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Mediation Outcomes: Lawyers' Experience With Commercial and Construction Mediation in the United Kingdom

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ABSTRACT

This paper reports on the final phase of a three-year study into the role of lawyers in the development of Alternative Dispute Resolution (ADR) following the implementation of the Civil Procedure Rules in 1999 and draws comparisons between US and Canadian studies. The paper centres on the use of mediation, which is recognised as the pre-eminent ADR process in the UK.¹ Data are analysed from 30 interviews with specialist commercial and construction-related lawyers who have utilised mediation in the dispute resolution process. Interviewees were selected from respondents to a national survey of lawyers specialising in commercial and construction-related practice. Whereas reaching settlement is typically regarded as the measure of success, this research focuses on *other* "mediation outcomes" experienced by solicitors and barristers, the majority of whom are repeat-users of the process. The data reveal that achieving settlement in a timely and cost-effective manner is among the chief advantages mediation has over litigation, but a number of other benefits can make the process an eligible option in dispute resolution. In particular, the process of mediation allows the parties to focus on or narrow the issues in dispute. Lawyer-interviewees also report tactical advantages from engaging in mediation. These range from providing the opportunity to examine the strengths and weaknesses of the case to testing witnesses and evidence. The data suggest lawyers are developing new practices in mediation, such as proposing the process in order to provide proof to the courts of willingness to compromise or participating in mediation in order to send messages to the opposition. Mediator-interviewees

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1. P. Brooker and A. Lavers, *Issues in the Development of ADR for Commercial and Construction Disputes*, 19 CIV. JUST. Q. 353, 353-70 (2000).

report a trend in mediation where cases are more difficult to settle and the participants more cognisant of mediation tactics.

INTRODUCTION

In the last decade, lawyers have taken a leading role in the development of ADR in the UK and many mediators and ADR specialists have a background in the legal profession.² This dominance led to uneasiness in some quarters that lawyers would take control of the new procedures and apprehension about their role in the expansion of ADR.³ The "juridification"⁴ of alternative procedures is not unfamiliar in the history of litigation in the UK where the legal profession, anxious to maintain their monopoly on dispute resolution, has assimilated alternatives, such as arbitration, into the formal system and legislation and the common law have facilitated this process.⁵ The introduction of ADR into the civil justice reform programme in the UK has led, inevitably perhaps, to an expanded role for the lawyers in the practice of mediation and the Civil Procedure Rules (CPR), albeit perhaps unintentionally, support the legal professions in influencing the way the process develops. CPR creates an overriding objective for courts to deal justly with cases by using active case management, which includes encouraging and assisting the parties in the use of ADR in appropriate cases. Judges have the power to stay proceedings while the parties endeavour to settle their dispute, but, arguably, the decisive future for ADR is determined by rule 44.5, which allows judges to take into account the parties' efforts to settle the dispute when considering costs.⁶ This paper reports on empirical interviews undertaken just after the implementation of CPR with construction and commercial lawyers, the majority of whom are repeat-users of mediation. Two main themes are considered. First, the extent to which judges and the courts influence the use of mediation in the context of commercial and construction dispute reso-

2. S. Roberts, *Mediation in the Lawyers' Embrace* 55 MOD. L. REV. 258 (1992); S. Roberts, *ADR and Civil Justice: An Unresolved Relationship* (1993) 56 MOD. L. REV. 452; P. Robertshaw & J. Segal, *The Milking of ADR*, 12 CIV. JUST. Q. 23 (1993).

3. *Id.* R. Davies, *Construction Conflict - The Specialist Contractor's View*, Proceedings of the First International Construction Management Conference, UMIST (1992).

4. J. Flood & A. Caiger, *Lawyers and Arbitration: The Juridification of Construction Disputes*, 56 MOD. L. REV. 412 at 412-414. (1993). Flood and Caiger use 'juridification' in the narrow sense to mean the monopolization of the legal field by legal professionals. They cite Pierre Bourdieu, *The Force of Law: Towards a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805 (1987).

5. *Id.* See also P. Brooker, *The Juridification of ADR: Legal Professionals' Involvement in ADR in the UK Construction Industry*, 1 ANGLO-AM. L. REV. 1, 1-36 (1999).

6. P. Brooker and A. Lavers, *Commercial and Construction ADR: Lawyers' Attitudes and Experience*, 20 CIV. JUST. Q. 327 (2001).

lution and second, an examination of the outcomes achieved by mediation in practice compared with its recognised theoretical benefits.

The modern ADR movement is often understood to have begun in the United States (US) as a response to dissatisfaction with the costs, speed and adversarial approach of litigation. In the 1960s and 1970s conciliatory, informal ADR procedures, based on the ideologies of reciprocity and harmony, were promoted in the US, as they facilitated the parties' autonomy by allowing them to participate more effectively in the resolution of their disputes. Mediation in particular was endorsed as the primary procedure for enabling the parties to reach a negotiated settlement. In its "purest form"⁷ disputants are encouraged by a third party neutral to communicate with each other, to consider all the interests of those involved in the dispute and to explore alternatives and create solutions though using compromise and agreement rather than "strict legal rights."⁸

In the US, mediation is supported "qualitatively" because it empowers the parties by focussing on their involvement, control and self-determination over the process but a divergent "quantitative" argument is identified which sponsors mediation because it provides cheaper, speedier and more efficient case processing.⁹ Many court-connected mediation programmes in the US were introduced to reduce the civil dockets. Although these schemes are reported to have significantly increased the use of mediation, empirical data also indicate that the mediation process has been transformed from a "qualitative" model to one resembling the "traditional bi-lateral negotiations" (between the parties' lawyers) usually engaged in by lawyers where settlement is the primary objective.¹⁰ Lawyers in these programmes are found to dominate the process, with the parties having a reduced role and mediation is reported to be increasingly evaluative rather than facilitative.¹¹ In court-connected schemes, lawyers and their

7. Carrie Menkle-Meadow, *Lawyer Negotiation: Theories and Realities – What we learn from Mediation*, 56 MOD. L. REV. 362, 372 (1993).

8. JAY FOLBERG, & ALISON. TAYLOR, *MEDIATION* 7 (1984); A. BEVAN, *ALTERNATIVE DISPUTE RESOLUTION* (1992).

9. Carrie Menkle-Meadows, *When Dispute Resolution Begets Disputes of its own: Conflicts among dispute professionals* 44 UCLA L. Rev. 1871, 1871-1872 (1997).

10. Nancy Welsh, *Making Deals in Court Connected Mediation: What's Justice got to do with it*, 79 WASH. U. L. Q. 787, 788 (2001).

11. P. Thompson, *Enforcing Rights Generated In Court-Connected Mediation – Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 38 OHIO ST. J. ON DISP. RESOL. 509 (2004); Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalising ADR: Attorneys' Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473 (2002); Welsh, *supra* note 10, at 789; D. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL.81; L. Riskin, *Understanding Media-*

clients have been found to select mediators for their skills in valuing or assessing the strengths and weaknesses of cases, rather than facilitating and empowering the parties to reach their own decisions.¹² Empirical data from the US and Canada indicate that, although court-connected programmes have encouraged mediation use, the outcomes achieved produce monetary rather than creative settlements¹³ and there is indication that the parties' relationships are not always improved.¹⁴ Furthermore, there is evidence of an increasing tactical use of the process by lawyers in some court schemes.¹⁵

The mediation movement in the UK reveals a similar developmental pattern to that of the US. Research prior to CPR indicated that the take-up rate of mediation in the voluntary sector and in court-sponsored schemes was moderate¹⁶ and unlikely to increase until the legal profession and judges were educated about the potential that ADR had to offer for the resolution of cases.¹⁷ ADR's potential contribution to dispute resolution rested not only with the legal professions' endeavours to use it but also the endorsement given by the judiciary of promotion and encouragement of its use. Part One of the article gives consideration to the court initiatives to promote ADR: namely, the use of ADR orders and court mediation schemes, and a review is made of the leading cases relating

tors' *Orientations, Strategies and Techniques: a Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

12. Welsh, *supra* note 10, at 788, 789.

13. McAdoo, *supra* note 11, at 520; Welsh, *supra* note 10, at 789.

14. Roselle L. Wissler, *Court Connected Mediation in General Civil Cases: What We Know From Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 664 (2002).

15. J. Macfarlane, J., *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation* 2002 J. OF DISP. RESOL. 241, 266-269; Welsh, *supra* note 10, at 851.

16. See, e.g., H. Genn, *Central London County Court Pilot Mediation Scheme: Evaluation Report*, 5/98 LORD CHANCELLOR'S DEPARTMENT, RESEARCH SERIES 15 (1998). 160 cases were mediated out of 4,500 offers during the period of the study. L. Mulcahy, *Can Leopards Change Their Spots? An evaluation of the role of lawyers in medical negligence mediation*, 8 INT'L J. LEGAL PROF. 203-224 (2001). Only 12 cases were mediated in a medical negligence mediation pilot scheme set up in April 1995. Poor co-ordination of the scheme by civil servants, the provision of little funding for its launch, the failure of the Legal Aid Board to provide legal aid for solicitors until the final eleven months and the reluctance of the National Health Service Litigation Authority to refer cases are cited as factors in its failure. P. Fenn and N. Gould, *Dispute Resolution in the UK Construction Industry, Conference on Dispute Avoidance in the Construction Industry*, University of Kentucky, Lexington, KY. (1994); P. Brooker and A. Lavers, *Perceptions of ADR as constraints upon its use in the UK Construction Industry* 15 CONSTR. MGMT. & ECON. 513, 513-526 (1999). Less than 4 percent of the respondents to a survey of contractors and sub-contractors reported utilising any form of ADR.

17. Genn, *supra* note 16, at 154. See also E. Ezeli & D. Hoare, *The Need for Education in Alternative Dispute Resolution*, 5 ENG'G CONSTR. & ARCHITECTURAL MGMT., 144, 144-149 (1998). Interviews with UK experts in the construction industry indicated a lack of understanding of ADR principles and ADR experience and the authors concluded this should be surmounted by education and training by universities, professional institutions and specialist ADR bodies. (At 149) See also M. Reynolds, *ADR and the Courts*, 6.2 CONSTR. & ENG'G L., 17 (2001).

to the approach taken by judges to furthering the overriding objective of the court by encouraging the use of mediation.

Part Two of the article reviews data from the interviews with solicitors and barristers on their experience with using mediation for construction and commercial disputes. Interviewees were respondents from an earlier postal survey,¹⁸ which had investigated how lawyers were employing mediation following the implementation of the CPR. This survey was designed to supply information on the practice of ADR in commercial and construction fields and to test lawyers' attitudes on the suitability and appropriateness of mediation.¹⁹ The survey instrument was constructed to explore details relating to the frequency in use of mediation, determinants for recommending mediation to clients, and the types of case found suitable for mediation, with reference to categories of dispute and size of disputed claim. The survey also explored the end product of mediation in terms of reaching settlement and financial or creative outcomes.

The findings from the postal survey revealed that some sectors of the legal profession were embracing mediation and respondents had a high level of knowledge and experience with the process. However, data did show that lawyers in the study were experiencing relatively high levels of non-settlement and nearly a third of all mediations were reported as not settling or only reaching partial resolution. Neither financial size nor categories of dispute were found to affect the settlement rate but the data indicated that the incidence of failure to reach settlement was affected by the attitudes of the parties involved in mediation. Mediation was reported not to reach settlement either because the parties held uncompromising or unrealistic attitudes or because they were polarised or entrenched in their positions. Lawyers also reported that the tactical use of mediation was sometimes a relevant factor in non-settlement. Survey respondents,

18. A random sample of 529 solicitors and barristers was drawn from specialists' lists of construction and commercial practitioners provided by the Law Society and Bar Council, which resulted in a response rate of just over 24 percent. A substantial number of respondents (two-thirds) had used mediation: Although this suggests a wider take-up of ADR than reported in other research, it is likely that the respondents were those who either had used mediation or were more enthusiastic than non-respondents and may not be representative of all commercial and construction lawyers. The findings, however, provided illustrative data of mediation use from an informed sector of the commercial and construction fields. See, e.g., K. MOSER, & G. KALTON, SURVEY OF METHODS IN SOCIAL INVESTIGATION (1993) discussing non-response to surveys. Those enthusiastic about a product are more likely to respond to a postal survey. *Id.*

19. P. Brooker & A. Lavers, *supra* note 6, 227-247; P. Brooker and A. Lavers, *Commercial Lawyers' Attitudes and Experience with ADR*, 4 WEB JOURNAL CURRENT LEGAL ISSUES (2002) available at <http://webjcli.ncl.ac.uk/2002/issue4/brooker4.html> (2002).; P. Brooker, *Construction Lawyers' Attitudes and Experience with ADR*, 18 CONST. L. J. 97, 97-116 (2002).

however, did not measure the benefits of mediation only by “quantitative” settlement outcomes; lawyers held significant levels of appreciation about its “qualitative” attributes such as enabling creative settlements or improving party relationships but the findings also revealed that these benefits were not a frequent occurrence in practice. Nearly three-quarters of all mediations reported involved a financial settlement only. The final phase of the study reported here, follow-up interviews with survey respondents, was designed to investigate the actual benefits and outcomes, beyond settlement, that the interviewees had experienced when engaging in mediation.

An examination of the case law indicates the importance of ADR in the civil justice system. Increasingly, judges are prepared to exercise sanctions in relation to costs for unreasonable refusals to engage in mediation. The interviews took place just after the seminal decision in *Dunnett v Railtrack PLC (2002)*²⁰ when costs were denied to the successful appellant for refusing an offer to participate in mediation. This decision had a notable impact on the interviewees of which the majority were repeat-users of mediation. Although the judgment in *Dunnett* was recognised to have successfully increased awareness of mediation, it was also noted that there was an increased use of threats in legal negotiations in order to provide proof to the courts of willingness to compromise or participate in mediation. Further, there were indications in the interview data that some lawyers are using the mediation process for strategic outcomes, such as “sending messages” or testing evidence and witnesses. Judicial statements in ADR case law highlight the benefits to be gained from mediating and the skills that experienced mediators have in facilitating settlement. Judges also comment on the ability of mediators to foster creative settlements and resolve disputes “which are quite beyond the power of lawyers and courts to achieve.”²¹ Yet empirical evidence from court-connected schemes in the US suggest that these outcomes are achievable but not standard: non-financial outcomes are rare and non-settlement is often reported to be the result of the parties’ uncompromising attitudes. A review of mediation literature in the UK suggests that little independent empirical evidence exists on the practical application of mediation outside court-connected or government-sponsored schemes. This paper seeks to provide some insights into the outcomes experienced by lawyers in this study when engaging in voluntary mediation. The authors contend that the interview data provide confirmation that mediation can bestow many benefits on the dispute resolution process in construction and commercial disputes but it also furnishes the opportunity for lawyers to use the process “instrumentally,” which

20. *Dunnett v Railtrack PLC*, (2002) C.P. Rep. 35 (Eng. C.A. 2002).

21. *Id.* at ¶ 14.

may inadvertently be supported by judicial and court support given to fostering the use of ADR.²²

PART ONE: BACKGROUND TO THE STUDY

ADR experience pre-CPR

Research prior to the implementation of CPR suggested that the take-up rate of ADR in the construction and commercial fields was moderate. One of the first major surveys in the construction industry²³ concluded that the use of ADR was insubstantial in construction, which was confirmed by a later survey of contractors and sub-contractors in 1996, where less than 4 percent of respondents had used ADR.²⁴ The Central London County Court Mediation Scheme (CLCC Scheme), established in 1996, reported a 5 percent take-up for non-family civil disputes.²⁵ The report concluded that solicitors' lack of knowledge, negative attitudes, fear of showing weakness and concerns about lost revenue were the causes of the poor level of mediation activity.²⁶ Studies in the areas of construction and clinical negligence have similarly reported that lawyers view ADR as a threat.²⁷

Pre-CPR research suggested that demand for mediation was unlikely to increase until the professions (legal and other) and the public was educated about its capability to assist in the resolution of disputes.²⁸ The authors' postal survey of lawyers working in the commercial and construction-related fields found that its respondents, many of them repeat-users of mediation, held more positive attitudes towards the process than solicitors in the CLCC scheme. A substantial number of practising lawyers who responded to the questionnaire reported high

22. Macfarlane, *supra* note 15, at 260.

23. P. Fenn & N. Gould, *Dispute Resolution in the UK Construction Industry*, Speech at the Conference on Dispute Avoidance in the Construction Industry at the University of Kentucky (1994).

24. P. Brooker & A. Lavers, *supra* note 16 at 513-26.

25. Genn, *supra* note 16.

26. *Id.* at ¶ 2.11.

27. See also N. Gould & M. Cohen, *Appropriate Dispute Resolution in the UK Construction Industry*, 17 CIV. JUST. Q. 103 (1998). The authors suggest that some lawyers in their study perceive ADR as a threat. *Id.* at 25. See also Mulcahy, *supra* note 16. Mulcahy suggests that the threat of mediation led leading specialist solicitors in clinical negligence to be involved in setting up the pilot scheme. *Id.* at 19.

28. Genn, *supra* note 16, at 154. See also E. Ezelike & D. Hoare, *supra* note 17; M. Reynolds, *supra* note 17.

levels of familiarity with mediation, recommend its use frequently and had experienced high degrees of satisfaction with the process.²⁹

Mediation use post-CPR

Other available statistics on ADR use suggest that utilisation of mediation post-CPR is varied across different areas of practice. Research commissioned by the Law Society and the Civil Justice Council found that CPR had little effect on the use of ADR in clinical negligence, personal injury and housing cases.³⁰ The early findings of a mediation scheme in the Leeds County Court indicated that few mediations had taken place and the DETR reported only 48 cases in the scheme piloted by the Planning Inspectorate for appeals in the planning process.³¹ However, other reports indicate an increase in mediation activity; for example, a survey of members of the Association of Northern Mediators (ANM) and other commercial mediators in 2000 suggested an increase in mediations in the second half of the year, from 90 to 124 mediations.³²

29. Brooker & Lavers, *supra* note 6, at 327-347. See also Brooker, *supra* note 19; P. Brooker and A. Lavers, *supra* note 19.

30. T. Goriely, R. Moorhead & P. Abrams, *More Civil Justice? The Impact of the Woolf reforms on pre-action behaviour*, available at http://www.worldbank.org/publicsector/legal/MoreCivilJustice_R43Report_v1.pdf (2002) (research commissioned by the Civil Justice Council and The Law Society). Summaries of in-depth interviews with 54 lawyers, insurers and claims managers suggested that interviewees had little experience of ADR in clinical negligence or housing cases and confirmed the conclusion of Professor Genn's report in 1998. See Genn, *supra* note 16 (stating that the demand for mediation in personal injury was "virtually non-existent" and that CPR had little effect on the use of ADR in clinical negligence, personal injury and housing cases). See also L. Mulcahy et al., *Medical Negligence Claims: An Option for the Future*, THE STATIONARY OFFICE (1999). See also Mulcahy, *supra* note 16, at 203-224. See also *Making Amends: a consultation paper setting out proposals for reforming the approach to clinical negligence in the NHS*, THE CHIEF MEDICAL OFFICER (2003), available at http://www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsPolicyAndGuidance/PublicationsPolicyAndGuidanceArticle/fs/en?CONTENT_ID=4010641&chk=oLC1W%2B (2003). The report indicates that a "substantial rise" of mediation activity in the NHSLA (National Health Service Litigation Authority) mediation initiative: from 9 in the first year of the scheme to 47 in the first 10 months of the third year. *Id.* at 95. Recommendation 15 suggests that mediation should be "seriously considered before litigation for the majority of claims that do not fall within the proposed NHS Redress Scheme" (i.e. cases over £30,000). *Id.* at 125-26.

31. 'Mediation in the Planning System', J. OF PLAN. L. 873-874 (2000). No appeals were made in 73 percent of cases following mediation and applicants reported being left with a feeling that they had been heard and a better understanding of the position and the local authority planner left with a better application. *Id.* at 873-874. (Accessed from Westlaw: author not cited. Last visited May 1st 2005) See also B. Pearce, *Mediappeal: A New Kind of Appeal Procedure*, J. OF PLAN. L. 1240-45 (2000); and B. Pearce, *Mediation in the Planning System*, J. OF PLAN. L. 904-910 (2000).

32. A. Glaister, *Mediation trends in the North of England*, (1) J. OF ADR., MEDIATION AND NEGOTIATION (3) 7. (2001).

After a slow start to the Government's pledge to use ADR, the number of government referrals rose from 49 in 2001-2002 to 617 offers of ADR in 2002-2003.³³ Only 27 percent of the offers were accepted but 89 percent of the disputes where ADR was accepted settled without a hearing. Impetus for the public bodies to use ADR was enhanced following the decision in *Royal Bank of Canada Trust Corporation Ltd. v. Secretary of State for the Defence* [2003] EWHC 1841 (Ch)³⁴ where the Department's refusal to use ADR was based on the grounds that the case involved a "black and white" answer to a question of law. Mr Justice Lewison placed "great weight" on the government pledge to use ADR in suitable cases. However, in *Halsey v. Milton Keynes General NHS* [2004] the Court of Appeal decided that the judge was wrong to "attach such weight to the ADR pledge."³⁵ The pledge was "no more than an undertaking that government will consider ADR in suitable cases." (For a detailed analysis of *Halsey* see below.) If a case is suitable, then the party, whether or not a public body, would act unreasonably if ADR was refused and if the case is unsuitable then a refusal to agree to ADR does not breach the pledge. (It is noted that government was again refused costs for conditionally refusing to undertake mediation in *Queen on the Application of Nurse Prescribers Ltd. v. The Secretary of State for Health* [2004].)³⁶

Initially, following CPR, there was a substantial increase in mediation appointments and Centre for Effective Dispute Resolution (CEDR) statistics indicate a steady rise in court-referred mediations from 19 percent in April 1999-Mar 2000 to 31 percent in April 2001-March 2002.³⁷ The number of "scheme-

33. Department for Constitutional Affairs *Alternative Dispute Resolution: Monitoring the effectiveness of the Government's commitment to using ADR*, available at <http://www.dca.gov.uk/civil/adr/adrmon03.htm> (2003).

34. *Royal Bank of Canada Trust Corporation Ltd. v. Secretary of State for the Defence* [2003] E.W.H.C. 1841 (Ch).

35. *Halsey v. Milton Keynes General NHS Trust* [2004] E.W.C.A. Civ. 576, 35 (C.A.) (U.K).

36. *Id.* (noting that the government was again refused costs for conditionally refusing to undertake a mediation). See *The Queen on the Application of N (Acting by her Mother and the Litigation Friend B), B v Barts and the London NHS Trust, Disability Rights Comm'n, Sec'y of State for the Home Depar't* [2004] E.W.H.C. 719 (Q.B.) (U.K.).

37. CEDR reported a mediation increase of 141 percent in the first year following CPR. The Patent Office, *Alternative Dispute Resolution (ADR) (2004)*, available at <http://www.patent.gov.uk/about/ippd/issues/adr.htm>. CEDR Solve Commercial Statistics for 2002/2003 indicate an increase of voluntary mediations, which were up by 50 percent although there was a 30 percent decline in court ordered/agreed "stay mediations." CEDR, *CEDR Solve Commercial Mediation Statistics 2002/2003* (2003), available at www.cedr.co.uk/index.php?location=/library/articles/stats_2002_2003.htm. (last visited May 1, 2004). In total, CEDR report a 22 percent increase in commercial mediation in 2002-2003. Scheme

based” mediations rose to 105 for the year 2002-2003; a 62 percent increase from the previous year.³⁸ CEDR reports an overall increase of mediation activity of 35 percent in 2003.³⁹ Currently, the civil and commercial mediation market is estimated to be between 1800 to 2000 mediations per annum.⁴⁰

The available data on mediation numbers suggest an increase in mediation activity following CPR. Judges have a central role in overseeing change in the litigation practices of the lawyers and ultimately the development of ADR and mediation.⁴¹ The following section analyses judicial support given to ADR and mediation since CPR. First, an examination is made of court initiatives to promote ADR: namely issuing ADR orders and the provision of court mediation schemes. Second, a brief review is made of the leading cases relating to the approach taken by judges to further the overriding objective of CPR.

ADR orders in the Commercial Court

At the time CPR was introduced, judges had limited training and experience of the different ADR procedures and commitment to furthering its use was limited to specific judges and dispute areas.⁴² This position has not been static and the judiciary is actively promoting ADR through court mediation schemes and exercising judicial powers under CPR to stay proceedings until ADR is attempted. The CEDR Civil Justice Audit found that seven out of 10 judges would stay a case when requested to do so by one or both parties.⁴³ A review of ADR orders in 2002 indicated that the Commercial Court issued 233 orders from July 1996 to June 2000, with about half resulting in ADR over the period under examination.⁴⁴ Prior to CPR, the numbers taking up ADR after an order was reported to be “disappointing” but it was calculated that about three-

based mediation increased by 62 percent. *Id.* See also The Lord Chancellor's Department, *Civil Justice Reform Evaluation: A continuing evaluation of the Civil Justice Reform*, 4.8 (2002), available at <http://www.patent.gov.uk/about/ippdf/issues/adr.htm>.

38. CEDR *Solve Commercial Mediation Statistics 2002/2003*, *supra* note 37.

39. CEDR, *CEDR Mediation Figures Reach All Time High* (2004), available at www.cedr.co.uk (last visited Oct. 25, 2004).

40. CEDR, *Mediator Audit*, at 3 available at www.cedr.co.uk (last visited 2nd March 2005).

41. Woolf, *The Interim Report*, ACCESS TO JUSTICE (1995); Woolf, *The Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, ACCESS TO JUSTICE (1995).

42. Brooker & Lavers, *supra* note 1, at 360-61. See Andrew Burr and Richard Honey, *The Post-Woolf TCC: Any change?*, 17 CONSTR. L. J. (5) 378 (2001); W. Rees & P. Howell-Richardson, *ADR, Update on the impact of CPR on ADR*, (1.1) JOURNAL OF ADR MEDIATION & NEGOTIATION 8 (2001).

43. CEDR, *The CEDR Civil Justice Audit* 1, 6 (Apr. 2000) available at <http://www.cedr.co.uk/library/articles/CJAreport.pdf>.

44. Hazel Genn, *Court-Based Initiatives For Non-Family Civil Disputes: The Commercial Court and the Court of Appeal*, THE LORD CHANCELLOR'S DEP'T RESEARCH SERIES NO. 2, 30-31 (2002), available at <http://www.dca.gov.uk/research/2002/1-02es.htm>.

quarters of the parties issued with orders post-CPR had undertaken some form of ADR.⁴⁵ The report concluded that the Commercial Court is putting 'substantial pressure' on lawyers and is influencing the way that the legal professions advise their clients in relation to dispute resolution and ADR.⁴⁶

Court Mediation Schemes

The Court of Appeal's Mediation Scheme was introduced in 1997 but judicial encouragement has been found to be less effective for cases at this stage of dispute resolution. Between November 1997 and October 1999, the Court of Appeal issued 767 'invitations to mediate' but only 38 mediations had taken place at the time of the report: a 2 percent take-up rate.⁴⁷ Genn concluded that this discouraging rate is likely to emanate from the 'expectations' of what the process can achieve at a late stage in dispute resolution and the "potential for compromise" after one party has already had success in court.⁴⁸

A number of regional courts run mediation schemes⁴⁹ and Government confirmed its plans to initiate pilot mediation and ADR schemes through 40 courts in 2004.⁵⁰ Mediation schemes are run in Exeter, Liverpool, Newcastle, Manchester, Birmingham and Leeds. In the Leeds Combined Court, the Law Society makes mediator appointments from a list from the Association of Northern Mediators, which includes both lawyers and non-lawyers, however, the scheme resulted in only eight appointments in the first six months although an increase in appointments was reported in 2001.⁵¹ A more proactive approach, based on

45. *Id.* From July 1999 to December 1999, it was calculated that about three-quarters of the parties issued with ADR orders engaged in some form of ADR.

46. *Id.* at 37.

47. *Id.* at 78. In a further 99 cases, one party agreed to mediation. *Id.* A better rate was achieved following the appointment of a full-time administrator. *Id.*

48. *Id.* at 98.

49. *The Lord Chancellor's Continuing report on CPR.* *Supra* note 37. More recently Exeter launched a mediation scheme in March 2003 and Guildford in April 2003. CEDR, *Number of Court Based Mediation Schemes Increase* (Jan. 5, 2003), available at www.cedr.co.uk/index/archives/20030501.htm. The schemes are based on the Central London County Court. *Id.*

50. ADR Group, *Debate 2003: Should the court do more to encourage the development of mediation?*, available at <http://www.adrgroup.co.uk/adr-debate-2003-transcript.html> (last visited Feb. 28, 2005).

51. Glaister, *supra* note 32, at 7-11. The mediator list includes both lawyers and non-lawyers, who charge between £125-£500 per party. *Id.* Although the early findings of the Leeds scheme indicated that few mediations took place, a survey of members of the Association of Northern Mediators (ANM) and other commercial mediators in 2000 indicates an increase in mediation activity in

an automatic referral scheme in Ontario, is to be adopted by the Central London Civil Justice Centre.⁵² Each week twenty (20) cases are to be selected randomly for mediation at the allocation stage. If, after a year, the pilot scheme is deemed successful, it will be adopted at other court centres.

Valuable lessons may be learnt from the experience of the US and Canada to mandate mediation recommendations and support the introduction of court-connected ADR programmes. Research indicates that the level of mediation activity escalated with the development of these schemes in the early to mid 1990s.⁵³ It is estimated that half of state courts and nearly all federal district courts in the US sponsor mediation programme.⁵⁴ Prior to this dramatic growth, the limited level of voluntary mediation was commonly believed to be the result of attorneys' negative attitudes to the process, including deficiency of knowledge, fears that suggesting mediation signifies a "weakness in case," apprehension about loss of revenue and the lack of judicial involvement.⁵⁵ Wissler found limited evidence from survey data that lawyers fear using or recommending mediation will signal a weakness in case; more relevant was lawyers' and judges' lack of familiarity with ADR. Resistance to mediation is often overcome once lawyers have attended mediation sessions.⁵⁶ McFarlane's study of the Ontario scheme found that mandatory mediation led to a decline in lawyer "scepticism"⁵⁷ and other studies report that mandatory rules requiring attorneys to discuss ADR options remove some of the barriers restricting mediation use.⁵⁸ However, Wissler found the single greatest impact on frequency of ADR discussion and mediation use is "active judicial encouragement."⁵⁹

Although US court-connected programmes have led to an increase in mediation and more positive attitudes held about ADR by lawyers, researchers have found that attorneys dominate court schemes and bring their own values and

the second half of the year: from 90-124 mediations. See also The Association of Northern Mediators, *Civil and Commercial Mediators in the North of England*, available at <http://www.northernmediators.co.uk/>.

52. Department of Constitutional Affairs (DCA), *Press release March 30, 2004, UKCA Series 117/04* available at <http://www.dca.gov.uk>.

53. Roselle Wissler, *Barriers to Attorneys' Discussion and Use of ADR*, 19 OHIO ST. J. ON DISP. RESOL. 459 (2004).

54. Deborah Hensler, *Our Courts, Ourselves: How the ADR Movement is Re-shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 185 (2003).

55. Wissler, *supra* note 53, at 463.

56. Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 842 (1988).

57. Macfarlane, *supra* note 15, at 316.

58. McAdoo, *supra* note 11; Wissler, *supra* note 53.

59. Wissler, *supra* note 53, at 503.

practices to the mediation process.⁶⁰ There is evidence that lawyers regard mediation as a “litigation tool” rather than a “client orientated problem solving process.”⁶¹ Several studies report that the mediation model adopted in many schemes is not a conciliatory, consensual process but is “adversarial” and “aggressive” and one in which clients have little involvement. This has led to concern that the fundamental attribute of mediation, facilitating the self-determination of the parties, is being overridden by the use of evaluative mediation, which lawyers are said to prefer.⁶² Mediation outcomes in court schemes are reported to result more frequently in financial settlement rather than creative outcomes focussing on the interests of the parties.⁶³ Statistics from court programmes also report lower settlement rates than those found in the voluntary market,⁶⁴ which is consistent with the findings from voluntary and court schemes in the UK.⁶⁵

Mediation is usually promoted as an alternative to litigation but the majority of cases settle before going to trial through legal negotiation. Menkle-Meadows observes that studies of legal negotiation found that “lawyers settle quickly with little negotiation intensity or bargaining of principled or unprincipled nature as both sides try to cut a deal which is often fairer to the lawyers’ payment incentive than to the particular client.”⁶⁶ Settlements from legal negotiations are often financial and do not tend to focus on non-monetary or individualised needs of the parties. Kritzer argues that the lawyer’s mode of payment influences negotiation, particularly where contingency fees are used, because it provides an “economic incentive” to focus on monetary issues rather than explore creative outcomes.⁶⁷ Research suggests that lawyers often bring their negotiation mind-

60. Peter N Thompson, *Enforcing Rights Generated In Court-Connected Mediation – Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. OF DISP. RESOL. 510 (2004); McAdoo, *supra* note 11; Carrie Menkle-Meadow, *supra* note 7.

61. McAdoo, *supra* note 11, at 530.

62. Hensler, *supra* note 54; Nancy Welsh, *The Thinning Vision of Self-Determination in Court Connected Mediation: The Inevitable Price of Institutionalisation?*, 6 HARV. NEGOT. L. REV. 1 (2001); Carrie Menkle-Meadows, *supra* note 9; Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly From a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235 (2002).

63. Wissler, *supra* note 14. Wissler reports 82% of mediations resulting in monetary settlement although a significant number of cases involved car accident or personal injury cases. *Id.* at 666.

64. *Id.* at 664. Wissler reports a 45% settlement rate. *Id.*

65. Genn, *supra* note 16; Genn, *supra* note 44.

66. Menkle-Meadow, *supra* note 7, at 371.

67. HERBERT KRITZER, LET’S MAKE A DEAL, See Chaper 5 at 99. (1991).

sets and habits to mediation:⁶⁸ It is therefore not surprising that mediation outcomes in many US programmes are monetary rather than creative when the schemes promoted by the courts are directed or dominated by lawyers.

Studies in both Canada and the US provide insights into some of the developing trends in mediation practice, which have occurred when institutionalising the process through court-connected schemes. In some programmes, mediation has been found to be moving from the “purist”⁶⁹ ideal of facilitating the parties’ interests and autonomy to facilitating the quantitative objectives of the courts and lawyers. Court schemes in the UK are putting pressure on lawyers and their parties to engage in mediation. US and Canadian research confirms that the development of court programmes will increase the use of ADR but that other problems, relating not only to the outcomes achieved by mediation but to the very nature of the process, emanate from this type of provision. The following section considers the level of judicial encouragement for mediation in the UK by examining the growing case law in this area.

Judicial Decisions

Another measure of the extent to which judges encourage ADR can be obtained from an examination of judicial statements relating to the new procedures and the enforcement of CPR rules. After a relatively cautious start, judges have taken a firm stance when using their powers under CPR to award damages for unreasonable behaviour in litigation or unreasonable refusals to use ADR.⁷⁰ The Court of Appeal in *Dyson and Field (Executors of Lawrence Twohey deceased) v. Leeds City Council* (1999)⁷¹ restated its powers of awarding indemnity costs or ordering higher rates of interest on damages when parties act unreasonably in failing to use ADR and unreasonable threats to use litigation have been held to be a breach of pre-action protocol in *Paul Thomas Construction Ltd. v. (1) Damian Hyland (2) Jackie Power* (2001).⁷² Following the Court of Appeal’s decision in *Dunnett v. Railtrack PLC* (2002),⁷³ significant pressure has been placed on legal representatives to consider and discuss ADR with their clients. Despite deciding the case in favour of the defendants, the court refused to award costs to Railtrack because of its unreasonable refusal to use ADR. Railtrack rejected ADR because it would have entailed further payment of money, which the company was unwilling to contemplate. The decision on costs sanctions has

68. McAadoo, *supra* note 11; Menkle-Meadow, *supra* note 7, at 362-79.

69. Menkle-Meadow, *supra* note 7, at 372.

70. CEDR, *supra* note 43 at 6.

71. *Dyson v. Leeds City Council*, C.P. Rep. 42, 1999 WL 1142459, (1999) LAWTEL (Nov. 22, 1999) (unreported elsewhere).

72. *Paul Thomas Constr. Ltd v. Hyland*, CILL 1748, 18 Const. L.J. 345 (2001).

73. *Dunnett v. Railtrack Plc*, [2002] C.P. Rep. 35, 2002 WL 45445.

been affirmed in a number of cases following *Dunnett*. In *Leicester Circuits v. Coates Brothers Plc* [2003],⁷⁴ the court awarded costs only for the lower courts and required both parties to pay for the trial costs when the successful appellants withdrew from an arranged mediation only a month before trial and in *Virani Ltd. v. Manuel Revert y Cia SA* (2003),⁷⁵ the Court of Appeal penalised an unsuccessful appellant for refusing the court's invitation to mediate.

Cases following *Dunnett* showed that, whilst there was a raised level of awareness about mediation, some lawyers, when engaging in negotiation, were manipulating the CPR requirements that the parties consider ADR. In *SITA v. The Wyatt Company (UK) Ltd, Watson Wyatt Partners (A Firm), Watson Wyatt SARL The Wyatt Company (UK) Ltd., Watson Wyatt Partners (a firm), Watson Wyatt SARL v. Maxwell Batley (a firm)* [2002],⁷⁶ the claimant's solicitors were found to have attempted to "browbeat and bully" the defendant into mediation and Mr. Justice Parks declined 'to deprive the defendant of their costs on the ground that they refused to be "dragooned into the mediation." The defendant's rejection of mediation was further justified when it was found that "they had been told by the person trying to get them to join in [mediation] that the mediator was already 'motoring/ against them.'" Following the decision in *Dunnett*, lawyers are required to reflect seriously on the use of ADR⁷⁷ but the message is clear: a "demand" to mediate is not the same as "an invitation."⁷⁸ However, the strategic utilisation of proposing mediation had not gone unnoticed in profes-

74. *Leicester Circuits v. Coates Brothers Plc* [2003] EWCA Civ 290.

75. *Virani Ltd v. Manuel Revert y Cia SA* (2003) LAWTEL (July 18, 2003) Extempore, [2004] 2 Lloyd's Rep. 14, 2003 WL 22656552. (unreported elsewhere).

76. *Société Internationale de Telecommunications Aeronautiques S.C. (SITA) v. Wyatt Co. (UK) Ltd* [2002] EWHC 2401, 2002 WL 31599703, at ¶ 15.

77. This message is highlighted in professional journals. See, e.g., H. Dundas, *CPR has Teeth: Frank Cowl and Ors v. Plymouth City Council: Dunnett v. Railtrack Plc*, (2002) 68 ARBITRATION (3) 290 (2002); M. Lind, *In the matter of ADR v. CPR*, NEW L.J., Arbitration and ADR Supplement, Sept 27, 152 (7049) 1430-1431 (2002); Case comment, *Beware of the Consequences of Failing to Consider ADR*, IN HOUSE LAWYER 1000, May 2002, at 70-71; N. Jamieson (Case Comment), *ADR – You Have Been Warned*, COMMERCIAL LAW, 2002, at 54, 61-62, 64-65; M. Giaquinto and W. Berwick, *Civil Procedure: Reject Mediation at Your Peril*, CONSTRUCTION LAW, 2002, at 13(6), 27-29; D. Stewart, *Can the Court Force Parties to Use ADR?* COMMERCIAL LAW, 2002, at (54) (72); *ADR and Judicial Review After Cowl*, JURID. REV. 7(3), 2002, at 148-51; R. Dyke, *Roses and Horses: FDR and ADR*, NEW L.J. 1562, 7031 (678) (2001); *Mediation – Civil Procedure Rules*, (2001) CILL 1748; *Costs and Failure to Enter ADR*, PERSONAL INJURY NEWS, at 6.5(6) (2003).

78. *Société Internationale de Telecommunications Aeronautiques S.C. (SITA) v. Wyatt Co. (UK) Ltd*, [2002] EWHC 2401, at 15, ¶ 9. Park J considered the third refusal for mediation to be legitimate as it was too close to the commencement of trial.

sional legal journals.⁷⁹ Lawyers were reported to be “skilled” in turning down mediation by entering into “endless correspondence” about the choice of mediator and the location and duration of mediation in order to bring the matter close to trial and thus to a point at which it was too late to mediate.⁸⁰

An increasing number of cases provide evidence of the willingness of the courts either to issue ADR orders,⁸¹ to comment on the appropriateness of the case for mediation⁸² or the exercise of the powers given to them under the rules.⁸³ It is recognised that “substantial parts” of judicial review cases can be settled outside litigation using mediation.⁸⁴ Moreover, the Chancery Division confirmed the binding status of agreements drawn up by the parties following mediation in *Kirit Lalju Thakrar v. Ciro Citterio Menswear* [2002]. The court held it had “no hesitation in concluding that the compromise arising from mediation is one which the court can and should uphold.”⁸⁵

Judicial statements in many cases have indicated that some judges view mediation as an eminently appropriate procedure to assist the resolution of disputes and this, at one point, even included a case where both parties were not

79. M. Lind, *supra* 76. The author suggests a well-timed proposal puts the client in the ‘driving seat.’ *Id.*; S. Wilcock, *When Is It Safe to Say No?*, 58 COMM. LAW. 44 at 44-45 (2002/2003).

80. D. Turner and D. Gammack, *Mediation: Where Does it Fit into Civil Litigation*, (17) CORP BRIEFING, (1) 2, 2003 at 2-4. Parties are reported to becoming “skilled” in turning down mediation when “endless correspondence concerning the choice of the mediator, location of the mediation, duration of the mediation, date, etc., can go on until the matter is more or less at trial, and then it is too late to have a mediation.” *Id.*

81. *Sixth Duke of Westminster v. Raytheon*, 2002 WL 31476425 (QBD)(Comm Ct), 2002 EWHC 1973; *Shirayama Shokusan Co Ltd and Other v. Danovo Ltd* [2003] All ER (D) 114 (Dec) (holding that the court has jurisdiction to direct the parties to ADR even if both parties are not willing to submit to it). The court viewed mediation to be appropriate to the case because the parties were in long-term lease arrangement and a number of issues in dispute were not at issue in the summary judgment application. *Id.*

82. *Agodzo v. Amegashitsie*, (Civil Division) May 20, 1999. (Smith Bernal) The Court of Appeal did not find that the trial judge was imposing or ordering ADR when he stated, “At the moment I am not prepared to proceed further with the amended summons for directions until ADR has been explored because it seems to me a case eminently suitable for ADR and not really suitable for the courts except as a last resort.” *Id.*

83. *Malkins Nominees Ltd. v. Societe Fianciere Mirelis SA*, EWHC (2002) 1221 (CH). The claimant’s costs were increased to 85 percent following new information that reduced the claimant’s culpability in refusing an ADR. *Id.* at ¶ 9. However, the court did not accept that the defendant’s offer of ADR was a “cynical tactical manoeuvre.” *Id.* at ¶ 7. *HSBC Bank USA v. Secorior Cash Servs. Ltd.*, [2002] EWCH 2674. In an application under §24.4(a), Mr Justice Colman required the parties to inform the court within a month whether they would attempt ADR and if not, why not. See S. Copp, *Corporate Governance: Change, Consistency and Evolution, Part 2* (2003) I.C.C.L.R. vol. 14(3). 114-128. The author notes that ADR is “gaining quasi-mandatory status” in Company Law cases concerning section 459 of the Companies Act 1985. See, e.g., *Blythe v. Sams*, December 15, 1999, CA, LEXIS transcript; *Re Rotadata* [2000] B.C.C. 686.

84. *Frank Cowl & ORS v. Plymouth City Council*, [2001] EWCA Civ 1935.

85. *Kirit Lalju Thakrar v. Ciro Citterio Menswear Plc in Admin.*, (2002) EWHC 1975, 53.

willing to submit to it.⁸⁶ However, until *Hurst v. Leeming* [2003],⁸⁷ no transparent guidelines were available to assist lawyers in the decision to use or reject mediation. Earlier research noted that ADR experts differ on their understanding of the criteria for assessing the suitability of cases for mediation.⁸⁸ Some mediators claim cases believed previously not to be suitable for ADR had settled successfully using mediation and advocates of the process have suggested “that any case – could benefit from the use of ADR.”⁸⁹ Other ADR professionals were reported to be more cautious about identifying mediation “preceptors”⁹⁰ at an early developmental stage. Nevertheless, after CPR, some judges appeared to be moving to a view that nearly “anything is capable of being mediated” and that experienced mediators might have the skills necessary to achieve successful settlement from unpromising cases.⁹¹ A view held by the court in *Dunnett* and reiterated in subsequent cases.⁹²

Skilled mediators are now able to achieve results satisfactory to both parties in many cases, which are quite beyond the power of lawyers and court to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may well be that the mediator is able to achieve a result by which the parties shake hands and feel that they have gone away having settled the dispute on terms with which they are happy to live.⁹³

This belief was supported in *Hurst v. Leeming* (2002). Mr. Justice Lightman identified the critical factor for determining the unsuitability of cases for mediation: that “objectively viewed” there was an unrealistic prospect of the process succeeding in reaching a settlement.⁹⁴ Parties and their legal advisors were cautioned against adopting a “high risk” strategy of refusal based on their judgement of the likelihood of an unsuccessful outcome: the court may find a ‘real prospect’ exists and consequently impose a severe costs penalty. In giving

86. *Shirayama Shokusan Co Ltd v. Danovo Ltd* [2003] All ER (D) 114 (Dec).

87. *Hurst v Leeming*, 1 Lloyd’s Rep. 379 (2002) (U.K.).

88. See Brooker & Lavers, *supra* note 1, at 361-365 (2000). Genn, *supra* note 44.

89. Martin Partington, *Alternative Dispute Resolution: Recent Developments, Future Challenges*, 23 CIV. JUST. Q. 99, 106 (2004); David Shapiro, *Alternative Dispute Resolution Under the New Civil Procedure Rules - Some Guidelines for Lawyers and Judges*, 18 LITIGATION 2, 7(1999).

90. Brooker, *supra* note 1, at 362.

91. *Id.* at 362-63.

92. Paul Francis Gaston, *David Paul Boughton v. Peter George Courtney E.W.H.C.* 600 (2004) (U.K.); *Reed Solutions PLC v. Reed Bus. Info. Ltd.*, E.W.C.A. Civ. (2004) (U.K.).

93. *Dunnett v Railtrack PLC*, C.P. Rep. 35, 14 (2002) (U.K.).

94. *Hurst*, 1 Lloyd’s Rep. at 381.

his judgment, Mr. Justice Lightman noted that mediation has the capacity to overcome what appear to be even hopeless cases. A number of determinants lawyers previously regarded as relevant for refusing ADR were considered by the court not necessarily to justify a refusal to mediate.⁹⁵ The defendant's reasons in *Hurst v. Leeming*: a "watertight case," the high costs already incurred, the need to defend a serious allegation of professional negligence or defend a claim "totally lacking of substance," were all judged not to warrant a conclusion that the matter was unsuitable for mediation.⁹⁶ The court imbued the process of mediation with the power to overcome the factor most frequently found in empirical studies in the UK, the US and Canada to determine mediation failure: the negative attitude of the parties.⁹⁷

Further, the hurdle in the way of a party refusing to proceed to mediation on this ground is high, for in making this objective assessment of the prospects of mediation, the starting point must surely be the fact that the mediation process itself can and does often bring about a more sensible and more conciliatory attitude on the part of the parties than might otherwise be expected to prevail before the mediation, and may produce a recognition of the strengths and weaknesses by each party of his own case and of that of his opponent, and a willingness to accept the give and take essential to a successful mediation. What appears to be incapable of mediation before the process begins often proves capable of satisfactory resolution later.⁹⁸

In *Hurst v. Leeming*, the court recognised, exceptionally, that mediation had no real prospect of success on grounds involving the plaintiff's personality and conduct in the litigation process. Mr Hurst had been "unable or unwilling to appreciate the explanations refuting the claim." He had already proceeded with two "vexatious" claims against his solicitors, resulting in his bankruptcy and putting him in the position where he had nothing to lose. The court believed the

95. John H.B. Roney, *Alternative Dispute Resolution: A Change in Perspective*, 10(11) I.C.C.L.R. 329 (1999). The author suggests that cases that are "open and shut" are not suitable for ADR. *Id.* at 332. Carolyn Harmer, *New Civil Procedure Rules – A Personal View*, J. OF PER. INJ. LITIG. 81 (June) (1999). Harmer, who has 10 years experience with ADR, suggests that the parties should decide when cases are appropriate and not judges who are "interventionist." *Id.* at 83.

96. *Hurst*, 1 Lloyd's Rep. at 381.

97. Brooker, *supra* note 19, at 114; Genn, *supra* note 16, at 58 (1998); M. Borg, *Expressing Conflict, Neutralising Blame and Making Concessions in Small Claims Mediation*, L. AND POL'Y 115-141(2000). Empirical research in the U.S. indicates that the way the parties in mediation handle blame either by justifying, excusing or denying it, restricts their willingness to make concessions and thus reach settlement. Participants who were individuals rather than representatives in the process or business people, were less likely to compromise, as they wanted to show blameworthiness. "As mediation is increasingly integrated in the court system, and consequently more heavily utilised, identification of cases that are most suited to the forum will become more important. Recognising the existence and significance of differences in the meaning that mediation participants attach to conflict and compromise may help in directing the most appropriate cases to mediation." *Id.* at 137.

98. *Hurst*, 1 Lloyd's Rep. at 381.

motivation behind the action related to his beliefs regarding his previous partners and concluded that Mr Hurst was unlikely to accept any mediation settlement unless it involved a significant financial sum.⁹⁹

Following *Hurst v. Leeming*, lawyers were in the uncertain position of being unable to gauge effectively the criteria for judging the suitability of cases for ADR, because, in any given circumstance, the court might find that there was a "reasonable prospect" of successful settlement. The question of when a successful litigant should be penalised for refusing an offer of ADR has now been reconsidered in *Halsey v Milton Keynes General NHS Trust, Steel v. Joy Halliday* (2004).¹⁰⁰ The judgment evidences a move from eulogising mediation to the recognition that the process is not a panacea for all disputes.¹⁰¹ Lord Justice Dyson acknowledged that there are both advantages and disadvantages to mediation and that as yet it has not been "demonstrated"¹⁰² that the process is suitable for all disputes. It was further noted that settlement in mediation is not predictable. Therefore a presumption in favour of mediation was rejected when deciding whether a party has acted unreasonably in refusing mediation. The decision proceeded on the "basis that *many disputes are suitable* for mediation" (emphasis added) and because a number of non-family court mediation schemes have been successful.¹⁰³

The fear that recent court decisions had made ADR virtually compulsory should be dispelled by the decision in *Halsey*.¹⁰⁴ The court took the opportunity to reject a more vigorous approach to encouraging ADR by compelling reluctant parties to engage in ADR. The effectiveness of mediation was deemed to be its voluntary nature and forcing unwilling parties to mediate would not only be a "constraint on the right of access" to court but might also lead to a violation of article 6 of the European Convention of Human Rights.¹⁰⁵ Further, such an approach would potentially "add to the costs to be borne by the parties, possibly

99. *Id.*

100. *Halsey v. Milton Keynes General NHS Trust* [2004] E.W.C.A. Civ. 576, 35 (C.A.) (U.K.).

101. *Id.* at ¶ 16. See also I. Grainger, *The Costs Consequences of a Failure to Mediate*, 23 CIV. JUST. Q. 244 (2004).

102. *Halsey*, E.W.C.A. Civ. 576 at ¶ 6.

103. *Id.*

104. Some professional journals suggest that the effect of recent case law is to make ADR virtually compulsory. See, e.g., D. Turner and D. Gammack, *Mediation: Where Does It Fit Into The Civil Justice System?* 17.1 CORPORATE BRIEFING 2 (2003); S. Copp, *supra* note 83. M. Frangeskides, *Voluntary or Compulsory?* 108 IN HOUSE LAW. SUPP. 18-19 (2003); see also *Hurst*, 1 Lloyd's Rep. at 381; C. Harmer, *supra* note 95. Harmer suggests that it should be for the parties to decide if the case is appropriate not judges.

105. *Halsey*, E.W.C.A. Civ. 576 at ¶ 9.

postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process.” *Halsey* held that the role of the court is “merely to encourage and facilitate” the parties to use ADR.¹⁰⁶

Depriving a successful party of all or some of his costs for refusing to agree to ADR is an exception to the general rule and the burden is placed on the unsuccessful party to prove that there should be a departure from the general rule. In *Halsey*, the court declared that “the fundamental principle is that such a departure is not justified unless it is shown that the successful party acted unreasonably in refusing to agree to ADR.”¹⁰⁷ In deciding whether a party has acted unreasonably “the court must have regard to all the circumstances in a particular case.”¹⁰⁸ However, Lord Justice Dyson accepted The Law Society’s submission that this consideration might include, but not be limited to, six relevant factors: “(a) the nature of dispute; (b) the merits of the case; (c) the extent which other settlement methods have been attempted; (d) whether the costs of mediation would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether ADR had a reasonable prospect of success.”¹⁰⁹ The court emphasised that the list was not restricted to these six factors and that in “many cases a single factor would not be decisive.” The court then expanded on each factor.

Dyson LJ confirmed the Commercial Court Working Party’s¹¹⁰ examples of situations where disputes may be inappropriate for mediation, including those where the court is required to determine issues of law, where there are allegation of fraud or commercially disreputable conduct, where the party wants a point of law resolved or an injunction or other relief.¹¹¹ It has long been accepted that these explicit situations are inappropriate for ADR.¹¹²

The court found the issue of “the merit of the case” more difficult to determine, particularly where the parties believe they have a strong case, because in that situation it was felt that the opposition could obtain settlement by using the threat of costs sanctions. Large companies were felt to be particularly vulnerable to “pressure and tactical ploys” to mediate from claimants with weak “nuisance claims.”¹¹³ Although this is incontrovertible, it is also true that claimants

106. *Id.* at ¶ 10.

107. *Id.* at ¶ 13.

108. *Id.* at ¶ 16.

109. *Id.*

110. Available from <http://www.hmcourts-service.gov.uk/publications/misc/admiralcomm/working.party.htm#> (Last visited 22nd April 2005).

111. *Halsey*, E.W.C.A. Civ. 576 at ¶ 17.

112. See e.g., A. H. Gaede *ADR - The US Experience and some suggestions for International Arbitration: The Observations of an American Lawyer*, (8) *INTER’L CONSTR. L. REV.* (1) 5, at 21-22 (1991); R. Hill, *Dispute Avoidance and Resolution Mechanism*, 4 *ARB. & DISP. RES. L. J.* 287, at 292-293 (1996).

113. *Halsey*, E.W.C.A. Civ. 576 at ¶ 18.

with a limited budget and a good claim may be forced to accept a negotiated settlement rather than mediate, particularly in the voluntary mediation sector, because the process is now rarely inexpensive.¹¹⁴ The court was unequivocal that no weight should be given in “borderline cases” when the party refuses ADR because they believe they have a good case.¹¹⁵ However, the decision in *Hurst v. Leeming* that a belief in a “watertight case”¹¹⁶ is no justification for refusing mediation was modified to the point that the party must have an “unreasonable” belief in the strength of its case. “The fact that a party *reasonably* believes that he has a watertight case may well be sufficient justification for a refusal to mediate.”¹¹⁷

Lawyers may gain some reassurance when advising clients to refuse mediation if they have attempted other methods of settlement, because this may be a relevant factor, as it indicates that one party is making efforts to settle and it may also indicate that the other party has adopted an unrealistic view of the merits of the case.¹¹⁸ Prior to *Halsey*, not all refusals to use ADR or mediate had resulted in “Dunnett-type” orders.¹¹⁹ In some cases, sanctions had not been applied when there was a genuine offer to settle, or reasonable efforts had been taken to resolve the dispute. In *Alan Valentine v. (1) Kevin Allen (2) Simon John Nash (3) Alison Nash* (2003),¹²⁰ the court did not penalise a refusal to mediate where a party had made reasonable offers to resolve the dispute and sought a “round table” meeting. A further noteworthy development in *Corenso (UK) Ltd. v. The Burnden Group Plc* [2003]¹²¹ was the acknowledgment that “ADR is not synonymous with mediation.”¹²² CPR requires the parties to resolve their difficulties without resorting to court by using alternative dispute resolution but the court in *Corenso* stated that “negotiation or attempts to use ‘an honest broker’, may equally be appropriate,” which indicates a willingness on the part of the

114. Brooker & Lavers, *supra* note 1, at 366.

115. *Halsey*, E.W.C.A. Civ. 576 at ¶ 19.

116. *Hurst*, 1 Lloyd’s Rep. at 381.

117. *Halsey*, E.W.C.A. Civ. 576 at ¶ 19.

118. *Halsey*, E.W.C.A. Civ. 576 at ¶ 20.

119. Ronald Keith McCook v. Aloysius Lobo, London Seafood Ltd., (*sued as London and Seafood Poultry Ltd.* [2002] EWCA Civ 1760 (CA) at 34.

120. Alan Valentine v. Kevin Allen, et al. (2003) LTL 29/7/2003 (unreported elsewhere).

121. *Corenso (UK) Ltd v. The Burnden Group Plc* [2003] E.W.H.C. 1805 (Q.B.) (U.K.). The successful claimant was not denied costs despite refusing mediation as they had shown a willingness to resolve the dispute. *Id.*

122. *Id.* at 60.

courts to recognise negotiation techniques employed by lawyers as evidence of satisfying the CPR requirements.¹²³

Recently, the unifying negotiation practice engaged in by the parties in *McMillan Williams v. Range* [2004]¹²⁴ resulted in both parties having their costs refused for their “frolic in the Court of Appeal.”¹²⁵ The appellants were a firm of solicitors and the defendant a solicitor. The court of first instance had given a “strong recommendation” to attempt ADR because the costs of further litigating the dispute would have been “disproportionate to the amount at stake.”¹²⁶ Two days before the mediation, the appellant refused to proceed because “neither side was willing to change their position.” Lord Justice Ward noted that “the lesson to be learned is that the true negotiation position is never known until the mediation is concluded.”¹²⁷ The Woolf Reports were highly critical of the adversarial approach used by lawyers in litigation and the CPR rules were introduced to counter many of the practices of lawyers. As discussed earlier, research into legal negotiation in both the UK and US raised deep concerns about the quality of some lawyers’ practice in this area.¹²⁸ To adopt an approach where legal negotiation satisfies the CPR requirement may be regarded as a retrograde step.

In *Halsey*, the court observed that the settlement outcome of mediation “cannot be predicted with confidence.”¹²⁹ A successful litigant may therefore have to pay the costs of an “abortive mediation.” The court noted that mediation could be at least as expensive as a day in court when each party bears the cost of its own legal representative. Therefore, when the cost of ADR is disproportionately high, this might be taken into account when considering whether a sanction should apply to a successful litigant. It was also considered that it might be significant to a cost sanction if mediation has been proposed late in the day, because, in these circumstances, the case is delayed from going to trial.

The court in *Halsey* considered that Lightman LJ had taken “too narrow an approach” in *Hurst v. Leeming* when confining an unreasonable refusal to mediate to the question whether “objectively viewed” the mediation would have a reasonable prospect of success, because it “focussed on the nature of the dispute rather than the willingness of the parties to compromise and the reasonableness

123. *Id.* His Honour Judge Reid stated that the only requirement on the parties is to attempt to resolve their difficulties without resorting to court by alternative dispute resolution. In other cases it may be that negotiation or attempts to use an “honest broker,” may equally be appropriate. *Id.*

124. *McMillan Williams v. Range* [2004] WL 412966.

125. *Id.* at 30.

126. *Id.* at 29.

127. *Id.* at 30.

128. HAZEL G. GENN, *HARD BARGAINING: OUT OF COURT SETTLEMENT IN PERSONAL INJURY CASES* (Clarendon Press 1987); HERBERT M. KRITZER, *LET’S MAKE A DEAL* (University of Wisconsin Press 1991); Carrie Menkle-Meadow, *supra* note 7 at 362-379 (1993).

129. *Halsey*, E.W.C.A. Civ. 576 at ¶ 21.

of their attitudes.”¹³⁰ Part of the equation for successful mediation can be the ‘inherently intractable’ nature of the dispute or the quality of the mediator.¹³¹ So determining whether mediation would have a reasonable prospect of success is only “one of a number of potentially relevant factors.” The burden is placed on the unsuccessful party to prove that the mediation has a “reasonable prospect of success,” rather than the successful party having to show that there was no reasonable prospect of success, because it is “significantly easier” to prove.¹³²

Finally, the court established the significance of court recommendations to use ADR. Any successful party refusing to use ADR after the court advised that course of action will find that this is taken into consideration when costs are awarded. A party refusing to engage in ADR or mediation after an ADR Order “runs the risk for this factor alone” that their actions will be held to be unreasonable, because it is evidence that the court believe that the case is suitable for alternative procedures.¹³³

Following the decision in *Halsey*, lawyers may now be more confident about the criteria the court will apply when imposing a cost sanction for failing to use ADR and the guidelines provide practical examples of potentially relevant grounds when deciding not to mediate. However, as CEDR note, the position may be no clearer, as it is based on a test of reasonableness.¹³⁴ Critics have noted a further danger that some lawyers who wish to avoid ADR will exploit the scope of the list of relevant factors.¹³⁵ The decision in *Halsey* may indicate a decline in judicial confidence in the ability of mediation to resolve all but the most unpromising cases, but there is no decline of the court’s understanding of the benefits mediation has over litigation. The decision in *Halsey* stresses that lawyers should “routinely” consider ADR with their clients and courts should “robustly” encourage its use because of the merits that the process has over court decisions.¹³⁶

Mediation provides litigants with a wider range of solutions than those that are available in litigation: for example, an apology; and explanation; the con-

130. *Id.* at ¶ 26.

131. *Id.* at ¶ 27.

132. *Id.* at ¶ 28.

133. *Id.* at ¶ 29.

134. T. Alan, *Dunnett Lives On: First Thoughts on Halsey v. Milton Keynes NHS Trust*, available at www.cedr.co.uk/index.php?location=/library/articles/Dunnett_lives_on.htm (last visited on Oct. 13, 2004).

135. I. Grainger, *The Costs Consequences of a Failure to Mediate*. 23 CIV. JUST. Q. 244 (2004).

136. *Halsey*, E.W.C.A. Civ. 576 at ¶ 11.

tinuation of an existing professional or business relationship perhaps on new terms; and an agreement by one party to do something without an existing legal obligation to do so.¹³⁷

Empirical research shows that not all mediations reach a settlement outcome: a point recognised in *Halsey*. Indeed, overall settlement rates of less than 50 percent have been recorded in some court connected mediation schemes in the US and UK.¹³⁸ CEDR, the largest provider of mediation services, reports that settlement rates remained at 75 percent for the year 2002-2003.¹³⁹ Although a substantially better rate of 87 percent was achieved in a study of mediators from the Chartered Institute of Arbitrators Panel of Mediators. Caution should be used when comparing rates in different mediation studies, because researchers do not use the same time frame for settlement.¹⁴⁰ Nevertheless, all studies undertaken in both the US and the UK indicate that lawyers are likely to experience non-settlement if it becomes a more general part of their practice. Studies of mediation in court-connected schemes in the US and Canada indicate that mediation activity increases with judicial encouragement but the data also show some participants engage in the instrumental use of ADR.¹⁴¹ Judicial encouragement of ADR in the UK has already enhanced the take-up of mediation but a high proportion of unsettled mediations may result in a lack of confidence in the process.¹⁴² Cost sanctions and court encouragement may lead in the short term to an increased use of mediation but it may also result in uncommitted participants in mediation and the tactical use of the process.

Part two discusses the findings from interviews with barristers and lawyers who have experience of using mediation for construction and commercial related disputes during the period mediation development discussed above. First, a brief review of aims behind the research and the methodology of the interviews is given and then the findings are discussed.

137. *Id.* at 15.

138. Genn, *supra* note 44. An overall rate of 45 percent was reported for mediation in the Court of Appeal Mediation scheme. *Id.* at 88; Wissler, *supra* note 14, at 665 (reporting a settlement rate of 45 percent).

139. CEDR, *CEDR Mediation Figures Reach All Time High*, available at <http://www.cedr.co.uk> (2004).

140. See P. Fenn & G. Hunt, *The United Kingdom Government's Pledge to ADR and the Chartered Institute of Arbitrators Mediation Panel*, 68 *ARBITRATION* 144, 147 (2002).

141. Macfarlane, *supra* note 15, at 266-69; Welsh, *supra* note 10, at, 850-51.

142. P. Brooker, *supra* note 19, at 114, 116.

PART TWO

The research project

The aim behind the project was to investigate the role that solicitors and barristers have taken in ADR following the introduction of CPR and how the procedures are used in dispute resolution. People often negotiate their disputes in the "shadow of the law,"¹⁴³ using the likely outcome of a court decision to guide their negotiations.¹⁴⁴ The role of lawyers is therefore an integral part of dispute resolution and the legal professions' experiences and attitudes to ADR and mediation are likely to affect its future development. Although the parties are able to attend mediation without legal advisors, in large commercial disputes representation will be employed frequently not only in negotiation but also in the mediation itself. Further, parties may choose to engage a legally qualified mediator for some disputes.¹⁴⁵

Methodology of research interviews.

This paper reports on data collected from follow-up interviews with solicitors and barristers who had agreed to participate in an interview after completing the postal survey. Nearly a third of the respondents agreed to an interview but a selection criterion of having used mediation at least once was utilised. (One respondent had used ADR but not mediation.) The interviews took place from March to May 2002, approximately three years after the introduction of CPR and 15-17 months after the distribution of the postal survey. In total, 30 interviews were conducted and the meeting lasted for approximately 45 minutes to one hour. The main objectives of the interviews were to explore the outcomes of mediation in terms of the perceived advantages and disadvantages of taking part in the process and to probe the findings of the postal survey.¹⁴⁶ A semi-structured methodological approach was used, focussing on the following areas:

- i. Mediation experience post-completion of the questionnaire

143. See, e.g., O. Fiss, *Against Settlement*, 93 YALE L. R. 1073, 1073-90 (1974); R. Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behaviour*, 11 J. OF LEGAL STUDIES 225, 225-51 (1988).

144. Oliver Wendell Holmes. *The Path of the Law*, 10 HARVARD L. REV. 154 (1897).

145. Brooker, *supra* note 5.

146. J. BELL, *DOING YOUR RESEARCH PROJECT* (Oxford University Press, 1987).

- ii. The benefits and outcomes derived from engaging in the process of mediation
- iii. The saving in costs when engaging in mediation
- iv. The outcomes, if any, from an unsettled mediation
- v. The effect of CPR on mediation

Interviewees' profiles and mediation experience

Twenty-seven (27) solicitors and three (3) barristers were interviewed. Half the interviewees had 15 years or more post-qualification experience and over two-thirds had over 10 years (see Table I). Over 90 percent of the solicitors interviewed worked in firms with six or more partners and half in firms with more than 20 partners (see Table II.). Fourteen (14) interviewees practised in both construction and commercial work, ten (10) worked only in the construction field and six (6) operated only in the commercial sector (see Table III). Interviewees came from both London-based practices and provincial firms located throughout England and Wales. All barristers interviewed practised in London sets.

Table I: Reported length of service post-qualification

Number of years	Number of lawyers	Percentage
2-5 years	2	7
6-10 years	5	17
11-15 years	7	23
15+ years	15	50
Not stated	1	3

Table II: Reported size of solicitor's firm

Size of firm	Frequency	Percentage
1-5	2	7%
6-20	10	37%
21-50	7	26%
51+	8	30%

Table III: Interviewees' reported area of practice.

Specialist	Frequency
Commercial-related	7
Construction	10

Mixed	13
Total	30

Education and training in ADR

At the time of completing the postal survey, the interviewees had considerable experience of mediation training and practice. All but one lawyer (29) had completed a training course in mediation and many had attended more than one course or undertaken mediator training. Twelve (12) reported attending courses run by the Centre for Effective Dispute Resolution (CEDR), 10 with the ADR Group and seven (7) with other ADR providers (see Table IV). Nearly two-thirds (19) had qualified as mediators, although five (5) had not completed their training. Eight (8) received mediator training from ADR Group, seven (7) from CEDR and four (4) had taken courses at other organisations either in the UK, the United States or Australia.

Table IV: Interviewees' experience with ADR courses.

ADR organisation	Frequency	Percentage
CEDR	12	40
ADR Group	10	33
Other	7	23
None	1	3
Total	30	100

Mediation experience

Interviewees had considerable experience with using mediation, having taken part in 251 mediations at the time of completing the survey (see Table V). The majority (26) had used mediation more than once. Twenty-two (22) reported experience with construction mediations and twenty-three (23) lawyers had been involved in commercial-related mediations. Two trained mediators had used mediation on over forty (40) occasions and one third of the interviewees (10) had utilised the process ten (10) times or more. Interviewees had slightly more experience of commercial mediation (148) than construction-related mediation (103). (See Table V.)

Table V: Interviewees' mediation experience at the time of completing the questionnaire.

Type of mediation	Frequency	Settled	Not settled	Partially settled	Settlement rate*
Commercial	(148)* 147	119	25	3	80.1%
Construction	(103)* 97	68	16	8	70.1%
Total	(251)* 244	187	41	11	76.6%

**Reported mediations. Not all interviewees reported settlement success. These mediations are not included when calculating the settlement rate.*

Settlement outcomes

In the postal survey, interviewees reported achieving full settlement in 76.6 percent of mediations (81 percent for commercial mediation and 70 percent for construction mediation). Settlement rates relate to full settlement; other mediations were reported as partially settling some issues. Despite experiencing high levels of settlement, twenty-one lawyers (70 percent) had participated in mediation at least once where the process failed to settle the dispute. One construction solicitor reported 10 mediations in the postal survey but had not supplied settlement outcomes. Interview data revealed that the lawyer did not consider the disputes to be "normal construction disputes." Rather they involved very complex issues, multiple parties (some involving international parties), substantial financial claims and on-going contracts. The mediations had taken several months to set up and lasted over a week. The outcomes of the mediations were that they often resolved some issues of the dispute, leaving other parts ongoing and the contract continuing to run.

The authors regard the interview data as being from a sample of lawyers with a high level of training and experience in mediation. Many of the lawyers interviewed were repeat-users of mediation at the time of the postal questionnaire and twenty-two interviewees (73 percent) had used mediation in the period between the survey and the interviews (see Table VI). Although most of the mediations they had experienced resulted in successful settlement, a substantial number of interviewees had participated in the process when settlement of the dispute was not achieved. Accordingly, the data provide valuable insight into the utilisation of mediation by lawyers and into outcomes achieved by mediation in commercial and construction-related disputes.

Table VI: Interviewees' mediation experience post-survey

	Mediation used	Mediation not used
Construction lawyers	7	3
Commercial lawyers	5	1
Mixed Practice	10	4
Total	22	8

MEDIATION OUTCOMES

Reaching settlement is, perhaps, the principal gain achieved by mediating but not all mediations achieve this goal. However, when ADR becomes part of a programme for civil reform, both here and in other common law countries, a quantitative analysis of mediation often becomes the focal point in its promotion.¹⁴⁷ Researchers have used methods other than settlement to measure mediation outcome, such as user satisfaction, post-dispute climate or the settlement rate for multiple claims or complex disputes.¹⁴⁸ One major objective in this part of the study was to explore with experienced users the benefits, perceived and actual, of engaging in mediation other than settlement. As an experienced mediator commented in the interviews:

Obviously most people do define mediation success in terms of whether you reach an agreement on the day, but I don't adopt that strict approach. And in my book, if parties do go away at the end of the day with at least having got some form of benefit out of mediation, whether it's in terms of getting things off their chest and narrowing issues or whatever, that is still a successful mediation. So I think that the mediation industry has not done itself any favours over the years in terms of defining success as settlement on the day, and saying success equals settlement - it doesn't always follow.

147. Carrie Menkle-Meadows, *supra* note 9; Welsh, *supra* note 10.

148. See, e.g., Thomas Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65, 119 (1996). The author cites Kenneth Kressel and Dean Pruitt who use six approaches to mediation assessment: (1) user satisfaction, (2) rates of compliance, (3) rates of settlement, (4) nature of agreement, (5) efficiency improvement, and (6) improvements in the post-dispute climate). K. Kressel and D. Pruitt, 'Mediation Research: The Process and Effectiveness of Third Party Interventions. Conclusion' (1989) *A Perspective on the Mediation of Social Conflict Id.* at 395-400. See also Douglas Henderson, *Successful Mediation: An Empirical Analysis*, 11 OHIO ST. J. ON DISP. RESOL. 105 (1996) (examining the effect of factors such as strong emotions, multiple claims, complex or technical issues and financial size of dispute on the settlement outcome of construction mediations).

Each interviewee was asked to consider the financial benefits from engaging in mediation and to particularise the outcomes achieved by the process as distinct from reaching settlement. The data reveal that a number of benefits are believed to accrue from using mediation. These are sub-divided into the following headings;

- Savings in costs
- Creative outcomes
- Process outcomes
- Tactical outcomes

Costs

Early ADR literature extensively promoted mediation with reference to the savings that can be made in terms of management and legal costs.¹⁴⁹ Research suggests that it is now a commonly held perception that engaging in mediation saves costs, particularly when compared with the expense of pursuing the case through the courts.¹⁵⁰ Judges recommend ADR frequently because of the costs already incurred by the parties in litigation or the potential savings if ADR is utilised. However, studies in mediation practice in the UK and US have not explicitly determined the savings,¹⁵¹ particularly since mediators in some schemes do not charge professional rates or any fee at all.¹⁵² An earlier study undertaken by the authors “debunked the myth” that mediation is a cheap process and revealed that experienced mediators are becoming more expensive.¹⁵³ Nevertheless, 71 percent of lawyers in the postal survey were satisfied with the cost of mediation. (Although the authors note the ultimate arbiter of this criterion is the client.) Furthermore, the respondents identified savings in management and legal costs as a relevant factor when selecting the process together with the possibility of reaching earlier settlement and preventing delay.¹⁵⁴

149. See ALEXANDAR BEVAN, *ALTERNATIVE DISPUTE RESOLUTION* (1992). *Supra* note 8.

150. Genn, *supra* note 16, at 120; Brooker & Lavers, *supra* note 16. Contractors and sub-contractors in the construction industry were found to hold positive perceptions of the advantages of using ADR over litigation or arbitration, particularly in relation to cost and time. *Id.*

151. See Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology 2002* J. OF DISP/ RESOL. 81 (suggesting that because empirical evidence has failed to prove that ADR saves costs and time for the litigant and courts, decision makers now promote ADR on the grounds that the parties prefer it to litigation); See also Genn, *supra* note 16. Only half the plaintiffs believed that they had saved costs and that a failed mediation lead to increased costs. *Id.* at vi.

152. Parties in the CLCC Scheme paid £25 each for mediation and the Court of Appeal Mediation Scheme provided free mediation until its re-launch under CEDR Solve. Parties now pay their own fees unless they are unable to do so in, which case pro-bono work is done.

153. Brooker & Lavers, *supra* note 1, at 353-70.

154. Brooker & Lavers, *supra* note 6, at 345-46; Brooker, *supra* note 19, at 111-12.

All thirty (30) interviewees were of the opinion that engaging in mediation led to savings and that these are substantial compared with those of a full court hearing. However, the data reveal that determining savings in time and cost is a “deceptively” difficult task and interviewees were unable to estimate with precision the percentage savings, because of the number of variables in the calculation. For example;

- Timing
- Financial size of the dispute
- Complexity of the issues
- Number of parties
- Preparation required before mediation.

A very experienced commercial mediator questioned the marketing of mediation by reference to the savings made by using the process: “I think it is so wrong; I stopped selling it like that. I think, whether it is commercial or not, I have stopped saying that. I talk about control, confidentiality, predictability of outcome, business planning, project-led, because I am dealing with commercial organisations.” ADR has been marketed in the past in the UK as providing control, confidentiality, consensus and costs.¹⁵⁵

Seven lawyers preferred not to estimate the percentage, as the figure depends on too many determinants, but they all believed mediation provides the opportunity to make considerable cost savings. However, half of the interviewees (15) maintained that savings of 70 percent and over (four of these calculated savings of over 90 percent) could be achieved when mediation takes place early enough in the dispute. A barrister experienced in using mediation for professional negligence claims explained how he calculated the costs of mediation:

Well, I think it is easy to do (*estimate savings using mediation*) in the sense that it depends when the action settles. In the two cases that I referred to that settled, they both settled after the first case management conference, before witness statements were exchanged and before disclosure of documents. Now in terms of the initial costs of going to trial, disclosure of documents is one of the most expensive in terms of man-hours. So those actions were both (what) 30%

155. ADR has been marketed in the past as providing control, confidentiality, consensus and costs. See, e.g., G. Dixon & E. Carroll, *ADR Developments in London*, 7 INT’L CONST. L. REV. 436 (1990).

percent down the line by the time they settled. So in comparison of a case that goes to trial and succeeded, they were saving 70 percent of costs.

Interviewees observed that the timing of mediation is crucial when estimating savings, because there is a diminishing return on costs: the closer mediation takes place to court action, the smaller the potential savings. If preliminary work preparing for a trial is undertaken before mediation, such as disclosure, attendance at case conference meetings and preparation and exchange of witness statements, these costs inevitably reduce savings. Further, if settlement is not achieved, the client will have the added expense of paying for the mediation and the mediator's fee. However, successful litigants may be compensated for this eventuality, as the Commercial Court in *Days Medical Aids Ltd. v. Pihsiang Machinery Manufacturing Co Ltd & Ors* (2004)¹⁵⁶ allowed a failed mediation to be considered as part of the costs of the proceedings, which was confirmed in *Halsey*.¹⁵⁷ One solicitor, whose practice involves financial institutions, described how to explain to clients the savings to be made when using mediation:

You could say, for example, to a client, 'We're at an early stage of the litigation, if we mediate now it's likely to cost you, say, £3,500. If we carry on, deal with disclosure of documents, exchange of witness statements and facts, experts' reports, and have the final hearing, you might incur ten times that. You might incur £35,000.' But that's very simplistic. After all, what might very well happen, unless the mediation is successful, is the client incurs £3,500 for the mediation plus the costs.

Interviewees perceived that potential savings correspond to the size of the dispute: greater gains are achieved from large financial disputes. All mediations involve preparation costs, which accrue regardless of the financial size of the dispute. Legal representation incurs further expense and the costs escalate if the process takes a complete day or does not finish until late in the evening or the next day. Interviewees estimated the cost of a day's mediation to be between £3,000-£7,000 and the daily rate is often the same, regardless of the financial size in dispute. Therefore, the smaller the value in dispute, the smaller the financial savings made. This led several interviewees to question the appropriateness of mediation for small-value disputes, which were recognised as better dealt with by negotiation or litigation:

You know, for the sort of smaller, we'll say £100,000 claims, if you start incurring £3,000 or £4,000 for a mediation alone, it is not an insignificant hit, bearing in mind that the client doesn't have to incur that, the client can just go on and litigate and take his chances in court.

[Interviewee: Do you think disputes under £100,000 are not worth mediating?]

156. See *Days Med. Aids Ltd. v. Pihsiang Mach. Mfg. Co.*, [2004] E.W.H.C. 44 (Q.B. Comm.).

157. *Halsey*, E.W.C.A. Civ. 576 at ¶ 21.

Um - I wouldn't go that far, but certainly if you're looking at a claim of, say, less than £50,000, to have a formal mediation process with a third party mediator may not be considered to be good value for money. Most clients would be far keener, perhaps, to just have a direct negotiation or that sort of thing.

At certain financial levels, mediation ceases to be a viable option and settlement, even at a higher figure than the worth of the claim or negotiation, may be a preferable option.

Now if you can settle cases for up to say £20,000, it's unlikely that, from an insurer's point of view, we would want to mediate a case like that. I think, given that sort of damages, you ought to be able to negotiate a settlement. And it is probably worth paying the claimant a bit more money, rather than going through the process of mediation. But once you get above that figure, around that figure, then mediation is very useful.

The court recognised in *Halsey*¹⁵⁸ that mediation could be as expensive as a day in court. Leading mediators can now command high remuneration for their services.¹⁵⁹ This has led to the suggestion that some solicitors' firms are avoiding mediation because of the level of leading mediators' fees.¹⁶⁰ The data indicate that, in the experience of the interviewees, mediation can provide significant saving compared to the costs of litigation when the dispute is financially large but that other factors have to be taken into consideration. Where the dispute is of small monetary value, the savings are more likely to be minimal or non-existent. In such situations, negotiation is the preferred method of dispute resolution.

Timing

The interview data indicate that, depending on the financial size and complexity of the case, substantial savings are to be made when mediating early in the dispute. Much therefore depends on the timing of mediation. Yet there is little empirical evidence available which identifies the optimum timing for mediation, although some research suggests that mediation is less likely to settle

158. *Halsey*, E.W.C.A. Civ. 576 at ¶ 21.

159. Brooker & Lavers, *supra* note 1, at 353-70.

160. Some interviewees considered the cost of preparation for mediation to be quite substantial. See P. Newman, *Does ADR Have a Future?* LEGAL EXECUTIVE., 14 (Feb)(2003). The author suggests that one of the reasons that many law firms are reluctant to use ADR is the cost of leading mediators. *Id.*

very early or very late in the litigation.¹⁶¹ Data from the first two stages of the study reveal a divergence of opinion between both ADR specialists¹⁶² and lawyers¹⁶³ on the issue of the timing of mediation. Although 85 percent of the lawyers in the postal survey were in agreement that it was essential to gauge the best time for mediation, only 53 percent agreed that this should be as early as possible.¹⁶⁴

Before the interviews, the majority (19) of the lawyers agreed with the statement in the postal survey that mediation should be as early as possible. Nevertheless, the interview data suggest that mediations have been used successfully at different stages of the dispute resolution process. Several lawyers had experienced settlement when engaging in the process shortly before trial: even when the mediation resulted from a stay in court proceedings. Only one interviewee reported mediation failing to achieve settlement because the process was “too close to the next hearing and attitudes had become entrenched.” Conversely, two lawyers described experiencing non-settlement when mediating too early in the dispute because the parties either “hadn’t really defined the issues that were between them” or “did not understand the system’.”

An advantage of mediating disputes early is that “huge savings” are possible. Weighed against this is settling without eliciting all the information, a relatively high monetary outlay if the dispute is financially small and wasted expenditure if settlement is not achieved. Settlement in mediation involves balancing the risk of succeeding in court against agreeing a known outcome at an early stage and thus making a cost saving. A solicitor-mediator, who had used mediation for both commercial and construction disputes, explained:

I mean, if you can do it before you initiate proceedings, you must be talking about 75 percent, even 80 percent savings, which makes it enormously attractive as an economic proposition. The downside is, of course, at that point you are in a much less informed environment – you’re dealing with many more ‘what ifs’ and ‘maybes’. And it is then a question of-to what extent you are comfortable with [taking] that view at that early stage and how comfortable are your clients? Because there is a great deal of risk taking and assumption at that point. The earlier you do it, the bigger the saving is going to be, with the price of being rather less certain about what the outcome might have been.

A quarter of the lawyers interviewed (8) confirmed the importance of balancing early mediation and resultant savings against the risk of engaging in the

161. Genn, *supra* note 16, at 47. Settlement was found to be highest for cases between nine months to one year old since entry of the defence. *Id.* Genn’s report suggests that settlement is less likely for cases “at the two extremes of the case-life spectrum, i.e. the very young or the very old.” *Id.*

162. Brooker & Lavers, *supra* note 1, at 362, 369.

163. Brooker & Lavers, *supra* note 6, at 342-43.

164. *Id.* at 342

process before the parties have an understanding of their case. Frequent comments were made as to the necessity of thorough case preparation. A City solicitor working in the construction field reiterated the point, “[w]e would not really want to mediate from a position of ignorance. I can see that we hadn’t exchanged expert evidence, and most of our cases will depend on expert evidence, or a lot of them do; we would not want to be mediating blind.”

A comprehensive forensic review of a client’s case places a lawyer in a position to negotiate and make a “reasonable deal” and it places clients and their lawyers in a position to mediate. So, commenting on construction disputes, identifies lack of preparation as a common ground of mediation failure and suggests that unworkable mediation is often due to the knowledge of the parties, rather than the issues in dispute.¹⁶⁵ One lawyer-mediator explained his “criteria” for mediating:

The only thing you have to be careful of, of course, is knowing that you can mediate, which is, I suppose, an answer maybe to another question about when mediation doesn’t work. I do not think you can possibly mediate until you are in a position to negotiate, because that is what it is really. So there is a thing about ‘can you mediate too early?’ Well - yes, you can. If you don’t know enough about your own case and the other side’s case as you perceive it, and can’t make a judgment about what a reasonable deal would be, then don’t mediate.

An experienced commercial mediator conceded a change in opinion on the fundamental issue of the timing of mediation. Previously, the interviewee held the view that mediation should take place as early as possible in the dispute but had changed his stance, believing that the parties require a better understanding of their case before mediating. A warning was given of the potentially negative effect of the decision in *Dunnett v. Railtrack PLC* (2002), whereby lawyers, fearing cost sanctions, are likely to encourage clients into mediation too hastily:

I mean, one of the dangers of the *Dunnett* case is parties are going to rush off to mediation too soon. I always felt that it was never too soon to mediate, but I have mediated a few cases now where I think possibly that’s not right, they got there too soon and they needed to sort their ideas out, sort their case out a little bit more.

The danger of using “a too early to mediate argument” against an ADR order is evident: if the parties are not ready to engage in the process, they must

165. Gary Soo, *Working Through Unworkable Mediation*, 66 *ARBITRATION* 207, 207-10 (2000). The author suggests that unworkable mediation is often due to the knowledge of the parties rather than the issues in dispute. *Id.* A common ground of mediation failure is a lack of preparation. *Id.*

persuade the judge to that effect. The court has recognised the legitimacy of asserting the need for a later mediation in order that experts can more “meaningfully” participate in the process. In *Sixth Duke of Westminster v. Raytheon* (2002),¹⁶⁶ the court noted that mediation requires a “trade off between a more informed later mediation and potentially saving in costs by way of an earlier mediation.” The defendant had the claimant’s expert report for over a year and in the circumstances the court favoured an early attempt at mediation.¹⁶⁷

Although some courts have adopted the view that “mediation is better considered at an earlier stage of proceedings,” the most experienced mediator-interviewees could not definitely identify the optimum time for engaging in ADR and no “pattern” existed in the data for the best time to propose mediation. The cost of mediation depends on the number of days mediating, the amount of evidence the parties wish to produce, the mediator fee and the level of representation required. If mediation fails to reach a concluded settlement, the parties will have incurred mediation costs and face further expense if continuing with litigation or other dispute resolution mechanisms. Interviewees commented on the “wasted costs” when this happens, although the process itself may act as a catalyst for later settlement or produce other benefits, which override this drawback. (See next section.) The data suggest that calculating the cost-benefit of mediating is not, for the most part, an exact science. In many of the cases where ADR is encouraged by the courts, significant pre-action expenditure has already occurred and it is submitted that the court’s insistence will often not have expedited the process or saved costs substantially for the disputants. The use of some caution in encouragement of parties in mediation is necessary if increasing disillusionment and declining settlement rates are to be avoided.

Creative outcome

The defining attribute of mediation is said to be that the parties are enabled to reach settlements based on their own interests. Therefore one of the potential benefits of mediation is that a skilled mediator should invite the parties to search for alternative “creative” solutions to their dispute.¹⁶⁸ By focussing on the parties’ interests and relinquishing “strict legal rights,”¹⁶⁹ the parties are encouraged

166. *Sixth Duke of Westminster v. Raytheon*, 2002 WL 31476425 [2002] E.W.H.C. 1973 (Q.B.) (Comm Ct).

167. See *id.* *Halsey* indicates that it may be considered not unreasonable to refuse a late offer to mediate if it delays the trial proceedings. See *Halsey*, E.W.C.A. Civ. 576 at ¶ 22.

168. ALEXANDER H. BEVAN, *ALTERNATIVE DISPUTE RESOLUTION: A LAWYER’S GUIDE TO MEDIATION AND OTHER FORMS OF DISPUTE RESOLUTION* (1992). *Supra* note 8 at 24. The author identifies situations where the parties, particularly if they are in an on-going business relationship, may “explore creative solutions.” *Id.*

169. Jay Folberg & Alison Taylor, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* *Supra* note 8 at 9-10 (1984).

to explore new business opportunities.¹⁷⁰ The data from the postal survey indicated that creative outcomes for mediation were uncommon in the experience of respondents. The majority of settlements (72 percent) were financial only, 20 percent achieved both a financial and creative outcome and only 8 percent resulted in a creative outcome.¹⁷¹ These findings are consistent with surveys in the US, which also report that monetary outcomes predominate in court-connected schemes which lawyers dominate.¹⁷² Interviewees were asked to discuss the nature of the mediation outcomes they had experienced in order to explore the diversity of creative agreements that are feasible.

New business arrangements

To be able to create new business arrangements, the parties need to continue their working relationship. Interviewees recognised that relationships between suppliers, agencies, trading relationships or sub-contractors may contain the potential for new commercial arrangements, although this might be expected to be a rare occurrence. However, other contracts or disputes involving professional negligence, insurers or financial institutions were perceived to be less likely to lead to a creative settlement because of the nature of the dispute. A barrister explained:

It (*new business arrangement*) is very unusual because in order for that to take place, there has to be either an on-going relationship between the parties, or the potential for one. Take, for example, classically a professional negligence case. Normally, if you have sued your solicitor or accountant or surveyor in negligence, you are not going to stick with working with him. There is no creative outcome possible there but, where you have companies who fall out over contracts because they are working in the same or complementary businesses or industries, there is normally some way out there. But I have only come across that once.

Another factor believed to impede the brokering of new business arrangements is the effect of conflict on the relationship of the parties. A number of interviewees (10) reported that the dispute itself often leads to an irretrievable

170. Other authors have discussed the merits of using ADR and mediation, whereby the parties are able to explore alternative solutions and fashion settlements, which can bring new business arrangements. See, e.g., P. O' Connor, *ADR: Panacea or Placebo?* 58 *ARBITRATION* (2) 107 (May) (1992); and Dixon *supra*, note 155, at 436-52.

171. P. Brooker and A. Lavers, *supra* note 6 at 338-39.

172. McAdoo, *supra* note 11, at 520; Welsh, *supra* note 10, at 789.

breakdown of the parties' association, whereby they are unwilling to work together again. Further, the litigation process was often perceived to intensify the problem. A very experienced solicitor-mediator described several mediations where new contractual arrangements had been constructed but explained the uncertainty of achieving this when litigation has begun:

If you have a course of dealings, mediation can be a brilliant way of providing a dispute resolution mechanism that does not interfere with the ongoing commercial relationship. But a lot of mediations are one-off. You go into a deal and then it all goes horribly wrong and because you're almost at litigation or post-litigation stage, once you have served someone with a claim form, it's difficult to maintain a good working relationship, in my experience.

The training for mediation emphasises the potential for looking for new contracts and deals and mediator-interviewees were alive to these opportunities. However, lawyers described this outcome as an "unusual bonus" or the result of "exceptional" circumstances. For example; one solicitor described a mediation where the parties were able to reach a new agreement because the company supplying defective goods had been taken over by a large conglomerate, which did not want a bad start to its new acquisition and was, therefore, "amenable to diffusing the situation" by providing the product at a "heavily discounted rate."

In total, only seven interviewees gave examples of mediations where the outcome was an agreement, which involved a continuing future working relationship. These included;

- new development plans (2)
- new job for sub-contractor (1), and
- continuing to use one party as supplier (3).

Creative outcomes

Although the majority of interviewees had little actual experience of creating new contractual arrangements where the parties continued their relationship, nineteen (19) lawyers described other examples of "creative outcomes" achieved through mediation. Seven (7) described how the mediation process had resulted in the parties agreeing to alter strict legal rights by rewriting either a part of a contract or property deeds and three (3) interviewees had participated in mediations where the outcome resulted in one party agreeing not to continue legal action on separate issues. In total, interviewees described thirty-five (35) mediations which had produced creative outcomes. Analysis of the data provides a list of the outcomes achieved. For example;

- dividing up the work in a joint venture,
- building a car park in a dispute over access,
- providing time for payment in disputes with financial institutions,

- buying a defective house at the market price,
- putting defects right,
- providing an expression of good will,
- the decision maker agreeing to a site visit,
- the managing director agreeing to look at the evidence,
- re-writing a complaints procedure,
- re-arranging company assets,
- buying out a member of a family company.

Other interviewees were not convinced of the “reality” of such arrangements or contended that most commercial clients want a money settlement “on an economic basis” and that “fancy legal solutions don’t really come into that.” Nevertheless, other interviewees described “fringe benefits,” which were characterised as mediation outcomes and which made engagement in the process a worthwhile activity. For example;

- one party giving an apology, (4)
- quasi ‘day in court’, (2)
- new work for solicitor,
- client observing lawyer working.

Process-outcomes

Although the data suggest that opportunities for achieving new business or “creative outcomes” were not regarded by interviewees as the primary objective for mediating, participating in the “process” of mediation was believed to provide a number of ancillary benefits for the client and lawyer. For example;

- Focussing on issues,
- Enabling the parties to assess strengths and weaknesses,
- Providing a “reality check,”
- Acting as a catalyst for future settlement.

Focussing on issues

Notably, lawyers commented that the process of mediation allows the parties to concentrate on the “key issues” involved in the dispute. Twenty (20) interviewees specifically referred to advantages gained from “focussing” on or “clarifying” specific points during mediation. The benefit from this is that mediation can facilitate settlement on some matters, leaving the parties to continue to seek resolution beyond the process. If the parties proceed to trial, fewer points need to be considered, providing savings in time and cost. When parties are encouraged to concentrate on specific issues, it also enables them to move away from areas impeding the progress of settlement. Specific stumbling blocks, or personalities, may be hindering dispute resolution and mediation can provide the opportunity to look beyond these in order to find issues where agreement can be reached. A solicitor described the supplementary gains from a mediation which had not reached settlement:

The interesting thing about it was that they had actually narrowed a number of the issues down and a trial date was fixed and it would have meant (which I actually class as a successful outcome of mediation) that, instead of going to court and arguing over about twelve different issues, they narrowed it down to about three key areas. Consequently, instead of having - I think it was listed for a four or maybe a five days trial - it would have taken a day. Well, you can look at that in a number of ways. You can look at it in terms of cost saving, you save four days of trial time, and High Court action is probably the best part of £40,000 or £50,000 of anyone's money. They reduced the need for witnesses and reduced, in part, the need for experts' evidence. And so, all round, a sharpening of the case.

Strengths and weaknesses

Another benefit provided by the process of mediation is the opportunity to assess the strengths and weaknesses of both client and opposition's case. Such examination enables the legal advisor to evaluate the arguments and to assess potential difficulties in evidence or experts' reports. Mediation and a skilled mediator can provide the scope to review the strengths of the case, which is an advantage over the litigation process. A skilled mediator encourages the parties to take a realistic view of their case and this can advance the disputes towards settlement;

I think another advantage of mediation is that it helps a party to understand, maybe in a way that wasn't previously the case, what the strengths and weaknesses of its case are. Because in the process, you can talk privately to the mediator, you can ask the mediator, "What do you think?" Now, in the case, the substantial case, the mediator is a QC. The QC, in the process of Day Four or Five, gave us his view on certain aspects of the case, which were not good for our client. So, whilst he never sits as a judge, he can talk to you privately. And you are entitled to say to him, "What do you think?"

'Reality check'

Mediation was believed to be particularly beneficial when parties are taking an “unrealistic” view of their positions. By participating in the process, the parties are encouraged to make a detailed examination of their case, both before and during the mediation, which provides the opportunity for “reality checking” or an “adjustment of perspective.”¹⁷³ A CEDR survey of mediators found that mediators rated “reality testing” and “creative problem solving” to be the most important contributors to mediation settlement.¹⁷⁴ One solicitor-mediator described a mediation where the parties had been unable to reach settlement on the day but the process “softened” the parties’ attitudes and enabled them to reach settlement two months later:

But in fact what happened was that the mediation process, you could call it a softening up if you like, it made both sides come face to face with what the parameters of settlement were in a very intense situation. They then went away and over a period of time I think points sank in and people re-adjusted their expectations. And I don't think that would have happened without there being that mediation and that's why it was it was able to settle over the course of the next two months.

Catalyst

A number of interviewees were of the opinion that, even when the mediation had failed to achieve settlement, the process had provided the “catalyst” or “impetus” for reaching settlement at a later stage. As a construction solicitor explained:

[Interviewer: *Did the mediation have much to do with reaching a creative outcome afterwards?*]

Yes, I think so. It focussed minds on the strengths and weaknesses of the case and really dismissed all the other arguments. And I think it also put everyone in a mind to actually settle.

Explaining non-settlement, another solicitor described how both parties had been able to see the other side's case during the process. Although the mediation failed to resolve the problem, settlement was reached at a later stage: “It was helpful because it enabled both parties to clarify what were the real issues in the expert evidence. It helped remove what were personal issues and just clari-

173. A. Bevan, *Mediation – The Threat of the Courts*, 13 J. OF ARB., MEDIATION & NEGOTIATION 78 (2001).

174. CEDR Mediator Audit *supra* note 40 at ¶ 5.3.

fied what were practical issues. So it moved the whole process on and was a worthwhile exercise.”

Tactical outcomes

Interviewees perceived mediation as furnishing other valuable outcomes, ranging from testing arguments and evidence to a “tactical use” of ADR. Over half (17) described “tactical outcomes” gained from mediating. For some, taking part in the process enables the parties to get “a feel of the financial muscle” of the other side or allows the parties to “eyeball” each other. Others described how mediation had been used to convey messages concerning the strength of case or their client’s commitment to the dispute or sometimes to buy clients more time “on the pretence that you are investigating or considering mediation.” At a fundamental level, mediation enables both parties to learn more about the other side’s case; as a newly qualified mediator explained:

Being cynical, yes, because it gives you a chance to test your own case. And I know certainly, because I’ve gone through the mediation process, I’m a trained mediator with the ADR Group, and that’s one of the concerns as you’re trained. You may have parties coming before you who are there just simply to test their case and have no intention of settling. And to be honest, that is a useful by-product of an unsuccessful mediation.

The process itself supplies the opportunity to assess how clients, the opposition or witnesses might perform at a future trial and such information can assist in later settlement negotiations or at the trial itself. A barrister described two mediations where the parties did not settle on the day but the process exposed deficiencies in the cases which encouraged later settlement;

In the first case, it became clear at the mediation that the defendants could not call a number of witnesses and did not have contact with a number of witnesses who would be important to them at trial. That is something that would not have emerged until much later in the action. But it was cards on the table at the mediation and it became clear that the defendants were going to have difficulty at trial in running their defense for practical reasons and, for that reason and really no other, the case settled. In the other case, it worked the other way around, because what was apparent at the mediation was that the claimant had very poor document control within his company and was going to struggle to prove his loss at trial. Again, that would not necessarily become apparent until trial and may well have been covered up, in a pejorative sense by an expert, if we had served a quantum report. It wouldn’t have become apparent until cross-examination of that expert at trial that quantum was a problem. So, in both those cases, the respective parties went away having ringing in their ears the observations of the mediator they had got difficulties and they eventually settled.

One barrister whose mediation experience was chiefly in professional negligence cases explained how the process of mediation can be utilised strategically:

I have been instructed in cases where we have acted for the defendant where that (*tactical use of mediation*) has been our prime motivation; although in cases where that has been our prime motivation, very often when you go to the mediation something constructive nevertheless comes out of it. But there is no doubt at all that a lot of defendants, especially insured defendants, tend to use mediation for that purpose. I mean, most indemnity insurers take quite a cynical, hard-nosed, bottom line view towards litigation and very often, they will agree to mediation with tactical reasons in mind. And I say that having acted for many of them in those circumstances.

The data indicate that some interviewees have experience of mediation undertaken as part of a strategic plan and mediator-interviewees reported more "tactical games" being played in the process itself, with the parties being less open and more manipulative with the mediator. A solicitor described his recent experiences as a mediator and his "game plan" for mediation when representing a client:

Actually, can I mention one other thing? I don't know if this is relevant, but I've just thought of one other thing. I have felt that many of the people who do mediations are the more experienced mediators, and what you have also seen is a change in the profession about doing mediations. Those who do them are now more hard-nosed. Ten years ago, we did mediation, people were very open with the mediator, very helpful to the mediator, and it was very easy. And you can tell within minutes of starting mediation whether people have done them before or not. If you've got somebody who – it's their first mediation, they are very easy to mediate because you tell them about being helpful and they are helpful, and it's dead easy then. I don't do that. If I am going into a mediation now, for a client, I will have worked out in my mind in advance my last alternative. I order things and will have set them way ahead of where we want them, and we will defend the line that we know is much harder than we want for ages. So that the mediator suddenly thinks he has broken through when he manages to negotiate an offer, which is where we wanted to be. I don't know if that makes sense, but you *now manipulate the process* instead of engaging in the process. Now, that's cynical, but it's what I'm here to do, and I see that as a mediator too. Is manipulating the process too hard a description? They are *more aggressive within the process*, perhaps. (Italics provided.)

Other experienced mediator-interviewees recounted adopting a different approach and different roles when representing a party in mediation and reported

encountering tactical uses of mediation. One experienced commercial mediator explained how the process was used to indicate how strong the client's case was:

I mean, I certainly found myself (and I should have known better, I suppose) but I found myself in a mediation using the opportunity of the mediation to soften up the other side, if you like. In other words, to let the other side know how strong I reckon my case was and so to force them to look at the consequences of not settling. And I think parties are using it (mediation) like that and sometimes are using it tactically to get across certain messages.

A number of interviewees believed the potential for tactically using mediation has been exacerbated by the recent decision in *Dunnett*. Interviewees perceived that proposals to mediate are used cynically either to "blackmail" opponents on the issue of costs or to avoid the ire of the judge at trial, a perception confirmed in some of the professional literature.¹⁷⁵ As one solicitor explained:

And yes, you can use it tactically. And following this recent Railtrack case (*Dunnett*) that has come out; you can see that an awful lot of solicitors will start offering mediation, partly because they want it and partly because they want to put the other side in a squeeze over costs if they refuse it.

Interviewees described a change in lawyers' practice following the decision in *Dunnett*. Mediation letters were sometimes being used to "bluff" the opponents about their intentions and this was producing tactical responses. As one solicitor explained:

I have had a number of experiences of solicitors writing letters to me on the basis of saying, 'Let's mediate, and if you don't agree to this, we'll show this letter to the court.' In other words, it's being used as a costs tactic. In which case, I may, if I am in the same frame of mind, i.e. I think we can do it now; I will call their bluff if I think they are bluffing. I may say, 'Yes that's fine, let's do it.' Or, I may write back and say, 'Well, I don't know enough about my client's case to make this meaningful but, as soon as I do, then I'll get back to you.'

The data support the view that the judicial steer in *Dunnett* has engendered a change in legal practice requiring lawyers to incorporate a consideration of ADR or mediation into the negotiation and dispute resolution system. However, the data also indicate that some lawyers are adopting an adversarial approach in the mediation process. Mulcahy, in her study of personal injury mediation in the UK, found that some lawyers bring their normal negotiation practices to mediation and, when solicitors conduct settlement negotiations in mediation, they become more adversarial.¹⁷⁶ This phenomenon is not confined to the UK: US

175. Professional journals discuss "tactics" of using mediation. See, e.g., Lind, *supra* note 79 (suggesting that a well-timed proposal puts the client in the "driving seat."); and Wilcock, *supra* note 79, at 44-45.

176. Mulcahy, *supra* note 16, 212-14. The data from interviews with solicitors who had used mediation in clinical negligence cases suggested that conducting settlement negotiations in media-

and Canadian studies of court-connected mediation revealed that some lawyers bring their normal practices to mediation and use the process instrumentally.¹⁷⁷ This development may be of more general concern following the decision in *Halsey* (2004), where the court expressly stated that the conduct of the parties in mediation is not the concern of the court: "We make it clear at the outset that it was common ground before us (and we accept) that parties are entitled in an ADR to adopt whatever position they wish, and if, as a result, the dispute is not settled, that is not a matter for the court."¹⁷⁸ The aim of CPR was to create a "fundamental change" in the adversarial "culture" civil litigation.¹⁷⁹ The evidence from this research and others suggest that some lawyers merely transplant the ethos of their existing legal practice to the new procedures. The following section investigates the interviewees' experience and perceptions of the effect of CPR on mediation and lawyers' practices more generally.

CPR

CPR was designed to produce costs proportionate to the case, justice with reasonable speed and less complex, understandable procedures.¹⁸⁰ In 2002, a report from the then Lord Chancellor's Department on the working of CPR¹⁸¹ found a reduction in the number of cases issued,¹⁸² parties settling more cases before the hearing and a steady growth of ADR.¹⁸³ The report concluded overall

tion made the lawyer more adversarial and that some solicitors continue their normal negotiation practices within mediation; G. Gibson, *Horses for Courses: War Lords as Peacemakers: Are Trial Judges Bad for ADR?* 68 *ARBITRATION* (1) 2 at 2-10 (2002). The author suggests a similar experience in Australia where some trial lawyers retain their adversarial practices in mediation.

177. Carrie Menkle-Meadow, *supra* note 7; McAdoo, *supra* note 11.

178. *Halsey*, E.W.C.A. Civ. 576 at ¶ 14.

179. Lord Chancellor, Lord Irvine, forward to CPR.

180. Lord Woolf, Access to Justice Interim Report, Chapter 1, at ¶ 3 (1995).

181. Lord Chancellor's Department, *Civil Justice Reform Evaluation: A Continuing Evaluation of the Civil Justice Reforms*, available at <http://www.dca.gov.uk/civil/reform/ffreform.htm> (2002).

182. *Id.* Over the three-year review of CPR, there has been a "gradual decline" in the number of claims issued in the County Courts and a significant drop in the Queen's Bench. Data from the Court Service on the disposal of cases indicate that there is an increase of fast-track cases settling or being withdrawn before the hearing and a reduction of multi-track cases settling on the day of hearing. *Id.* at ¶ 4.3, 4.4. In the County Court, the report compared claims in tort, contract, possession of land and recovery of goods and an increase in settlement was linked to the new procedures. *Id.* at ¶ 3.2.

183. *Id.* at ¶ 4.8. There was initially a substantial increase in ADR appointments following the introduction of CPR. For example, CEDR reported an increase of 141 percent in the first year following CPR.

that CPR had engendered a change in the litigation culture and the pre-action protocols, introduced to provide an uncomplicated procedural framework, were “working well to promote settlement and a culture of openness and co-operation.”¹⁸⁴

Detailed analysis of the LCD report suggests that the rules may have engendered a “degree of co-operation” in the legal professions but the success of CPR is qualified, a finding which is corroborated from other sources.¹⁸⁵ The Continuing Evaluation Report was unable to determine whether CPR has reduced cost and noted growing evidence of an increase in some areas: “It is still too early to provide a definitive view on costs. The picture is still relatively unclear with statistics difficult to obtain and conflicting anecdotal evidence. Where there is evidence of increased costs, the causes are difficult to isolate.”¹⁸⁶

CPR had been in place for three years when the lawyer-interviews took place. Interviewees were asked to comment generally on CPR and its effect on mediation. Over three-quarters (23) thought that the Rules have produced a positive effect on mediation or the dispute resolution process more generally. One beneficial outcome, recognised by twenty-two (22) interviewees, is that CPR brings ADR to the fore and provides the parties with the opportunity to contemplate mediation at various points when embarking on civil litigation.

I think it (*the introduction of CPR*) was very good, because it brought it (*mediation*) much more to the fore. Not only did it make those lawyers who had not really thought about it aware of it, they had to be aware because it is in there. I think it mentions it (*mediation*) in about six different places, doesn't it? But more beneficially than that, it brings around this notion that disputes must be proportionate and so on and that this is one of the ways to settle it sensibly and early on. And therefore you should be considering it (*mediation*) because of costs consequences.

Research into the effect of CPR suggests that clear ground rules in the protocols enable parties to focus on key issues at an earlier stage and have encour-

184. *Id.* at ¶ 2.5. Surveys of solicitors undertaken by the Law Society Woolf Network concluded that lawyers find CPR to be working efficiently and quickly. Findings from the 4th Survey revealed that although 84 percent of solicitors agreed that the procedures were quicker and 70 percent that they were more efficient, only 25 percent thought CPR was working well and 69 percent thought they were working well with reservations. 81 percent did not agree that the procedures were cheaper. *Id.*

185. T. Goriely, R. Moorhead & P. Abrams, *supra* note 30. The report provides data on 54 in-depth interviews with lawyers, insurers and claims managers, concentrating on three areas of work personal injury (PI), clinical negligence, and housing claims. Interviewees regarded the reforms as a success as they provided, clearer structure, greater openness and making settlement easier to achieve and that dispute resolution culture was more open. However, interviewees criticised opponents for not adapting to new culture and any change in culture was patchy. R. Turner, *New Rules for the Millennium*, 150 *NEW L. J.* 49 (No. 6919) (2000).

186. Lord Chancellor's Department, *supra* note 181, at ¶ 7.1-7.2.

aged a greater openness.¹⁸⁷ A MORI poll conducted by CEDR Civil Justice Audit found a “clear recognition” that lawyers surveyed felt there was less litigation and faster case settlement.¹⁸⁸ These findings were confirmed by the experience of the interviewees. Putting ADR on the civil reform agenda not only provides the opportunity for discussing mediation but it also accommodates the potential for reaching a resolution of the dispute.¹⁸⁹ Twelve (12) lawyers commented on the increased incidence of settling disputes since CPR and provided explanations for this phenomenon. First, CPR provides the expectation that the parties must adopt a reasonable and rational approach to settlement.

Yes, I can't quite work out what the relationship between mediation and pre-action protocols in the CPR is. But it seems to me now that parties generally want to be seen by the court to be trying to have either settled it, or, failing that, to have narrowed the issues, or, failing that, to have identified the issues and considered the best means of resolving them. In other words, to have complied with the overriding objective, not just paid lip service to it, but actually done something positive. And I think that means that now there is more likely to be a meeting. And if there's a meeting, then there is more likely to be consideration of mediation.

Second, CPR has effectively eliminated the negative perception that proposing mediation reveals a weakness in the case. It is noted that early research in the construction industry did not indicate that contractors and sub-contractors feared that proposing ADR signified a weakness in case.¹⁹⁰ However, the spectre of this perception has been canvassed in professional legal literature and recognised as one of the causes for the slow uptake of ADR in the UK.¹⁹¹ Interviewees found that the rules not only allow the parties to talk “openly and up-front about settlement” but they have given a real bite to ADR by engendering a fear of judges applying sanctions for unreasonable behaviour. One lawyer-mediator explained his/her experience of the effect of CPR:

187. Goriely, *supra* note 30. The research found that interviewees believed that the clear ground rules enabled parties to focus on key issues at an earlier stage and encouraged a greater openness.

188. The Civil Justice Audit, *supra* note 43. *Id.* at 4; *see also* Burr, *supra* note 42.

189. Goriely, *supra* note 30.

190. P. Brooker & A. Lavers, *supra* at 16. Early research in the construction industry found that contractors and sub-contractors did not fear that proposing ADR suggested a weakness in ones case. *Id.* Only 59 percent of the respondents to the postal survey agreed with the statement that proposing ADR indicated a weakness in case. *Id.* *See also* P. Brooker & A. Lavers, *Commercial and Construction ADR: Lawyers' Attitudes and Experience*, 20 CIV. JUST. Q. 327, 335 (2001).

191. Genn, *supra* note 16; N. Gould and M. Cohen, *supra* at 27; Mulcahy, *supra* note 16.

So in '99, when new rules came in, there was what I call an 'outbreak of reasonableness' amongst solicitors. Previously, we would flatly refuse to cooperate with the other side and made them issue application after application for everything but suddenly you got all these dire warnings about if you don't follow the Protocol spirits and the overriding objective, you're going to get it in the neck. And everybody was absolutely determined they weren't going to be the ones who got a tongue lashing from the judge, so everybody became very cooperative. And it's only one step further for them then to go into mediation. So that's been one of the enormous successes of the CPR, it really has introduced a culture change.

Third, interviewees perceived that CPR had resulted in a change in the working practices of lawyers. Whereas before the rules lawyers left the collection of evidence until later in the litigation process, the advent of CPR has required lawyers to have a better understanding of their cases at a much earlier stage than previously. Both reports produced by the then Lord Chancellor's Office on CPR raised the problem of the costs of front-loading cases.¹⁹² Other observers have suggested that CPR is proving to be costly to administer and has not addressed the problem of complexity through the introduction of pre-action protocols, case conferences, summary assessments, allocation and listing questionnaires.¹⁹³ Interviewees raised concerns about the protocols. Nine (9) lawyers with experience of pre-action protocols reported front-loading of the case. However, a positive benefit from following the protocols is that lawyers gain a greater understanding of their client's case at an earlier stage, which puts them in an improved position to negotiate. One barrister experienced in professional negligence cases explained the effect of CPR on his practice:

Where, under the old regime, you could never have had a meaningful discussion with the other side about their case a month or two months after issuing the writ, because they would simply say 'Well, I haven't seen any documents yet. We don't have disclosure from our cli-

192. Lord Chancellor's Department, *Civil Justice Reform: Emerging Findings, An Early Evaluation of the Civil Justice Reforms*, ¶ 7.7 (2001). Lord Chancellor's Department, 'Continuing Report', *supra* note 37 at ¶ 7.1 (2002). 45 percent of the respondents to the Law Society Woolf Network 3rd Survey found front-loading of cases a problem. *Id.* See also, CEDR Civil Justice Audit, *supra* note 43.

193. R. Turner, *New Rules for the Millennium*, 150 NEW L. J. 49 (2000). It is suggested that many County Courts are having difficulty in implementing the procedures, thus creating further delay. Even the Royal Courts of Justice with the reduced number of claims being issued have found that the most routine procedures are taking three times as long to process. *Id.* See Burr, *supra* note 42; M. Simmons, *Settlement under the CPR: Quicker but not Cheaper*, IN HOUSE LAWYER 27 (2001). Following the monitoring of litigation post-CPR in Eversheds, Pinsnt Curtis, Rowe and Maw and Herbert Smith, the author reports that cases settled quicker but necessarily cheaper. The front-loading of cases offset any later savings. However, the costs involved in using mediation were reported to be "worth it" and the use of part 36 offers made the achievement of settlement easier. See also W. Rees and P. Howell-Richardson, *supra* at note 42; Goriely, *supra* note 30; CEDR, *Civil Justice Audit* (2000), available at <http://www.cedr.ac.uk>.

ent. I haven't proved my witnesses etc,' now, most of that will have been done and that means that the opportunity to settle the case earlier is much greater under the CPR. So that is one good thing CPR has done.

One consequence of the front-loading in CPR is an increase in negotiation activity between lawyers, which results in more cases settling.¹⁹⁴ A solicitor-mediator explained: "I think it may be a rather unusual by-product of CPR, in that with the front-loading of cases, more and more claimants and defendants are negotiating more and settling more before issue."

A further benefit from gaining greater knowledge and understanding of a client's case is that also assists at the mediation. "[n]ow we have the Construction Engineering Protocol and we are taking expert advice and we are involving experts on a level of detail that we probably would not have done in the old days, in pre-Woolf days. Some were probably better equipped to mediate anyway.

Although the evidence suggests that one result of CPR is that often the parties and their lawyers reach mediation better prepared than previously, this may come at a cost to successful settlement. Four leading lawyer-mediators reported encountering mediations that were more difficult to settle since the introduction of CPR:

I think it's (*CPR*) been positive. I think it has helped. But I think it has been positive in a wider sense in terms of settling cases. What you have now are a lot more cases that settle without any formal dispute resolution process, because of the Protocol, because of the encouragement to be sensible with your opposite number. And I think, that in some ways, it is the more difficult cases that now go to mediation. The easier cases are settling more quickly because people are not afraid to pick up the phone and talk and to make settlement offers.

[Interviewer: Do you think this might lead to fewer cases reaching a settlement in mediation?]

I do - that has been my experience. But in the olden days [...] they were quite straightforward - and one could see fairly quickly where this was going to go and the sort of figure it was going to settle at. And, OK, you batted the figures back and forward, but everyone knew they were going to do a deal that day. But now it's quite common, in my experience, for cases to come to mediation

194. Goriely, *supra* note 30. All respondents in the study thought more cases were settling following the introduction of CPR without a court agreement. *Id.* at xxvi; Simmons, *supra* note 30 (finding that the front-loading of cases encouraged early first offers).

that are very, very difficult – you’ve got some very either difficult issues or intransigent parties.

Not all interviewees believed that CPR has produced a universal change in attitude and culture in the legal profession and a number reported either negative experiences with CPR or problems arising from the procedural rules.

I think I get more aggression now than ten years ago or twenty years ago, significantly more than twenty years ago. And the CPR rules have not helped at all. They do not change people’s attitudes. All it does is give people more sticks to beat people with because you just now get letters the whole time saying, “I refer to the right to refer this letter to the court on the question of costs or anything we choose to discuss in correspondence at all.

The CPR rules have gone further than just providing the opportunity for negotiating settlement and ADR. A survey undertaken by the Technology and Construction Solicitors Association (TeCSA) found that the protocols were generally working well but that there was some evidence that “they were open to abuse.” For example, disagreement over the level of detail in the letter of claim and response lead to “unnecessary conflict and tactical positioning” and some claimants were issuing “speculative claims” in the hope of ADR or settlement without proving their case.¹⁹⁵ As noted earlier, some lawyers propose mediation or ADR with the threat of “costs-terrorism”:

I do not think the protocols have had an enormous effect. I think it is that bit of what I call ‘costs terrorism’ that’s worked. I mean it’s amazing how many times you see a letter - and I have to say I write them myself from time to time.

CPR may not have resulted in a “rash of reasonableness,” or a complete transformation of the adversarial mind-set for all lawyers but it has, with judicial support, allowed lawyers to explore ADR and mediation without taking a tactical risk. Under CPR, settlement is an “approved privileged objective of civil justice” and the new procedures provide the opportunity to discuss settlement openly and contemplate consensual dispute resolution mechanisms, which previously might have been perceived to indicate a weakness in one’s case.¹⁹⁶ The data support Roberts’ argument that CPR may lead to a “discrete, unsupervised, pre-litigation phase in which serious negotiations take place.”¹⁹⁷ However, the findings also indicate that, within this stage, some lawyers are initiating “cynical manoeuvres” with ADR, many of which, the data suggested, result from the fear of costs reprisals.¹⁹⁸ CPR may therefore have abetted the tactical use of mediation, albeit unintentionally.

195. D. Helps, *Now we are three*, BUILDING 41, 57 (2003).

196. S. Roberts, *Settlement as Civil Justice*, 63 MOD. L. REV. 739 (2000).

197. *Id.* at 747.

198. *Malkins Nominees Ltd. v Societe Fianciere Mirelis SA and others* EWHC (2002) 1221 (CH). The court did not accept the applicant’s view that the defendant’s advisor’s offer of mediation

It has been suggested that lawyers have, by the use of “forensic practices,” geared towards their own financial advantage, contributed to the failure of the civil justice system to control time and cost.¹⁹⁹ Similar cynicism is evident in the prediction that some lawyers at least may subvert the intentions of the Woolf reforms.²⁰⁰ Judicial pressure, a key part of the institutionalisation of ADR, may well deliver the improvement in early settlements that is the principal benefit claimed for it. However, and perhaps paradoxically, it will give further opportunities to the legal professions to use ADR tactically in ways, which may frustrate the aims of CPR. There must also be a real possibility that the exertion of pressure will damage the benefits of consensual ADR.²⁰¹ So ADR, and specifically judicial requirement of it, have changed the civil justice landscape, but not so as to obviate manipulation by lawyers; the juridification of arbitration provides an historical example of possible consequences, which are unlikely to be consistent with either the range of potential benefits offered by ADR or other aims of CPR.²⁰²

CONCLUSIONS

The words of Brooke LJ in the Court of Appeal in *Dunnett v. Railtrack* (2002) are destined to become amongst the most-quoted from the growing corpus of case law relating to ADR: “skilled mediators are now able to achieve results satisfactory to both parties which are quite beyond the power of lawyers and court to achieve.”²⁰³ They are no doubt warmly welcomed by mediators as official validation of their contribution to dispute resolution.

But in one respect they may do a disservice to the cause of mediation. More significantly for the purposes of this research, they may do a disservice to the understanding of mediation. This is because they are exclusively focused on success, defined by reference to the achievement of a settlement: “It may well be that the mediator is able to achieve a result by which the parties shake hands and

was ‘a cynical tactical manoeuvre’ and stated ‘that can be said in any case which ADR has been offered and refused by a party which subsequently loses the case. *Id.* At ¶ 7.

199. A. Zuckerman, *Lord Woolf's Access to Justice*, 59 MOD. L. REV. 773, 780 (1996). See also A. A. Ogus, *Some Reflections on the Woolf Interim Report*, 1 WEB JOURNAL CURRENT LEGAL ISSUES (1996).

200. Zuckerman, *Id.*

201. Zuckerman, *Id.*

202. J. AUERBACH, *JUSTICE WITHOUT LAW* (1983); R. ABEL, *POLITICS OF INFORMAL JUSTICE*, VOL. 1 (1983).

203. *Dunnett v. Railtrack* PLC C.P. Rep. 3,14 (2002).

feel that they have gone away having settled the dispute on terms with which they are happy to live.” No criticism of the Court of Appeal is intended in making this observation. It is entirely consistent with the usual view of the benefit of mediation. Judges might be expected to be concerned with settlement as the indicator of “success,” since that is the outcome which removes the problem from their hearing list, with the added satisfaction that it was achieved by consensus, ADR providers also tend to place great emphasis on this outcome and settlement rates form an important part of their marketing, nor is it surprising that researchers, too, seek to measure their settlement rates, given the natural preoccupation of the principal actors in the process.

But this preoccupation can result in insufficient (or no) emphasis being given to other outcomes. US commentators in particular use other criteria than outcome of mediation e.g. “user satisfaction,” “efficiency improvement” and “improvements in the post-dispute climate.”²⁰⁴

At the heart of the research reported in this article is a desire to appraise the potential benefits identified by users of mediation *beyond* the basic prospect of settlement.

- Savings in cost. While the research offers support for the often-repeated claim that mediation can save money, it is apparent that crude quantification is impossible. The later the mediation, even assuming settlement is achieved, the greater the wastage in preparatory costs. Furthermore, and unsurprisingly, the parties can be worse off if they mediate unsuccessfully, proportionately greater savings can be made in disputes where larger sums are involved, since all mediations will involve preparation costs; interviewees estimated actual mediation costs at between £3000 and £7000 per day. This issue of timing was perceived to be crucial in determining what savings in cost could be achieved.
- Creative outcomes/new business arrangements. Some evidence existed for the achievement of beneficial outcomes beyond financial settlement, such as the parties re-working an existing commercial relationship or exploring new business opportunities together. Outcomes of this kind were reported to be comparatively rare, and to be almost entirely absent from certain types of dispute, such as allegations of professional negligence, where the requisites for co-operation have been lost. Nevertheless, some credence was given to these “alternative outcomes,” although the indications were that they are limited in number. Less obvious beneficial outcomes were reported as including focussing on issues, the assessment of strengths and weaknesses of the respective cases and the provision of a “reality check”: even when the mediation *failed* to achieve settlement, a number of interviewees stated that the process had provided the catalyst or impetus for later settlement. This is a benefit which cannot be shown up by concentration on settlement rates, indeed, by that criterion such an outcome would probably be recorded amongst the failures.

204. Thomas Stipanowich, *supra* note 148. The author cites Kenneth Kressel and Dean Pruitt who use six approaches to mediation assessment: Stipanowich cites at 119 K. Kressel and D. Pruitt who use six approaches to mediation assessment: “(1) user satisfaction, (2) rates of compliance, (3) rates of settlement, (4) nature of agreement, (5) efficiency improvement, and (6) improvements in the post-dispute climate.” (K. Kressel and D. Pruitt, ‘Mediation Research: The Process and Effectiveness of Third Party Interventions. Conclusion’ (1989) *A Perspective on the Mediation of Social Conflict* at 395-400; . See also Douglas Henderson, *Supra* note 148.

- Tactical outcomes. This is at once an important additional benefit and a potential weakness. The research examined the tactical effects of mediations referred to by a majority of interviewees, as “feeling the financial muscle” of the other side or permitting the parties to “eyeball” each other. A “test run” of the case is seen as a useful by-product of a mediation failing to achieve settlement.

However, it is in the area of tactical outcomes that evidence emerged which is potentially damaging to the cause of mediation and, perhaps even more worryingly, to the reformed civil justice system. Put crudely, the availability of tactical advantage to parties may be seen as an attraction of mediation, but it also constitutes an invitation to their legal advisers to compete for it. There were indications that this is happening. Words like “manipulation,” “squeeze,” “bluff,” “force” and expressions like “tactical games” and “defend the line” will be familiar to lawyers routinely engaged in litigation or arbitration. They may appear as anathema to committed mediators and equally may have an ominous ring for the success of the Woolf reforms to the civil justice system.

Judges may feel, with some justification, that they have given ADR what support they can when the opportunities arise. The expectation, to put it no more strongly, that parties will actively explore the benefits of mediation, has been expressed in forthright terms even in those extreme cases where, exceptionally, refusal to mediate was permitted. Where necessary, judges have enforced the expectation by sanction, basically through costs. It is, therefore, an irony that the research identified reported instances of “costs terrorism” and other forms of tactical manoeuvring using the judicial statements in support of ADR in attempts to secure advantage far removed from the spirit of mediation or of CPR.

It is the overall conclusion of this research that a proper appraisal of the effects of mediation should include outcomes which cannot be understood by reference to a settlement rate and that evidence has been presented of the nature of those outcomes. Generally, these can be regarded as incidental, but not insignificant additional benefits of mediation, which may accrue even when no settlement is reached. However, the search for tactical advantage, ironically given the weapon of judicial support, is an outcome that may be hard to reconcile with the aims of the reformed civil justice system.

