and address of the proposed respondent) to ACAS; s/he does not need to provide ACAS with information on (e.g.) the nature of the dispute. The claimant can provide the information by filling out a form submitted online or by post, or over the telephone.⁶³
- A20. The information must be provided to ACAS within the normal time limit for presenting a claim to the Employment Tribunal (3 months for most claims). Otherwise – subject to the Tribunal’s narrow discretion to extend time – any subsequent claim in the Tribunal will be time-barred. Complying with the conciliation requirement will “stop the clock” for the purposes of Tribunal proceedings.⁶⁴
- A21. Once ACAS has received the information, it will allocate a conciliation officer, who will endeavour to promote a settlement (ss. 18A(2) and (3) ETA 1996), for a period of six weeks (r.6(1) Early Conciliation Rules). If the conciliation officer concludes that settlement of the dispute (or part of it) is not possible – or if settlement has not been reached in the six-week period – ACAS must issue an early conciliation certificate to the proposed claimant and respondent (r.7 Early Conciliation Rules).
- A22. However, whilst it is compulsory to provide information to ACAS, *participation* in ACAS conciliation is ultimately voluntary.⁶⁵ A proposed claimant or respondent can simply refuse the conciliation officer’s invitation to take part in any discussions. Indeed, the online ACAS form includes an option for the proposed claimant to refuse conciliation

⁶¹ Available here: [ET1 - Employment tribunal claim form \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/301121/ET1-claim-form.pdf).

⁶² The Rules are set out in the schedule to the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014, SI 2014/254, as amended by Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2014 SI 2014/847. They are available [here](#).

⁶³ See: <https://tell.acas.org.uk/apply-for-a-certificate>.

⁶⁴ For example, for unfair dismissal claims, s.207B Employment Rights Act 1996 provides that the “clock is stopped” on the day the proposed claimant provides the requisite information to ACAS, and remains “stopped” until the conciliation certificate from ACAS is provided.

⁶⁵ *Science Warehouse v Mills* [2016] IRLR 96, per EAT Judge Eady QC at [30].

at the same time as they provide the required information.⁶⁶ These provisions are currently under review.

- A23. If one or both of the parties declines to take part, the officer will be entitled to conclude that settlement is not possible and issue an early conciliation certificate accordingly (which may be prior to the expiry of the six-week period: r.7(1) Early Conciliation Rules).
- A24. Clearly the compulsion extends only to giving ACAS the opportunity to engage with the parties and certainly does not extend to requiring full participation in a conciliation process.

Mediation Information and Assessment Meetings

- A25. Section 10(1) of the Children and Families Act 2014 provides: *“Before making a relevant family application, a person must attend a family mediation information and assessment meeting.”* A MIAM is a short meeting conducted by a trained mediator, intended to provide information to litigants about mediation as a means of solving disputes.⁶⁷ A list of “relevant family applications” is set out in Practice Direction 3A (**PD 3A**) to the Family Procedure Rules (**FPR**). It includes private law proceedings relating to children (paragraph 12) and proceedings for a family remedy (paragraph 13).
- A26. Under r.3.7 FPR, the applicant must provide one of the following when making a relevant application: confirmation from an authorised mediator that the prospective applicant has attended a MIAM; a claim for a valid exemption to the MIAM requirement; or confirmation from an authorised mediator that a “mediator’s exemption” applies.
- A27. A list of the permissible exemptions to the MIAM requirement which an applicant may claim is set out in r. 3.8 FPR. The list includes (for example) where there is evidence⁶⁸ of domestic violence, child protection concerns, where there is an urgent risk to life,

⁶⁶ See: [Try to find a solution to your dispute before employment tribunal | Tell Acas.](#)

⁶⁷ Paragraph 2, Practice Direction 3A to the Family Procedure Rules (available [here](#)).

⁶⁸ PD 3A includes a list of acceptable forms of evidence at paragraph 20, which includes (for example) evidence of a police caution. The evidence need not be provided with the application form, but the applicant must bring the evidence to the first hearing.

liberty or home, and where the applicant has attended a MIAM or other ADR procedure in the previous 4 months.

A28. The Court will scrutinise the applicant's exemption claim, and if it is not satisfied, it may direct the parties to attend a MIAM. Per r.3.10 FPR:

"3.10. — MIAM exemption not validly claimed

- (1) If a MIAM exemption has been claimed, the court will, if appropriate when making a decision on allocation, and in any event at the first hearing, inquire into whether the exemption was validly claimed.*
- (2) If a court finds that the MIAM exemption was not validly claimed, the court will—*
 - (a) direct the applicant, or direct the parties to attend a MIAM; and*
 - (b) if necessary, adjourn the proceedings to enable a MIAM to take place;*

unless the court considers that in all the circumstances of the case, the MIAM requirement should not apply to the application in question."

A29. "Mediator's exemptions" are set out in r.3.8(2) FPR:

- "(2) an authorised family mediator confirms in the relevant form (a "mediator's exemption") that he or she is satisfied that—*
 - (a) mediation is not suitable as a means of resolving the dispute because none of the respondents is willing to attend a MIAM; or*
 - (b) mediation is not suitable as a means of resolving the dispute because all of the respondents failed without good reason to attend a MIAM appointment; or*
 - (c) mediation is otherwise not suitable as a means of resolving the dispute."*

A30. If no exemption applies, the applicant is obliged to attend the MIAM. The respondent is not obliged, but is *"expected to attend a MIAM, either with the prospective applicant or separately"* (PD 3A, paragraph 32).

A31. Alongside the requirements on an applicant, the court has a duty – and case management powers – to promote the use of MIAMs. It has the power to adjourn proceedings so that the parties can take part in a MIAM (FPR r 3.4).

A32. The MIAM process is more demanding of litigants than the ACAS process: the applicant is obliged to meet with a trained mediator, and his/her application will not be progressed without that taking place (unless one of the limited exemptions applies). However, like the ACAS process, MIAMs are not truly compulsory ADR: the respondent is not compelled to participate, only “expected” to do so. It is fair to say that the “expectation” may be reinforced by the Court exercising its powers to adjourn proceedings until ADR has been attempted by both parties, but that does not amount to “compulsion” in its true sense; the court would not (and probably could not) stay proceedings in perpetuity simply because one party refuses to attend a MIAM.

Small claims DRH hearings

A33. Lord Justice Briggs (as he then was), in the Final Report of his Civil Courts Structure Review,⁶⁹ drew attention to a process being adopted locally whereby small claims listed were listed for compulsory resolution hearings:

- “2.17. There is a form of small claims conciliation (to use an umbrella term) carried out by District Judges in certain County Courts hearing centres in the Hampshire, Dorset and Wiltshire area, and also in Romford. It works in the following way.*
- 2.18. First, all cases in the small claims track are routinely called in for a conciliation and case management session. Attendance is compulsory, and parties not attending have their claims (or defences as the case may be) dismissed or struck out, with liberty to restore which is only very rarely exercised.*
- 2.19. The DJ conducting the list (which will include up to twelve cases in a morning’s session) then invites each pair of parties to consider settlement, and provides assistance in the form of informal early neutral evaluation, in much the same way as is done at financial dispute resolution hearings in the Family Court.*
- 2.20. Those cases which do not settle there and then are given the benefit of case management directions designed to enable the parties to prepare for a final hearing much more effectively than is customary in the Small Claims Track.*
- 2.21. Statistics kept by the originator of the scheme in the Hampshire, Dorset, Wiltshire area (now HH Judge Dancey, but then a DJ) suggest that 25% of the entire small claims track list is disposed of due to non-attendance,*

⁶⁹ *Civil Courts Structure Review: Final Report*, Lord Justice Briggs, July 2016.

50% at the conciliation hearing, and a significant proportion of the remaining 25% settles before trial, due (anecdotally) to progress towards settlement achieved at the conciliation hearing.

2.22. This scheme bears an interesting relationship with the Small Claims Mediation service. While it is operated by judges, at much greater expense per hour to the court service than that provided by the small claims mediators, it brings about settlement of a much higher proportion of the small claims issued and deals in half a day with more than double the number of cases dealt with by a typical small claims mediator in a whole day.

2.23. I have found no convincing explanation why this form of judicial conciliation is being practised only in a small number of specific parts of England. It is possible that there are other parts where it is being practised, of which I remain unaware. The main argument against its more general use which has prevailed to date appears to be that cases which do not settle by means of this process therefore have to receive two doses of judicial attention, one at the conciliation hearing, and the other (which has to be by a different judge) at the trial. This is, of course, correct as far as it goes, but it does not follow that the overall economic analysis ought to be regarded as adverse to the use of this form of judicial conciliation.”

A34. These hearings, now known as DRH hearings, are still far from universal. However, they appear to have proven successful at least in certain hearing centres, including in Birmingham, where a settled process (and paperwork) has been established, including a standard summons which makes clear that non-attendance could be met with a strike-out. DRH hearings are within the scope of a review by a working party of the Civil Justice Council chaired by HH Judge Cotter, which has recently published its interim report.⁷⁰

The West Midlands Employment Tribunal ADR pilot

A35. The West Midlands Employment Tribunal is operating a pilot scheme for cases listed for trial lasting more than 5 days, whereby a 2-hour ADR hearing is listed six weeks after the exchange of witness statements.⁷¹ The hearings are conducted by a judge trained in judicial mediation (who will not conduct the trial). The purpose of the ADR

⁷⁰ [The Resolution of Small Claims: Interim Report](#), Civil Justice Council, April 2021.

⁷¹ The pilot is overseen by Tribunal Judge Lorna Findlay, who has produced a detailed pilot plan dated 30 December 2019 (updated on 22 December 2020), including draft directions for the ADR hearing.

hearing is to encourage the parties to resolve the dispute via agreement: the judge may provide directions before the hearing for the parties to produce certain documents, including a “position statement” setting out what each part wishes to achieve. At the hearing, the judge may give a preliminary, non-binding view on the merits of the parties’ positions. If the parties do not reach agreement, the judge may also list the matter for a longer judicial mediation hearing.

- A36. These ADR hearings are akin to an ENE hearing of the kind ordered in **Lomax**, in that they constitute a judge-led form of ADR that is “baked in” to the ordinary court process; albeit they occur somewhat later in the proceedings, after evidence has been exchanged.
- A37. The pilot commenced in July 2020. On 15 March 2021, Tribunal Judge Findlay reported on the results of the scheme, stating that it had resulted in 11 successful settlements, with 20 cases proceeding to trial. She noted the extensive resource-saving achieved by the scheme and proposed extending the pilot.