

Part V: CONCLUSIONS

This final Part of the report draws together themes from earlier sections, suggests conclusions which can be drawn from the King's College London survey of TCC litigation and identifies some issues still unresolved.

22 Before the King's College London survey

The body of published evidence suggests a significant, and growing role, for ADR – in all its forms – in the resolution of construction disputes. Several separate factors have interacted to bring this about:

- 1 Many of the standard forms (particularly those used internationally) have integrated ADR and multi-tier processes into their formal arrangements, some designed to avoid disputes as much as to resolve them, once they crystallise.
- 2 Many arbitrators and other professionals have added mediation to their portfolio of skills; and reputable organisations offering training and accreditation, as well as appointing mediators, have proliferated.
- 3 In parallel, governments have legislated to introduce – in some cases require – quick and less formal adjudication procedures in construction, as an alternative (or at least precursor) to formal litigation or arbitration.¹
- 4 In the late 1990s, a new vision of civil procedure took hold in much of the common law world: not just judicial resources, but the parties' own resources too, should be better matched to the particular characteristics of each dispute ('proportionality'). This led to 'active case management' as a new buzzword, entirely replacing the old idea that the parties 'ran' civil litigation, as slowly or as extravagantly as they chose, the court acting only as a neutral servant and umpire. Now we have intervention by the court to move the case forward in the right direction, at the right speed and with appropriate use of resources on all sides, with vigorous use of orders for costs as a major driver for compliance. In the English CPR, decisions on recoverable costs provide the 'teeth' for the courts' demanding expectations on the parties, including that they should consider ADR, even before a claim has been issued. Once litigation is formally under way, systematic and energetic judicial encouragement for ADR continues, in some jurisdictions actually required by law and/or offered by the court itself. Thus the twin ideas of 'the multi-door courthouse' and of 'court-annexed mediation' have become a reality – and not just in construction litigation.
- 5 In England & Wales, the acceptable methods by which lawyers' (and experts') services in civil litigation could be funded were augmented by the arrival of Conditional Fee Agreements, After-The-Event insurance against possible liability for the other party's legal costs and other linked devices. Adopted when the scope of civil legal aid became narrowed, these have had a significant impact in potentially reducing the litigation risk to a would-be claimant, at the same time incentivising that

claimant's lawyers and experts to be more enterprising and less conservative in their conduct of litigation. However, a side-effect has been to drive up costs and expose an unsuccessful defendant to a much increased costs risk.²

All of these innovations were in their different ways intended to change the behaviour of parties to construction disputes and their advisers, by a mixture of stick, carrot and 'best practice' example. In England & Wales, to judge from the drop in the traditional workload of the TCC (offset by a flood of applications to enforce adjudicators' decisions), adjudication in the UK certainly appears to have been successful in diverting some categories of cases away from the court.

But official statistics in England & Wales do not reveal much of the underwater detail below the visible structure of that most modern and cost-conscious liner, the *SS Woolf*. The King's College London survey therefore aimed, by donning the methodological equivalent of a wetsuit, to discover what was now happening in construction litigation below the great ship's waterline. Specifically, under the post-Woolf and post-adjudication procedural regimes, what categories of construction cases were now coming before the TCC? What part did mediation play in these – how, at what point and with what impact on the parties, their advisers and the court?

23 From the survey results

As Part IV above shows, summarising the survey results, the profile of the most frequent categories of case before the TCC is not what might be expected (in all likelihood reflecting the impact of adjudication). Mediation now plays an important role in many of the TCC cases which settle before going to trial; and its apparently positive impact on the eventual cost of resolving the dispute means that no construction litigator can any longer write this version of ADR off as irrelevant or ineffective. Judges too may feel better informed if they are aware of the survey data. For which categories of TCC case do the chances of a settlement before trial seem highest? And at what point(s) along the road towards a trial? How best, in procedural decision-making at a CMC, to facilitate this possibility?

As the survey shows, parties do not wait until a hearing is imminent before trying to settle their dispute. Successful mediations were mainly carried out during exchange of pleadings or as a result of disclosure. However, there were still a substantial number of respondents who mediated shortly before trial. A timetable leading to a hearing should therefore allow sufficient flexibility for a mediation along the way; and the parties are often in a better position than the court to know when the right time is, especially when they have sophisticated and commercially astute advisers, as usually in the TCC.

24 Beyond the survey

'Front-loading' and ADR

As Lord Justice Jackson's *Final Report* shows, there are strong differences of view between the TCC judges and different groups of court users about the impact (positive or negative) of the present *Pre-Action Protocol*.³ The PAP expects the parties to incur significant cost (and costs), as well as to consider ADR (usually meaning mediation), even before a claim is formally issued. On the one hand, to attempt to resolve the dispute before it gets into the court process must be

sensible in many cases; on the other, despite the paperwork already generated, the parties may still not know enough at that early stage to be in a position to identify the best agreed outcome of their dispute, set against the possibility of a win in court as a distant but uncertain goal. If the case does settle at an early stage, much of that preparatory effort and cost will have been unnecessary; but if the case does become a claim in court, some at least of the PAP compliance work will have to be redone in the form necessary for litigation.

The TCC's wish to manage litigation efficiently, for the parties' benefit as well as the court's, rightly gives it the power – once a case gets before it – to give its own views, if necessary forcefully expressed, about the value of attempting mediation. This will always take place in parallel with the progress of the case towards an eventual – but in most cases unlikely ever to happen – trial. In the present 'front-loaded' universe, it is therefore unsurprising that the TCC judges would also like a role in the PAP phase, if only to protect a party against doing or spending too much (or ultimately incurring a liability for the other side having spent too much).

Mandatory mediation?

Following *Halsey v Milton Keynes General NHS Trust*⁴ it is clear that, under English law, mediation must always be voluntary: for a court or judge to order mediation would be a potential breach of article 6(1) of the European Convention. However, judicial practice could easily blur the theoretical distinction between being (a) forced by a judge into ADR; and (b) strongly encouraged towards ADR (with a beefy costs fist inside the velvet judicial glove). Approach (a) is very likely to violate article 6(1), as *Halsey* confirms, but it is not clear that (b) is immune from challenge under the Convention: as Jack J said, summarising *Halsey*, 'the fear of costs sanctions may be used to extract unmerited settlements'.⁵ So the dividing line between voluntary and coerced ADR in this context is hard to draw with certainty. A litigant who is landed with an unfavourable costs order for failing to agree to ADR – or, even worse, goes to mediation at the court's suggestion but is afterwards stigmatised as failing to participate in good faith⁶ – could plausibly claim that this outcome operates as a clog or fetter on the right of access to the court, contrary to article 6(1); and that their apparent consent to ADR was no waiver of their fundamental rights, now directly enforceable in English law under the Human Rights Act 1998.⁷

In any event, the evidence supporting the use of mandatory mediation is mixed. The Ontario scheme showed great success, with four out of ten cases subject to mandatory mediation settling.⁸ However, the comparison group was with those undergoing no mediation, not mediation on a voluntary basis. One study in Boston (USA) in four district courts sought to examine the difference between voluntary mediation and mandatory mediation. A total of 171 parties were surveyed, almost evenly divided between claimants and defendants. 30% of those parties were required to mediate and 70% chose to mediate. Mandatory mediations were less likely to settle, with a 46% success rate, compared to a 62% success rate for voluntary mediation.⁹ As outlined in section 12 above, the VOL scheme in the Central London County Court saw a huge increase in mediations following *Dunnett v Railtrack*,¹⁰ but the settlement rate also consistently declined during that period.¹¹

So if the judges apply too much pressure, the overriding objectives of the CPR (including dealing with cases expeditiously and fairly and saving expense) may not be furthered; instead there will be lower settlement rates, with wasted cost and time. Nonetheless, some pressure is needed to ensure that parties are forced to consider mediation as an option. It could be argued that, at least in the TCC, this pressure is less needed than it once was. In other words, the legal profession involved in construction litigation now knows the benefits of mediation.

Regulation of mediation?

As the King's College London survey shows, most mediations within TCC litigation take place by the parties' agreeing on a mediator between themselves, without using an appointing body or the Court Settlement Process. This pattern of behaviour, suggesting a well-informed choice by the parties and/or their advisers, lends no force to the arguments for external State regulation of mediators, nor even for the less interventionist option of external (official) validation of institutions' training and accreditation systems. Nor does the survey data give any support to Professor Genn's concerns from the Central London County Court schemes that mediators may abuse their powers. This is possible to imagine, if one-off individual litigants (or SMEs without legal representation) are the parties to a mediation, as could often be the case in the County Court. However, this disparity or vulnerability is much less likely between the well represented corporate or other entities who are the usual parties to TCC litigation and their mediators.

The fact that some mediators obtain repeated appointments, as recorded in the survey, reinforces the impression that, at least in the relatively small 'market' of construction disputes in the TCC, individual mediators' reputation for success – and the way each achieves it – must be well known, and widely known. There must of course be 'repeat players' (advisers more often than parties) to construction disputes, who after a positive mediation experience will be inclined to want the same mediator again; the extent of this phenomenon is not known, but they as a group hardly need protection by having the function of mediator newly regulated.

The bigger picture

Underlying every aspect of this report are two difficult broad questions of policy:

- 1 Is it always wise, and also fair, to divert as many disputes as possible away from determination by judges in court, in favour of ADR (however well regulated)?
- 2 If not always, then when?

The courts in England & Wales, as well as the Government ministers responsible for the civil justice system, often speak as if ADR was in a general sense preferable to traditional litigation; the 2008 EC Mediation Directive heads in the same direction. However, as article 6(1) of the European Human Rights Convention proclaims, access to court for the resolution of disputes by a publicly appointed tribunal acting according to law is a fundamental right. In her 2008 Hamlyn Lectures, Professor Genn, the doyenne of empirical research into civil justice, challenged the way ADR was now treated as an almost universally desirable goal.¹² A year later, she repeated these points forcefully in a well publicised debate with Lord Woolf, architect of the present CPR and former Master of the Rolls, as reported by *The Times*:

The main thrust of civil justice reform was not about more access, nor about more justice: 'it is simply about diversion of disputants away from the courts'. Genn, Dean of Laws and Professor of Socio-Legal Studies at University College London, revisited her theme at a seminar this week hosted by UCL and had a swipe at some of the misreporting and misinterpretation of her comments. She admitted that the content appeared to have struck 'both chords and nerves'. Clearly, she said, people held strong views about civil justice policy and practice. But debate has been 'chronically hampered by what she called 'a lack of solid empirical evidence' and too much reliance on anecdote and assumptions. So what had Genn said to cause such a stir? Recapping, she said that 'in England, we are witnessing the decline of civil justice, the degradation of court facilities and the diversion of civil cases to private dispute resolution — accompanied by an anti-court, anti-adjudication rhetoric that interprets these developments as socially positive'.¹³

The fundamental difficulty of engaging with these issues is that when a case settles (by mediation or otherwise), we have no means of reliably knowing how closely that outcome matches what a court would have decided, had the case gone all the way to trial. That being so, it is very hard to assess whether one party's rights have been unjustly compromised in the outcome, even where there appears to be a significant disparity in bargaining power (or representation) between the disputants. Further, a negotiated or mediated settlement can take a commercially motivated form beyond the narrow law-defined options open to a judge ('I'll abandon this claim if you offer me the next job'); and such a result might be better for the parties than any judgment. Settlement – whatever its terms – may bring other positive side-effects: the cashflow advantage of money now, rather than waiting for trial; an often substantial saving on future legal and other costs; and the clients' own time no longer being committed to managing the dispute.

As Lord Woolf would readily accept, there are dangers in favouring ADR unqualifiedly, especially without a solid basis of reliable evidence about the consequences of so doing, for the parties and for public policy more widely. The King's College London survey – the heart of this report – aimed to reduce 'the reliance on anecdote and assumptions' which Professor Genn rightly criticises, though only in relation to one form of ADR in a small but specialised and complex category of High Court civil case. In this specific context, however, the survey data suggests that parties to litigation in the TCC, and their advisers, are well aware of what they are doing: they move their litigation forward in full knowledge of the tactical choices open to them and the imperatives of the CPR, in which mediation appears to be playing an increasing and positive role. This awareness must in fact be shared equally by the TCC judges, the other partners in this process; but demonstrating the present judicial mindset would need a further research project.

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- 1 Statutory adjudication in the common law world has so far always been paired with a threshold of minimum payment provisions, better to ensure cashflow for parties down the contractual chain; these interventions lie outside the scope of this report.
 - 2 So much so, that Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009), downloadable from www.judiciary.gov.uk/about_judiciary/cost-review/reports.htm (accessed 20 January 2010), recommends that success fees and ATE insurance premiums should cease to be recoverable: ch 4 para 3.26.
 - 3 *Final Report* n 2 ch 35 section 4. *The Pre-Action Protocol for the Construction and Engineering Disputes* (2nd edition 2005, revised 2007) and *Practice Direction: Technology and Construction Court Claims* (supplementing CPR Part 60) are both included within Rt Hon Lord Justice Waller (Editor-in-Chief), *Civil Procedure 'The White Book'*, London, Sweet & Maxwell (2009 edition) but are also downloadable from the MoJ website www.justice.gov.uk/civil/procrules_fin (accessed 10 December 2009).
 - 4 *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002.
 - 5 *Hickman v Blake Laphorn* [2006] EWHC 12 (QB), [2006] 3 Costs LR 452 [21]. Jack J says 'cost', but the original Halsey text says 'costs'.
 - 6 As Jack J suggested in *Carleton v Strutt & Parker* [2008] EWHC 424 (QB) [72].
 - 7 Philip Britton, *Court Challenges to ADR in Construction: European and English Law*, SCL Paper 152 (January 2009) 34.
 - 8 Robert G Hann and Carl Baar, with Lee Axon, Susan Binnie and Fred Zemans, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report – The First 23 Months*, Toronto, Ontario (2001), downloadable from www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/eval_man_med_final.pdf (accessed 10 December 2009) ch 5.2.
 - 9 See Roselle L Wissler, 'The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts', (1997) 33 Willamette L Rev 565, 580-581.
 - 10 *Dunnett v Railtrack plc* [2002] EWCA Civ 303, (Practice Note) [2002] 1 WLR 2434.
 - 11 Professor Dame Hazel Genn et al, *Twisting arms: court referred and court linked mediation under judicial pressure*, Ministry of Justice Research Series 1/07 (May 2007) 21-22, downloadable from www.justice.gov.uk (accessed 9 July 2009) 151.
 - 12 Professor Dame Hazel Genn, *Judging Civil Justice* (Hamlyn Lectures 2008), Cambridge, CUP (2009).
 - 13 Frances Gibb, 'Woolf v Genn: the decline of civil justice', *The Times* (23 June 2009).

Appendix 1: Edited version of Survey Form 1

[This was the form used for those cases which had settled ahead of a trial]

This survey is part of a research project by the Technology and Construction Court and the Centre of Construction Law & Dispute Resolution, King's College London. The goal of this survey is to gather information regarding the use of mediation in TCC disputes and the effectiveness or otherwise of court instigated ADR processes, in particular mediation. The analysis aims to:

- 1 Reveal in what circumstances mediation is an efficacious alternative to litigation;
- 2 Assist the court to determine whether, and at what stage, it should encourage mediation in future cases; and
- 3 Identify which mediation techniques are particularly successful *[not in fact pursued]*.

You should only disclose information that you and the parties are happy to disclose. It is fully understood that there may be good reasons why you may be unwilling to answer some of the questions.

Your details will be treated in the strictest confidence. Publication of the results of this questionnaire will be restricted to statistical data and analysis based upon the responses received.

Please insert Claim Number (clearly)

		F1
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1 What was the nature of the case? Please tick all those that apply

- | | |
|--|---|
| <input type="checkbox"/> Change to scope of work | <input type="checkbox"/> A dispute about adjudication |
| <input type="checkbox"/> Delay | <input type="checkbox"/> Arbitration claim |
| <input type="checkbox"/> Differing site conditions | <input type="checkbox"/> Professional negligence |
| <input type="checkbox"/> Payment issues | <input type="checkbox"/> Personal injury |
| <input type="checkbox"/> Defects | <input type="checkbox"/> Property damage |
| <input type="checkbox"/> Design issues | <input type="checkbox"/> IT dispute |
| <input type="checkbox"/> Other (please specify) | |

2 At what stage did the litigation settle or discontinue? Please tick only one

- | | |
|--|--|
| <input type="checkbox"/> During Pre-Action Protocol (PAP) correspondence | <input type="checkbox"/> As a result of a Part 36 or other offer to settle |
| <input type="checkbox"/> At or as a result of PAP meeting | <input type="checkbox"/> As a result of a Payment In |
| <input type="checkbox"/> Between PAP and service of claim form | <input type="checkbox"/> As a result of a preliminary issue(s) judgment |
| <input type="checkbox"/> During exchange of pleadings | <input type="checkbox"/> Shortly before trial |
| <input type="checkbox"/> During or as a result of disclosure | <input type="checkbox"/> During trial |
| <input type="checkbox"/> As a result of exchange of witness statements | <input type="checkbox"/> After trial but before judgment |
| <input type="checkbox"/> Other (please specify) | |

3 Was the settlement reached or the matter discontinued following (please tick only one)

- conventional negotiation?
- mediation?
- some other form of dispute resolution procedure? If so, see 4 below.

4 If some other procedure, please briefly describe: _____

*If the answer to question 3 was 'mediation', please continue.
 If not, please go to the final section (Personal Details).*

5 Was the mediation undertaken:

- on the parties' own initiative?
- as a result of some (if so what) indication of the court?
- as a result of some (if so what) order of the court?

6 Was the mediator a:

- Construction professional? Barrister? Solicitor?
- A TCC judge, as part of the Court Settlement Process?
- Other (please specify) _____

7 Please state the name of the mediator: _____

8 Please state name of Nominating Body (if applicable): _____

9 What were the approximate costs (in the lead up and on the day) of the mediation in respect of:

the mediator (overall costs)?	£	_____
room hire for the mediation?	£	_____
your firm's costs?	£	_____
your client?	£	_____
any other costs, eg experts?	£	_____

10 If the mediation had not taken place, is it your opinion that (please tick only one):

- the action would have settled anyway and at about the same time?
- the action would have settled at a later stage?
- the action would have been fully contested to judgment?

11 If you have ticked the second or third box for question 10, what costs do you consider were saved by the mediation? In other words, what is the difference between the costs which were actually incurred on the mediation and the notional future costs of the litigation which were saved by all parties? Please tick only one.

- £0 - £25,000
- £25,001 - £50,000
- £50,001 - £75,000
- £75,001 - 100,000
- £100,001 - £150,000
- £150,001 - £200,000
- £200,001 - £300,000
- More than £300,000

Appendix 2: Edited version of Survey Form 2

[This was the form used for those cases which had continued to trial]

This survey is part of a research project by the Technology and Construction Court and the Centre of Construction Law & Dispute Resolution, King's College London. The goal of this survey is to gather information regarding the use of mediation in TCC disputes and the effectiveness or otherwise of court instigated ADR processes, in particular mediation. The analysis aims to:

- 1 Reveal in what circumstances mediation is an efficacious alternative to litigation;
- 2 Assist the court to determine whether, and at what stage, it should encourage mediation in future cases; and
- 3 Identify which mediation techniques are particularly successful *[not in fact pursued]*.

You should only disclose information that you and the parties are happy to disclose. It is fully understood that there may be good reasons why you may be unwilling to answer some of the questions

Your details will be treated in the strictest confidence. Publication of the results of this questionnaire will be restricted to statistical data and analysis based upon the responses received.

Please insert Claim Number (clearly)

	F2
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1 What was the nature of the case? Please tick all those that apply

- | | |
|--|---|
| <input type="checkbox"/> Change to scope of work | <input type="checkbox"/> A dispute about adjudication |
| <input type="checkbox"/> Delay | <input type="checkbox"/> Arbitration claim |
| <input type="checkbox"/> Differing site conditions | <input type="checkbox"/> Professional negligence |
| <input type="checkbox"/> Payment issues | <input type="checkbox"/> Personal injury |
| <input type="checkbox"/> Defects | <input type="checkbox"/> Property damage |
| <input type="checkbox"/> Design issues | <input type="checkbox"/> IT dispute |
| <input type="checkbox"/> Other (please specify) | |

2 Were attempts made to resolve the litigation by (please tick all those that apply)

- conventional negotiation?
- mediation?
- some other form of dispute resolution procedure? (If so, see 3 below)

3 If some other procedure, please briefly describe: _____

If the answer to question 2 was 'mediation', but that mediation did not result in a complete settlement, please continue. If not, please go to Personal Details.

4 Was the mediation undertaken:

- on the parties' own initiative?
- as a result of some (if so what) indication of the court?
- as a result of some (if so what) order of the court?

5 Was the mediator a:

- Construction professional? Barrister? Solicitor?
- A TCC judge, as part of the Court Settlement Process?
- Other (please specify) _____

6 Please state the name of the mediator: _____

7 Did the parties agree on the identity of the mediator?

- Yes
- No

8 Please state name of Nominating Body (if applicable): _____

9 What were the approximate costs (in the lead up and on the day) of the mediation in respect of:

the mediator (overall costs)?	£ _____
room hire for the mediation?	£ _____
your firm's costs?	£ _____
your client?	£ _____
any other costs, eg experts?	£ _____

10 What was the outcome of the mediation?

- The action was settled in part
- The action was not settled at all

11 Was the mediation (please tick all those that apply)

- beneficial to the progress of the litigation in terms of narrowing the issues in dispute?
- beneficial to the progress of the litigation in that part settlement was achieved?
- beneficial in that your or your client gained a greater understanding of the issues in dispute?
- a waste of money?
- a waste of time?
- a cause of delay to the litigation timetable?

12. If you ticked the last box for question 11 then, if known, please state length of delay:

Years: _____ Months: _____ Days: _____

Appendix 3: Key caselaw on mediation and costs

[The cases are in date order of judgment (earliest first); those also discussed in the main body of the report are identified with #.]

CASE	TOPIC	KEY FINDINGS
<p><i>Hurst v Leeming</i> [2001] EWHC 1051 (Ch), [2003] 1 Lloyd's Rep 379 Chancery Division Lightman J [This case went to the Court of Appeal, but not on this issue]</p>	<p>Exception to the general costs sanctions rule</p>	<ul style="list-style-type: none"> • If one party offers mediation and the other party refuses it, the party refusing mediation has to have good and sufficient reasons for doing so, otherwise may be penalised in costs. • Although mediation is not necessary, dispute resolution is at the heart of the justice system: where a party refuses such a resolution, it is reasonably possible that there will be adverse costs consequences. • A party can refuse mediation where, on an objective view, it has no reasonable prospect of success. However, refusal is a high-risk course to take; if the court finds that there was a real prospect, the party refusing may be severely penalised. • In this case, the defendant reasonably took the view that by reason of the character and attitude of the claimant, mediation had no prospect of getting anywhere.
<p>#<i>Dunnett v Railtrack plc</i> [2002] EWCA Civ 303, (Practice Note) [2001] 1 WLR 2434 Court of Appeal Brooke, Robert Walker and Sedley LJJ</p>	<p>Costs sanctions, if party fails to accept offer to mediate</p>	<ul style="list-style-type: none"> • When the court asked the defendants why they were not willing to contemplate ADR, they said it was because this would necessarily involve the payment of money, which they were not willing to contemplate, over and above what had already been offered. This was a misunderstanding of the purpose of ADR. • Skilled mediators can achieve results satisfactory to both parties in many cases which are quite beyond the power of the courts to achieve. • A mediator may be able to provide solutions which are beyond the powers of the court to provide. • If a party turns down the chance of ADR, when suggested by the court, they may face uncomfortable costs consequences. • It was not appropriate to take into account the offers that had been made, given the defendants' refusal to contemplate ADR. • The encouragement and facilitating of ADR by the court is an aspect of active case management, which in turn is an aspect of achieving the overriding objective under CPR. The parties have a duty to further that objective and to consider seriously the possibility of ADR procedures.
<p><i>Société Internationale de Télécommunications Aeronautiques SC v Wyatt Co (UK) Ltd and others (Maxwell Batley (a firm), Pt 20 defendant)</i> [2002] EWHC 2401 (Ch) Chancery Division Park J</p>	<p>Conduct of the parties before and during proceedings</p>	<ul style="list-style-type: none"> • The Part 20 defendant was wholly successful in the case and in normal circumstances would receive an order for its assessed costs, to be paid by the main defendant. However, the Part 20 defendant had on three occasions before the case came to trial declined to participate in mediation: should he therefore be denied some or all of his costs by this refusal? • It would be a grave injustice to deprive the Part 20 defendant of any part of their costs on the ground that they declined the defendant's self-serving demands.
<p><i>McCook v Lobo and others</i> [2002] EWCA Civ 1760, [2003] ICR 89 Court of Appeal Pill, Judge and Hale LJJ</p>	<p>Exception to the general costs sanctions rule</p>	<ul style="list-style-type: none"> • Before the appeal hearing, the claimant's solicitors wrote to the solicitors of the first and second defendants suggesting mediation. The solicitors did not reply. They should have done so as a matter of courtesy and because of the risk of having to explain to the court why they had not considered mediation. • In this case, however, mediation would have had no realistic prospect of success and therefore there was no reason to deprive the defendants of any of their costs.

CASE	TOPIC	KEY FINDINGS
<p><i>Leicester Circuits Ltd v Coates Brothers Plc</i> [2003] EWCA Civ 333 Court of Appeal Judge and Longmore LJJ and Sir Swinton Thomas</p>	<p>Withdrawal from mediation: bearing on costs</p>	<ul style="list-style-type: none"> • The whole point of having mediation – and, once you have agreed to it, proceeding with it – is that the most difficult of problems can sometimes, indeed often are, resolved. • It hardly lies on the mouths of those who have agreed to mediation to assert that it had no realistic prospect of success. • The unexplained withdrawal from an agreed mediation was of significance to the continuation of the litigation. While it could not be assumed that mediation would be successful, there was certainly a prospect that it would have done if it had been allowed to proceed: that therefore bears on the issue of costs.
<p><i>#Halsey v Milton Keynes General NHS Trust; Steel v Joy and another</i> [2004] EWCA Civ 576, [2004] 1 WLR 3002 Court of Appeal Ward, Laws and Dyson LJJ</p>	<p>Guidelines for costs when mediation refused</p>	<ul style="list-style-type: none"> • It is one thing to encourage parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. 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 key to ADR's effectiveness is that these processes are voluntarily entered into by the parties. • If the court were to compel parties to enter into 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. • In deciding whether to deprive the successful party of some or all of the costs on the grounds that he has refused to agree to ADR, it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. The burden is on the unsuccessful party to show why there should be a departure from the general rule. It would need to show that the other party acted unreasonably in refusing to agree to ADR. • In determining unreasonableness, the court must have regard to all the circumstances of the particular case. This will include: <ul style="list-style-type: none"> (i) the nature of the dispute; (ii) the merits of the case – the fact that a party reasonably believes that he has a strong case is relevant to the question of whether he has acted reasonably in refusing ADR; (iii) the extent to which other settlement methods have been attempted; (iv) whether the costs of ADR would be disproportionately high; (v) whether any delay in setting up and attending the ADR would have been prejudicial; and (vi) whether the ADR had a reasonable prospect of success – this will often be relevant to the reasonableness of one party's refusal to accept the other's invitation to agree to mediation, but is not necessarily determinative of the fundamental question of whether the successful party acted unreasonably in refusing to agree to ADR.

<p><i>Allen and another v Jones and another</i> [2004] EWHC 1189 (QB) Queen's Bench Division Bernard Livesey QC sitting as a Deputy High Court Judge</p>	<p>Conduct and proportionality as determining factors in assessing costs</p>	<ul style="list-style-type: none"> • Where there was no issue of conduct and no question of proportionality, and where the court had not itself either ordered or suggested that mediation should take place, the mere failure to submit to a request by the unsuccessful party for mediation, in a case such as this, ought not as a matter of principle of itself result in the successful party being deprived of his entitlement to the usual order for costs. • It was difficult to understand why the successful party should be penalised in costs simply because he had not exposed himself to the pressure of direct arguments from the opposite sides which the judge had by his judgment concluded to be incorrect. • Failure to agree mediation was a relevant factor and any failure should be given such weight as in all the circumstances of the case was appropriate; but to elevate it to the level of a predominant factor ran the risk of fettering the court's discretion.
<p><i>Reed Executive Plc and another v Reed Business Information Ltd and other</i> [2004] EWCA Civ 887; [2004] 1 WLR 3026 Court of Appeal Auld, Rix and Jacob LJJ</p>	<p>No disclosure of 'without prejudice' communications, in order to determine whether the party was unreasonable in rejecting ADR</p>	<ul style="list-style-type: none"> • The court could not order disclosure of 'without prejudice' negotiations against the wishes of one of the parties to the negotiations: <i>Halsey</i> considered that the rule in <i>Walker v Wilsher</i> was still good law. • In some cases, when it came to the question of costs, the court would not be able to decide whether one side or the other had been unreasonable in refusing mediation. • Such conclusion was not disastrous or damaging, from the point of view of encouraging ADR. • It was open to either party to make open offers of ADR or offers that were 'without prejudice save as to costs'. The opposite party could respond to such offers, either openly or in the 'without prejudice save as to costs' form. • The reasonableness or otherwise of going to ADR may be fairly and squarely debated between the parties and, under the <i>Calderbank</i> procedure, made available to the court but only when it comes to consider costs. • If an adverse inference were to be drawn against a party refusing disclosure of 'without prejudice' negotiations, there would be clear indirect pressure on it to permit disclosure. That would be contrary to principle.
<p><i>Re Midland Linen Services Ltd, Chaudhry v Yap and others</i> [2005] EWHC 3380 (Ch) Chancery Division Leslie Kosmin QC sitting as a Deputy High Court Judge</p>	<p>Part 36, ADR and costs</p>	<ul style="list-style-type: none"> • The court has a wide discretion under CPR Part 36.11(3) [costs consequences of claimant's acceptance of offer from defendant]. In exercising that discretion it must endeavour to come to a determination which is fair and just in all the circumstances. It must obviously pay regard to the circumstances in which the offer was made and accepted, ie late in the day, but it is not disbarred from considering more general matters such as the willingness or otherwise of the parties to resolve the dispute by mediation or negotiation. • An unreasonable refusal to mediate or negotiate is a factor that the court may take into account when deciding whether a successful party should be deprived of all or part of its costs. • There is no power in the court to order parties who are unwilling to mediate to mediate. • In this case, there was no serious engagement in the process of mediation to justify a finding in accordance with <i>Halsey</i> that the petitioner should in some way be deprived of his costs. • There was no evidence that the defendants had a serious intention to go down the route of mediation, communicated to the other side; there had been repeated disputes over the appointment of independent experts; there had been a dispute over the valuation expert; and the case was marked by a pattern of making and withdrawing of offers.

		<ul style="list-style-type: none"> Given the atmosphere that had been generated between the parties, the court doubted that a successful mediation could have taken place. While both parties stated their willingness to negotiate, their approach in negotiation was both inconsistent and uncertain.
<p><i>Wills v Mills & Co Solicitors</i> [2005] EWCA Civ 591 Court of Appeal Mance LJ</p>	<p>Reasonableness in refusing mediation</p>	<ul style="list-style-type: none"> The factual circumstances overall in the case were such that the applicant could not hope to discharge the burden on her of showing that the defendants acted unreasonably in refusing mediation. Although the court in <i>Halsey</i> had stated that prior encouragement by the court to mediate would, where it existed, be a relevant factor, the court did not believe that the court below had given such encouragement; even if it had, it was extremely weak and so informal that it had not been recorded in the judge's order. The defendants were entitled and bound to take the view that they needed to know how the case was put before considering mediation. Once they knew, they were also entitled to take the view they did, that the claimant's application was bound to fail.
<p><i>#Burchell v Bullard and others</i> [2005] EWCA Civ 358, [2005] BLR 330 Court of Appeal Ward and Rix LJ</p>	<p>Reasonableness prior to <i>Halsey</i></p>	<ul style="list-style-type: none"> Appeals against orders for costs are notoriously difficult to sustain. That is because the trial judge has a very wide discretion with the result that the court will only interfere with his decision if he has exceeded the generous ambit within which there is usually much room for reasonable disagreement; or because (even more unusually) he has erred in principle. The small building dispute is <i>par excellence</i> the kind of dispute which lends itself to ADR. The merits of the case favoured mediation. The defendants behaved unreasonably in believing, if they did, that their case was so watertight that they need not engage in attempts to settle. The stated reason for refusing mediation – that the matter was too complex for mediation – was plain nonsense. The costs of ADR would have been a drop in the ocean compared with the fortune that was spent on this litigation. The court was of the view that mediation would have been successful. However, one must judge the reasonableness of their actions against the background of practice, a year earlier than <i>Halsey</i>. In the light of the knowledge at the times and in absence of legal advice, the court could not condemn the defendants as having been so unreasonable that a costs sanction should follow many years later. The profession must take no comfort from this conclusion. <i>Halsey</i> made plain not only the high rate of a successful outcome being achieved by mediation but also its established importance as a track to a just result, running parallel with that of the court system. Both have a proper part to play in the administration of justice. The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate, simply because it was made before the claim was issued. The defendants, in this case, escaped the imposition of a costs sanction; but defendants in a like position in the future can expect little sympathy if they blithely battle on regardless of the alternatives.

<p><i>Daniels v Metropolitan Police Commissioner</i> [2005] EWCA Civ 1512, [2005] All ER (D) 225 Court of Appeal Ward and Dyson LJJ</p>	<p>Principles on which discretion to be exercised</p>	<ul style="list-style-type: none"> • It is difficult to envisage circumstances where it would ever be right to deprive a successful defendant of some or all of its costs, where it had refused to accept a Part 36 offer. • It would be entirely reasonable for a defendant, especially a public body, to take the view that it would contest unfounded claims and wanted to take a stand; the court should be slow to categorise such conduct as unreasonable and penalise that party through the payment of costs if the litigation was successful. • The court applied <i>Halsey</i>. The court must have regard to all the circumstances including: (i) the conduct of the parties; (ii) whether a party has succeeded on part of its case; (iii) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention. • The conduct of the parties includes: (a) conduct before, as well as during the proceedings, and in particular the extent to which the parties followed any relevant PAP; (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued or defended his case or particular allegation or issue; and (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.
<p><i>Askey v Wood</i> [2005] EWCA Civ 574 Court of Appeal Chadwick and Longmore LJJ</p>	<p>Mediation a sterile exercise if seeking to apportion liability of an unknown quantum</p>	<ul style="list-style-type: none"> • The court noted <i>Halsey</i>, which provided that the factors relevant to a decision as to whether there should be a departure from the general rule as to costs following the event include the nature of the case and whether ADR would have had a reasonable prospect of success. • Mediation would be a sterile exercise, where parties are seeking to apportion liability, if the parties do not know, at least in broad terms, what quantum figure is to be apportioned. The court would not therefore depart from the usual order for costs.
<p><i>Brown v MCASSO Music Productions</i> [2005] EWCA Civ 1546 Court of Appeal Baker and Neuberger LJJ</p>	<p>Conduct of the parties</p>	<ul style="list-style-type: none"> • In light of what was said in <i>Halsey</i>, a party's unpreparedness to negotiate at a time when the judge was encouraging negotiation could be said to be a more significant matter in relation to costs than the claimant's earlier refusal to mediate.
<p><i>The Wethered Estate Ltd v Michael Davis and others</i> [2005] EWHC 1903 (Ch), [2006] BLR 86 Chancery Division Clive Freedman QC sitting as a Deputy High Court Judge</p>	<p>Circumstances in which it may be reasonable to refuse mediation</p>	<ul style="list-style-type: none"> • The substantially successful claimant sought costs against the defendants, who sought to resist such an order, in whole or in part: they had raised mediation as a proposal on a number of occasions; the claimant had delayed going to mediation until well into the proceedings; and on the basis of what happened at the mediation itself. • In the first stage of the dispute, the defendants had kept a van on the claimant's land to put pressure, which was unjustified. Accordingly it was not unreasonable to refuse mediation. In the second period (once the van had been removed but the proceedings had not been begun), there was no communication between the parties, so no points could be taken against the claimant. In the third period (after proceedings had begun), the claimant's solicitors were justified in refusing mediation, because there was a controversy about the factual matrix and in their view the prospects of settlement would be higher once the factual evidence was exchanged. In addition, the nature of the dispute was at that stage difficult to fathom. In the final period, the claimant did proceed to mediation once it believed that the allegations had been adequately set out. This indicated that their objections were <i>bona fide</i>.

		<ul style="list-style-type: none"> In relation to the claimant's conduct at the mediation itself, this was an entirely 'without prejudice' process and privilege had not been waived. Evidence as to what happened at the mediation was inadmissible.
<p><i>LMS International Ltd and others v Styrene Packaging and Insulation Ltd and others</i> [2005] EWHC 2113 (TCC), [2006] BLR 50 TCC Judge Peter Coulson QC</p>	<p>When may an unsuccessful defendant be ordered to pay indemnity costs, having unreasonably refused mediation?</p>	<ul style="list-style-type: none"> The judge noted that <i>Halsey</i> concerned the issue of the possible deprivation of an otherwise successful party of his costs. It was not concerned with the differences between standard and indemnity costs and he was aware of no authority in which a losing party's refusal to mediate on its own justified an order for indemnity costs. In an exceptional case, a refusal to mediate might justify an order for indemnity costs, such as where the refusal was on any view wholly unjustified, or where it was motivated by completely commercial considerations: not the case here.
<p><i>#Hickman v Blake Laphorn and another</i> [2006] EWHC 12 (QB) Queen's Bench Division Jack J</p>	<p>Refusal to negotiate</p>	<ul style="list-style-type: none"> The main issue was whether the conduct of the second applicant was unreasonable. Although the situation was different from cases concerning a refusal to agree to mediate, since a refusal to negotiate was also involved, the same test was applicable. The insurers were not prepared to pay more than they thought the claim was worth because, if costs were taken into account, it would save them money. That was a legitimate stance, since otherwise the threat of a costs consequence could be used to extract more than a claim was worth. In those circumstances it had not been demonstrated that their position as to negotiation and mediation was unreasonable. It is not an answer that the unsuccessful party could have protected itself by a Part 36 offer or a payment into court. The potential saving of costs in comparison with the amount in issue between the parties was not something that was relevant to the reasonableness of a refusal to agree to mediation. It is a factor that can be taken into account but it must be watched carefully.
<p><i>P4 Ltd v Unite Integrated Solutions Plc</i> [2006] EWHC 2924 (TCC), [2007] BLR 1 TCC Ramsey J</p>	<p>Refusal to mediate unreasonable by reference to <i>Halsey</i> factors</p>	<ul style="list-style-type: none"> The claimant's solicitors made a number of offers to mediate, both before issuing proceedings and afterwards, which were rejected in terms. The court held that this rejection was unreasonable, by reference to the particular factors laid down in <i>Halsey</i>. These were: (1) the defendant could not reasonably have thought they had a watertight case: the sums in dispute were large and there were a number of issues which the claimant might have disputed substantially, but only at the hearing; (2) letters from solicitors could not be a proper substitute for ADR, which involves clients engaging with each other and a third party, such as a mediator, to resolve a dispute; there was no proper engagement in the correspondence on the central issues and concerns which are usually the focus of ADR; (3) ADR was not expensive, compared to the total costs of proceeding to trial; (4) there was no delay by the claimant in offering mediation; (5) the case not only had a reasonable prospect of succeeding in settling at mediation but a good prospect. In normal circumstances, considering the small amount awarded to the claimant, the defendant would have been entitled to its costs from the beginning of the action. However, due to the refusal of the defendant to attend mediation, the claimant was entitled to its costs up to the date of the defendant's Part 36 offer.

<p><i>Jarrom and another v Sellars</i> [2007] EWHC 1366 (Ch) Chancery Division Christopher Nugee QC sitting as a Deputy High Court Judge</p>	<p>Special circumstance justifying the exceptional course of no order as to costs</p>	<ul style="list-style-type: none"> • The lack of agenda, lack of detailed proposals, lack of witness statements and the costs involved were not sufficient to justify a refusal to attend a settlement meeting prior to proceedings being issued. • <i>Halsey</i> was applied: while the initial meeting would not have led to the complete settlement of all claims, it would have been preferable to explore what was in issue between the parties and how best the matters could be taken forward without the necessity for litigation.
<p><i>Nigel Witham Ltd v Smith and another (No 2)</i> [2008] EWHC 12 (TCC) TCC Judge Peter Coulson QC</p>	<p>Unreasonable delay in consenting to mediation may have adverse costs consequences</p>	<ul style="list-style-type: none"> • The starting point in the consideration of costs is CPR rule 44.3. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, although the court may make a different order. • In this case, it was not that the defendants refused to mediate at all but that they only consented to mediate very late in the litigation process, when the vast majority of costs had been incurred. • It was not unreasonable for the defendants to consider mediation but only once the claimant had properly set out its claim, particularly given that the claimant was obliged to make some radical amendment to the claim following the commencement of proceedings. • Mediation is often suggested by the claiming party at an early stage. But the responding party, who is likely to be the party writing the cheque, will often want proper information relating to the claim in order to be able to assess the commercial risk that the claim represents before embarking on a sensible mediation. • A premature mediation simply wastes time and can sometimes lead to a hardening of the positions on both sides, which make any subsequent attempt of settlement doomed to fail. • Conversely, a delay in any mediation until after full particulars and documents have been exchanged can mean that the costs which have been incurred to get to that point themselves become the principal obstacle to a successful mediation. • Compromise and reconciliation did not feature predominantly in the claimant's correspondence; as a result, early mediation had little or no chance of success. • The principles in <i>Halsey</i> might, in an exceptional case, be applicable to the situation where there was a mediation, but very late, when its chances of success were very poor; if it could be shown that the successful party unreasonably delayed in consenting to the mediation, this might lead to an adverse costs order. • In this case, there was nothing to demonstrate that the defendants unreasonably delayed in consenting to the Judicial Settlement Conference (under the CSP); even if there had been an earlier mediation, the claimant's uncompromising attitude meant that it would not have had a reasonable prospect of success.
<p><i>Carleton and others v Strutt and Parker (a partnership)</i> [2008] EWHC 424 (QB), 118 Con LR 68 Queen's Bench Division Jack J</p>	<p>Causing a mediation to fail because of unreasonable position same as refusing to mediate</p>	<ul style="list-style-type: none"> • Where a failure to mediate was due to the attitudes taken on both sides, it was not open to one party to claim that the failure should be taken into account in the order as to costs. • The party who agreed to mediation but who then caused the mediation to fail because of his unreasonable position was in the same position as a party who refused to mediate: such conduct could and should be taken into account in the order for costs. • The claimant's position at the mediation was plainly unrealistic and unreasonable. Had they made an offer which better reflected their true position, the mediation might have succeeded.

<p><i>TJ Brent Ltd and another v Black & Veatch Consulting Ltd</i> [2008] EWHC 1497 (TCC) TCC Akenhead J</p>	<p>Application for costs prior to hearing, for failure to comply with PAP</p>	<ul style="list-style-type: none"> • In circumstances where there had been compliance with the substance of the PAP, the judge was unwilling to order costs for lack of compliance with the detail, especially where: (1) the defendant had not raised the issue when the matter had last been before the judge; and (2) there was no evidence to establish that there was some realistic prospect of success prior to the issue of proceedings of a mediation taking place and that some resolution would have been reached at that mediation. • <i>Halsey</i> and <i>Midland Linen</i> were not of much assistance, as they related to orders being made at the court at the end of the case, when the court is fully informed of the rights and wrongs of the case.
<p><i>Vale of Glamorgan Council v Roberts</i> [2008] EWHC 2911 (Ch) Chancery Division, Cardiff District Registry Lewison J</p>	<p>Duty on public authorities to suggest mediation?</p>	<ul style="list-style-type: none"> • Any adjustment of the costs order was not warranted on the ground of settlement; it would be going too far to disallow costs incurred by a local or public authority because that authority did not initiate suggestions for a mediation. • In this case, any reduction in costs on account of partial success and exaggeration would be no more than nominal.
<p><i>Roundstone Nurseries Ltd v Stephenson Holdings Ltd</i> [2009] EWHC 1431 (TCC) TCC Coulson J</p>	<p>PAP – withdrawal from mediation</p>	<ul style="list-style-type: none"> • A party was wrong to cancel a mediation, because: (1) it was an agreed part of the PAP process; (2) without the mediation, there was no way in which the requirement for a 'without prejudice' meeting between the parties could be fulfilled; (3) the mediation was arranged before there was any question of inviting a third party and should have gone ahead without their involvement, especially since the third party had been identified to the defendant much earlier on than the planned date of the proposed mediation; (4) the third party had not participated because of the later service of the defendant's expert report. This was not a reasonable position for them to take. • The judge did not, however, consider that costs should be paid on an indemnity basis, because this '<i>was a bona fide, but incorrect decision made, perhaps, without any real thought of the ultimate consequences.</i>'
<p><i>Register of the Corby Group Litigation v Corby Borough Council (Costs)</i> [2009] EWHC 2109 (TCC) TCC Akenhead J</p>	<p>One must judge the decision to refuse ADR at the time that it was under consideration</p>	<ul style="list-style-type: none"> • The statement in <i>Halsey</i> that the fact a party believes that he has a watertight case is no justification for refusing mediation should be qualified. The fact that a party <i>unreasonably</i> believes that his case is watertight is no justification for refusing mediation; but the fact that a party <i>reasonably</i> believes that he has a watertight case may well justify refusing to mediate. • By reference to <i>Hurst</i>, did the defendant acted unreasonably in refusing mediation? The defendant formed the view, based on the claimant's expert reports, that mediation would be '<i>highly unlikely to be productive in reaching a conclusion.</i>' Whilst hindsight shows that they were wrong, one must judge the decision to refuse ADR at the time that it was under consideration. Given that the defendant had material evidence to support its stances on every material aspect of the Group Litigation issues and that the claimants were adopting a '<i>scattergun approach</i>', it was not unreasonable to form the view that mediation would not have produced a settlement.

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Much more has been written about the theory of mediation, and its proper place in the avoidance and resolution of disputes in construction, than about its actual use. *Mediating Construction Disputes: An Evaluation of Existing Practice* is the full report of research conducted in 2006-2008 by the Centre of Construction Law & Dispute Resolution at King's College London, collaborating with the Technology and Construction Court at three centres. It combines hard - and sometimes surprising - detail about its practice, from questionnaires completed by those actually involved in TCC litigation, with a summary of the existing knowledge about mediation in the common law world and about its relation to other formal and informal methods of dealing with construction disputes.

