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Costs Penalties

for refusal to engage in ADR

Summary:

There is a growing body of case law showing that costs sanctions are imposed on Defendants for refusing to enter ADR after it has been offered.

The case law has developed since *Halsey* [2004] in which the Court of Appeal gave guidance on when costs penalties for refusal to engage in ADR should be applied. In *PFG* [2013] the Court of Appeal approved a costs penalty imposed on a winning defendant for refusing to mediate. In *Garritt-Critchley* [2013] the winning claimant was granted **indemnity costs** for the defendants refusal to mediate. In *Laporte* [2015] the **winning defendant was deprived of 1/3rd of his costs due to his failure to engage in ADR.** In *Bourne* [2016] the wining defendant was deprived of 50% of his costs due to his refusal to engage in mediation. In *Reid* [2016] the defendant failed to beat the claimant's calderbank offer on costs and refused to mediate. Master O'Hare awarded indemnity costs to the winning due to the losing party's refusal to mediate.

Pre-action protocols:

The PAPs encourage ADR and warn of costs penalties for refusal and silence. The Clinical Negligence PAP states:

> **"5 ALTERNATIVE DISPUTE RESOLUTION**
> **5.1** Litigation should be a last resort. As part of this Protocol, the parties should consider whether negotiation or some other form of alternative dispute resolution ('ADR') might enable them to resolve their dispute without commencing proceedings.
> **5.2** Some of the options for resolving disputes without commencing proceedings are—
> (a) discussion and negotiation (which may or may not include making Part 36 Offers or providing an explanation and/or apology)
> (b) mediation, a third party facilitating a resolution ;
> **(c) arbitration, a third party deciding the dispute;**
> (d) early neutral evaluation, a third party giving an informed opinion on the dispute; and
> (e) Ombudsmen schemes.
> **5.3** …
> **5.4 If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR, but a party's silence in response to an invitation to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs**."

The Personal Injury PAP states:

> **"9. Alternative Dispute Resolution**
> **9.1**

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9.1.1 Litigation should be a last resort. As part of this Protocol, the parties should consider whether negotiation or some other form of Alternative Dispute Resolution ("ADR") might enable them to resolve their dispute without commencing proceedings.
9.1.2 Some of the options for resolving disputes without commencing proceedings are—
(a) discussions and negotiation (which may or may not include making Part 36 Offers or providing an explanation and/or apology);
(b) mediation, a third party facilitating a resolution;
(c) arbitration, a third party deciding the dispute; and
(d) early neutral evaluation, a third party giving an informed opinion on the dispute.
9.1.**3 If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR but unreasonable refusal to consider ADR will be taken into account by the court when deciding who bears the costs of the proceedings."**

Offers to arbitrate:

Lawyers for claimants and defendants are now inviting each other to arbitrate and warning of the costs penalties for failing to do agree to do so.
Claimant lawyers propose arbitration to the NHSLA, the MIB and Insurers to arbitrate claims instead of litigating. Where this is done a copy of the PIcArbs standard form Arbitration Agreement is filled in and sent to the insurer with the Claimant's lawyers suggested fixed recoverable hourly rates. Insurers and defendant lawyers then negotiate the rates and sign the agreement. Insurers are also proposing arbitration to claimant lawyers.

Costs sanctions for refusal and silence:

If the claimant, the NHSLA, the MIB or the insurers refuse to agree to arbitration, and in law silence is taken as failing to engage in ADR, then costs sanctions will probably follow whether the refuser wins or loses.

> Per Master O'Hare in *Reid*: "***If the party unwilling to mediate is the losing party, the normal sanction is an order to pay the winner's costs on the indemnity basis, and that means that they will have to pay their opponent's costs even if those costs are not proportionate to what was at stake. This penalty is imposed because a court wants to show its disapproval of their conduct. I do disapprove of this defendant's conduct but only as from the date they are likely to have received the July offer to mediate."***

Case Reports:

Bourne v Poznyak (2016) Costs for refusing ADR. This case, in which Elizabeth Darlington appeared for the defendant, illustrates the costs risks of refusing to mediate.
Facts: The claimant brought a claim seeking a declaration that he had a beneficial interest in a house in Skegness and a cafe in Ingoldmells. Both properties were owed by the defendant, a Ukrainian lady who had been granted asylum in the UK and who had been in a relationship with the claimant and had lived with him for some of the duration of the relationship.
Held: After hearing evidence over the course of two days, in a reserved judgment, HHJ Worster dismissed the claims. On the face of it, therefore, the defendant was entitled to her

costs. However, she had refused to mediate, in the face of a specific direction from the District Judge that "At all stages the parties must consider settling this litigation by any means of ADR (including mediation); any party not engaging in any such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal; such witness statement must not be shown to the trial judge until questions of costs arise". The defendant filed a statement stating that she considered the claim to be spurious and that the only basis she would be willing to attend mediation was if the claimant intended to offer her repayment of any of the monies allegedly withdrawn from her business. The Judge accepted the claimant's contention that this was nevertheless a case which was susceptible to mediation, a different outcome on the facts was certainly possible and mediation had reasonable prospect of success and ordered the claimant to pay only **50% of the defendant's costs.**

Reid v Buckinghamshire NHS Trust [2015] EWHC B21 (Costs) MASTER O'HARE:

"1. This clinical negligence case was proceeding to a ten day split trial on liability only but liability was agreed more than a year before that trial commenced. It was listed for a two day detailed assessment before me but, by the start of the second day the costs to be allowed had been agreed. I am asked now to rule upon the Claimant's entitlement to the costs of the assessment.

2. There are three key dates to note: 24 July 2015, the date of the Claimant's solicitors letter inviting the Defendant's solicitors to proceed to mediation; 28 September 2015, the date of the Claimant's solicitors' letter enclosing a Part 36 offer as to all of the costs to be assessed; and 6 October 2015, the date of the Claimant's solicitors letter enclosing a Part 36 offer in respect of counsel's fees, that is to say part of the costs to be assessed.

3. In the result the defendants failed to beat either offer and accordingly the claimant seeks remedies pursuant to Part 36.17 and also seeks further penalties having regard to the defendant's refusal to agree to mediation.

4. I shall start my judgment with the order I intend to make and then explain my reasons for it. The order I intend to make is more limited than the claimant invited me to make. It is in these five points.

a. I award a sum equivalent to ten per cent of the costs assessed. That is a figure of £13,000-odd.

b. I award interest on the costs assessed at eight per cent from the day of the judgment, the day of the award for costs. That was 7 January 2015.

c. I order the Defendant to pay the Claimant's costs of detailed assessment up to 27 July 2015 on the standard basis.

d. I order the Defendant to pay the Claimant's costs of detailed assessment from 27 July on the indemnity basis.

e. Lastly, I want to award interest on item (i) and on the costs of assessment (items three and four) at eight per cent starting from today.

5. As to (i), I am making the standard order which ought to be made when a paying party fails to beat the receiving party's offer to settle. It seems to me no good

reason has been shown to me to make an exception; as to that, see Cashman v Mid Essex Hospital Services NHS Trust [2015] EWHC 1312 (QB). Whilst there are some points which might lead one to think the standard penalties are unjust in this case (the imbalance of information between the parties (the claimants know more about their bill than the defendants do) and the claimant's failure to alter that imbalance by making replies) but those factors did not influence me to depart from the standard order. I think the defendants did have suitable information to make an assessment of the sum likely to be awarded, bearing in mind the high costs of assessment if this matter went as it did to a two-day hearing. The offer was made well before any detailed assessment was in the offing. No hearing appointment was made until several weeks after the offer was made.

6. But now I will say what I have not allowed. I did not think it right to order an additional percentage reward or penalty in respect of the offer of 6 October. That offer relates to counsel's fees. The penalty on the defendants in respect of counsel's fees has already been awarded in respect of the earlier offer. I did not think it right that a receiving party can multiply the number of ten per cent awards he obtains simply by itemising different parts of his offer and expecting the court to increase allow 10% increases in respect of all of them.
7. Also I think it is not right to allow any enhancement of interest either on the costs assessed or on the costs of assessment. It seems to me the ten per cent sum I have awarded is by itself a sufficient reward or penalty. I think it would be disproportionate to impose further penalties.

8. Next, I think it is not right for me to award interest on the ten per cent itself for any period starting earlier than today. That is a sum which is being assessed and awarded today; it is not a sum which the defendants could reasonably be expected to pay before today. Its arrival time is now. It having arrived, interest on it will run under the Judgments Act at eight per cent per annum from today, but that is not something I need state; that is the automatic effect of the Judgments Act 1838.

9. *In respect of the defendant's failure to mediate, I think the only sanctions available for me to impose are to award costs on the indemnity basis and to award interest on those costs from a date earlier than today, today being the normal date. I am persuaded that the defendant's refusal to mediate in this case was unreasonable. It took them six weeks to reply to the offer and they then replied in the negative. But nevertheless I do not think I should impose the indemnity basis penalty from a date earlier than the date the defendants are likely to have received the claimant's offer, and that is why, in item (iii) I said interest should run from 27 July, that is, some three days after the offer was sent. I do not think I have any power to award a percentage penalty as I can in respect of a Part 36 offer. In my view I do not have power to alter the rate of interest payable and I do not think it proportionate to add interest penalties on top of an award on the indemnity basis from a date earlier than today.*
10. *I want to end with a brief note of caution about sanctions imposed on parties who unreasonably refuse to mediate. Case law on this topic is largely about penalties imposed on parties who are in other respects the successful party. In Halsey v Milton Keynes NHS Trust [2004] EWCA Civ 576 and in other cases, penalties imposed upon*

winners. They do not involve the imposition of further penalties upon losers. One can see that throughout the judgment in Halsey. I will read out a sentence from paragraph 28:

"As we have already stated, the fundamental question is whether it has been shown by the unsuccessful party that the successful party unreasonably refused to agree to mediation."

11. *There are many other such references to this being a penalty against winning parties, for example, see paragraphs 13 and 34.*
12. ***If the party unwilling to mediate is the losing party, the normal sanction is an order to pay the winner's costs on the indemnity basis, and that means that they will have to pay their opponent's costs even if those costs are not proportionate to what was at stake. This penalty is imposed because a court wants to show its disapproval of their conduct. I do disapprove of this defendant's conduct but only as from the date they are likely to have received the July offer to mediate.***

LAPORTE v COMMISSIONER OF POLICE OF THE METROPOLIS [2015] EWHC 371 **QBD (Turner J)**

Summary: Despite successfully defending proceedings, after taking into account the factors listed in Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576, [2004] 1 W.L.R. 3002, a police commissioner was found to have failed, without adequate justification, to have engaged in the alternative dispute resolution process, and that was to be reflected in the costs order made.

Facts:

The claimants' proceedings were unsuccessful, but they argued that there should be no order for costs because the commissioner had refused to engage in alternative dispute resolution (ADR). The commissioner had, in the allocation questionnaire to the proceedings, declined the opportunity to attempt to settle. He failed to respond to a formal offer of mediation from the claimants despite a court order to do so. After further approaches, he offered to meet the claimants in a mediation hearing to narrow the issues for trial, but arrangements had still not been concluded nine months later. The claimants informed him that because of his refusal to engage in ADR they intended, in reliance upon PGF II SA v OMFS Co 1 Ltd [2013] EWCA Civ 1288, [2014] 1 W.L.R. 1386 and the Practice Direction on Pre-Action Conduct, to invite the court not to award costs in his favour. The commissioner claimed to have formed the impression that the claimants considered a money offer to be a prerequisite to compromise. He sought costs from the claimants, to be assessed on an indemnity basis.

HELD: (1) The case was not one in which the nature of the dispute made it unsuitable for mediation. The claimants could have obtained some level of damages. There were issues of fact to be resolved upon which both parties ran the risk of adverse findings. There was no continuing commercial relationship between the parties and it was unrealistic to suggest that a settlement by way of ADR would have been

inappropriate for the type of dispute in question. The commissioner accepted that he was prepared to mediate up to the point when it was apparent that there was no scope for narrowing the issues. That was a concession that the defence was not perceived to be so strong as to have justified a refusal to engage in ADR. The commissioner did not make any offers to settle before ADR was suggested and so all opportunities of resolving the case without the need for proceedings had not been exhausted. Mediation would not have delayed the trial of the action. The first offer of ADR was made long before the date when the hearing was likely to take place. The commissioner never excluded the possibility of making a money offer and the claimants never insisted that such an offer was a precondition of engaging in ADR. Representatives of parties to a dispute often sought to lower the expectations of the other side in preparation for ADR, but tactical positioning should not too readily be labelled as intransigence. The commissioner was not entitled to view the claimants' approach to ADR as purely tactical as it had been on their agenda from the outset and was pursued with appropriate vigour throughout. The commissioner was procedurally behind in the months prior to the hearing which meant that the pursuance of ADR was not prioritised. There was a reasonable chance that ADR would have been successful in whole or in part. The commissioner was not justified in coming to an alternative conclusion. He failed, without adequate justification, to fully and adequately engage in the ADR process, which had a reasonable chance of success, and that should be reflected in the costs order made, Halsey applied, PGF considered. The commissioner never categorised the case as one which was so self-evidently unfounded that it had to be fought regardless of the risk of incurring disproportionately high costs, and the chance of a money offer was never ruled out. Also, there was no real risk of any settlement having a potential impact on police powers or policing tactics. **The scale of the commissioner's shortcomings was not such as to justify disentitling him from claiming any costs; he was successful on every substantive issue and, although ADR made settlement a sufficiently likely possibility, it would not have been certain. The commissioner was awarded two thirds of his costs to be assessed on the standard basis** (see paras 44, 46, 48, 52, 55-59, 66-67 of judgment). (2) Indemnity costs were not ordered. Public bodies should not normally have a stronger claim to indemnity costs than other litigants (para.66).

GARRITT-CRITCHLEY & ORS v (1) RONNAN (2) SOLARPOWER [2014] EWHC 1774 **Ch D (Judge Waksman QC)**

Summary: The defendants were ordered to pay the claimants' costs on an indemnity basis, as their failure to engage in mediation or any other serious alternative dispute resolution had been unreasonable.

Facts: The claimants (G) applied for their costs to be paid by the defendants (R) on an indemnity rather than standard basis following an unreasonable failure to engage in mediation.

G's letter before action, which valued their claim at £208,000, stated that they were

willing to enter into an appropriate form of alternative dispute resolution (ADR), such as mediation. R did not engage with that offer. In the allocation questionnaire, R made it plain that they were not prepared to engage in any settlement activity as "the parties are too far apart at this stage". R stated that they were aware of the potential penalties if found to have unreasonably refused mediation, but were "extremely confident" of their position and did not consider G's claim to have a reasonable prospect of success. There was further correspondence between the parties, with G advocating mediation and R reiterating their confidence in their defence. A district judge stated that the overriding objective would be served by mediation and directed that before trial the parties were to explain any refusal to attend mediation. G made a Part 36 offer to settle for £10,000 plus their costs to that point without a response from R within the required period. R made a counter-offer for G to discontinue and pay R 75 per cent of their costs. G replied that if R were prepared to negotiate constructively, matters could still be progressed. A further opportunity to negotiate at the start of trial was not taken. After a four-day trial, R accepted, out of time, G's offer to pay £10,000 plus costs, at least on a standard basis.

HELD: Cases on liability such as the instant one did not generally provide any natural middle ground between the parties because they centred on whether a concluded agreement had been reached. However, to consider that mediation was not worthwhile because the sides were opposed on a binary issue was misconceived. The sort of case where, exceptionally, its nature might rule out mediation would be where the party wished to resolve a point of law or considered that a binding precedent would be useful, or where injunctive or other relief was essential to protect the parties. The instant case was, by its very nature, eminently suitable for ADR as G had appreciated in their letter before action. It was not realistic for R to say that the odds were so stacked in their favour that there was really no conceivable point in talking about settlement. If that had been their view, it was surprising that no application for summary judgment had been made. For R to say they had "extreme confidence" in their case did not seem to be a reasonable position to take, *Halsey* applied, Hurst v Leeming [2002] EWHC 1051 (Ch), [2003] 1 Lloyd's Rep. 379 considered. The fact that there was considerable dislike and mistrust between the parties was often the case in litigation. However, G were prepared to mitigate from the start, and it was where there might be distrust or emotion between the parties, which it might be thought was pushing them towards an expensive trial, where a mediator's skills were most useful. They were well trained to diffuse emotion, feelings of distrust and other matters in order that the parties could see their way to a commercial settlement. parties didn't know how far they were apart regarding settlement until they sat down and explored the position. If they were irreconcilably apart, which happened very rarely, the mediator would say so within the first hour of mediation. R's reference to a day of mediation being likely to cost as much as the value of G's significantly reduced revised offer, and to the cost of mediation being disproportionate to the sums involved in the claim, was also misconceived. The costs

of mediation were to be compared with the costs of a trial, and would have been far less. There might even be more reason to mediate where the claim was in lower figures, which was particularly true in the instant case as the last attempt at mediation or some sensible detailed negotiations had been made by G after their Part 36 offer. Apart from the question of costs, the difference between the parties would have been very slight. However, it was not just a matter of not seizing the opportunity to negotiate at that late stage, even though that would have saved everyone a vast amount of money. It was a continuing failure to engage with the process from the start, and the reasons for that failure simply did not stack up or accord with the authorities. **The failure to engage in mediation or any other serious ADR was unreasonable.** R were ordered to jointly and severally pay G's costs on an indemnity basis subject to a detailed assessment, save that G would only be entitled to 50 per cent of their solicitors' costs of preparation of the trial bundle (see paras 11-27, 33 of judgment).

PGF v OMFS [2013] EWCA Civ 1288 **CA (Maurice Kay LJ, Beatson LJ, Briggs LJ)**

Summary: The Court of Appeal extended the guidelines set out in on whether a refusal to engage in alternative dispute resolution amounted to unreasonable conduct which should attract a costs penalty. As a general rule, silence in the face of an invitation to participate in ADR was itself unreasonable, regardless of whether there was a good reason for a refusal to engage in ADR.

Facts: The appellant (P) appealed against a decision ([2012] 3 Costs L.O. 404) that it could not recover some of its costs following the late acceptance of its part 36 offer by the respondent (C) because it had failed to respond to C's invitation to mediate.

C had brought proceedings against P for alleged breaches of tenant's repairing covenants in a lease of a commercial building. C claimed approximately £1.9 million. C made two part 36 offers, of £1.125 million and £1.25 million, which were not accepted by P. It then sent P a detailed invitation to participate in mediation. P did not respond, even though the invitation was repeated a few months later. Instead, P made a part 36 offer of £700,000 which C eventually accepted shortly before trial. Ordinarily, upon acceptance of the offer, C would have been obliged to pay P's costs. However, the judge considered and concluded that P had unreasonably refused to participate in mediation. He therefore deprived P of its costs for the relevant period under the CPR r.36.10, but did not order P to pay C's costs. P appealed, and C cross-appealed against the judge's refusal to award costs to it.

P submitted that (1) it had not acted unreasonably; (2) its silence did not amount to a refusal to engage in mediation; (3) mediation stood no reasonable prospect of success in any event because of the distance between the parties' part 36 offers; (4) the judge's costs sanction was too harsh as he had not weighed C's responsibility for failing to accept P's part 36 offer earlier.

HELD: (1) **The time had come for the court to firmly endorse the advice given by S Blake, J Browne and S Sime in the ADR Handbook that, as a general rule, silence in the face of an invitation to participate in ADR was itself unreasonable, regardless of whether a refusal to engage in ADR might have been justified**. It was possible, however, that there might be rare cases where ADR was so obviously inappropriate that to characterise silence as unreasonable would be pure formalism, or where the failure to respond was a result of a mistake, in which case the onus would be on the recipient of the invitation to make that explanation good. There were sound practical and policy reasons for such a modest extension to the guidelines set out in Halsey, first, because an investigation of the reasons for refusing to mediate, advanced for the first time at a costs hearing perhaps months or years later, posed forensic difficulties for the court concerning whether those reasons were genuine. Second, a failure to provide reasons for a refusal was destructive of the objective of encouraging parties to consider and discuss ADR. Any difficulties or reasonable objection to a particular ADR proposal should be discussed, so that the parties could narrow their differences. That occurred routinely in relation to expert issues; there was no reason why the same should not apply to ADR. Third, it would also serve the policy of proportionality. Accordingly, P's silence in the face of two requests to mediate was itself unreasonable conduct sufficient to warrant a costs sanction (see paras 34-40 of judgment). (2) It would be perverse not to regard silence in the face of repeated requests for mediation as anything other than a refusal. That was all the more so because C's first request was couched in such detailed and sensible terms that it could not reasonably have been regarded as a mere tactic (para.42). (3) Part 36 offers did not necessarily represent the parties' respective "bottom line". Accordingly, there was no unbridgeable gulf between C and P's respective part 36 offers which could not in any circumstances have been overcome in mediation. The dispute was eminently suited to mediation, and it had had a reasonable prospect of success when offered by C (paras 46-48). (4) A finding of unreasonable conduct by a refusal to mediate did not produce an automatic result in terms of a costs penalty. The judge was plainly conscious that he was exercising a broad discretion, Halsey followed. To deprive P of the whole of its costs during the relevant period was within the range of proper responses to its seriously unreasonable conduct. The judge's lack of an express balancing exercise did not demonstrate that he did not in fact carry it out in his mind (paras 51, 54-56). (5) There was no recognition in Halsey that the court might go further and order the otherwise successful party to pay all or part of the unsuccessful party's costs. While in principle the court had that power, a sanction that draconian should be reserved for only the most serious and flagrant failures to engage with ADR, for example where the court encouraged the parties to do so, and its encouragement was ignored (paras 51-52).

Appeal dismissed, cross-appeal dismissed

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HALSEY v MILTON KEYNES GENERAL NHS TRUST [2004] EWCA Civ 576 **CA) (Ward LJ, Laws LJ, Dyson LJ)**

Summary: The burden was on an unsuccessful party to show why there should be a departure from the general rule on costs in the form of an order to deprive the successful party of some or all of his costs on the grounds that he had refused to agree to alternative dispute resolution. The fundamental principle was that such a departure was not justified unless it had been shown that the successful party had acted unreasonably in refusing to agree to ADR. The appellants, C1 and C2 who were the claimants, appealed against decisions awarding costs against them to the respondents, (the NHS Trust) and (D2) respectively, **who had refused to go to mediation** and subsequently succeeded in the litigation.

Facts:

C1 had brought a claim against the NHS Trust for allegedly negligent treatment of her husband leading to his death. On numerous occasions prior to and after the issue of proceedings C1 had indicated her desire to go to mediation. The NHS Trust refused to go to mediation, expressing the view that there had been no negligence.

Judge's decision: C1's claim was dismissed. The judge declined to make no order as to costs on the basis that C1 would not have compromised at mediation on any terms that could possibly be reasonable to the NHS Trust and the NHS Trust had taken the legitimate view that there was no negligence.

D2 was the first defendant to a consolidated action in respect of injuries suffered by the claimant (S) in two separate accidents. D2 refused to mediate on the basis that he was not prepared to compromise on the point of law at issue.

Judge's decision: The recorder decided the causation issue in favour of D2. On costs the recorder decided that costs should follow the event. His reasoning was that mediation had been raised late in the day and would have been likely to achieve very little.

Court of Appeal:

The burden was on the unsuccessful party to show why there should be a departure from the general rule on costs in the form of an order to deprive a successful party of some or all of his costs on the grounds that he had refused to agree to alternative dispute resolution (ADR).

The fundamental principle was that such a departure was not justified unless it had been shown that the successful party had acted unreasonably in refusing to agree to ADR. In deciding whether a party had acted unreasonably the court should bear in mind the advantages of ADR over the court process and have regard to all the circumstances of the particular case. Factors that could be relevant included

(i) the nature of the dispute;

(ii) the merits of the case;

(iii) the extent to which other settlement methods had been attempted;

(iv) whether the costs of ADR would be disproportionately high;

(v) whether any delay in setting up and attending the ADR would have been prejudicial; (vi) whether the ADR had a reasonable prospect of success.

Where a successful party had refused to agree to ADR despite the court's encouragement, that was a factor that the court would take into account when deciding whether his refusal was unreasonable.
There was no basis for the court to discriminate against successful public bodies when deciding whether a refusal to agree to ADR should result in a costs penalty.
The "ADR Pledge" announced in March 2001 by the Lord Chancellor was no more than an undertaking that ADR would be considered and used, wherever the other party accepts it, in all suitable cases by all government departments and agencies. C1 and C2 had both failed to show that the NHS Trust and D2 respectively had acted unreasonably in refusing to go to mediation.
(Obiter) The court's role was to encourage not to compel ADR. It was likely that compulsion of ADR would be regarded by the European Court of Human Rights as an unacceptable constraint on the right of access to court and therefore a violation of the European Convention on Human Rights 1950 Art.6 .

Appeals dismissed.

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