AN INVESTIGATION INTO THE NATURE AND ROLE OF NON-SETTLED ADR IN THE ENGLISH CIVIL JUSTICE SYSTEM*

Ever since the emergence of alternative dispute resolution (ADR)[1] in the 1970s as a set of formal dispute resolution mechanisms and the profound impact of Professor Sander's seminal lecture[2] at the Pound Conference[3] in which he proposed that ADR should be utilised to reduce reliance on conventional litigation, established civil justice systems have sought to integrate ADR mechanisms within their court procedures.[4] Indeed, in their recent report *Transforming Our Justice System*, the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals spoke of a new approach in simplifying court procedure which will be "designed to promote more conciliatory approaches to dispute resolution…" over expensive advaserialism.[5]

This steady shift in the focus of civil dispute resolution has been justified on a number of grounds. The US Model Standards of Conduct for Mediators makes clear from the outset that mediation is based on the principle of self-determination by coming to a voluntary, un-coerced decision in which each party makes free and informed choices as to process and outcome.[6] The EU mediation directive emphasises the virtues of mediation in promoting 'better access to justice'[7] as well as providing 'a cost-effective and quick extrajudicial resolution of disputes.' An increasingly powerful and dominant

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[1] The Centre for Effective Dispute Resolution (CEDR), a leading provider of dispute resolution services, defines ADR as "A body of dispute resolution techniques which avoid the inflexibility of litigation and arbitration, and focus instead on enabling the parties to achieve a better or similar result, with the minimum of direct and indirect cost." Available at http://www.cedr.com/about_us/library/glossary.php (Accessed 14 June 2017). For a detailed discussion of mediation as an ADR process and court approaches to ADR see Shirely Shipman 'Court approaches to ADR in the civil justice system' (2006) 25 (1) Civil Justice Quarterly 181-218.

[2] Frank E. A. Sander, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice: Varieties of Dispute Processing (April 7-9, 1976), 70 F.R.D. 79, 111–16 (1976). See also Frank Sander, Allen William and Deborah Hensler, 'Judicial (Mis) Use of ADR? A Debate' (1996) 27 U. Tol. L. Rev. 885.

[3] The Pound Conference: Perspectives of Justice for the Future 1976. See also Wayne D Brazil, 'Court ADR 25 Years after Pound: Have We Found a Better Way? (2002) 18(1) Ohio State Journal on Dispute Resolution 94. The Global Pound Conference 2016-17

[4] For example, in Canada in the 1970s concerns about the cost, time and adversarial nature of litigation sparked the development of more structured private ADR mechanisms. However, efforts to formally integrate ADR into civil litigation procedures were not made until after the release of the Canadian Bar Association's 1996 *Systems of Civil Justice Task Force Report* (CAB), which identified cost and delay as significant barriers to access to civil justice in Canada.

[5] Transforming Our Justice System By the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals September 2016 available https://www.judiciary.gov.uk/wp-content/uploads/2016/09/narrative.pdf (Accessed 14 June 2017).

[6] Available: http://www.mediate.com/articles/model_standards_of_conflict.cfm (Accessed 14 June 2017).

[7] Available http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32008L0052 (Accessed 14 June 2017).

justification for increased integration of ADR within the court process is the growing urgency in many civil justice systems[8] to effectively tackle the perennial problems of delay and excessive costs associated with litigation.[9]

At a time of continued austerity and retrenchment of State funding of the civil justice system and the need to overcome delay and excessive costs, ADR in England and Wales continues to gain favour with policy makers[10] and an increasing number of the senior judiciary.[11] Since Lord Woolf's revolutionary procedural reforms of the 1990's, ADR has been formally incorporated within the Civil Procedure Rules (CPR) and thus is a permanent feature of the civil justice landscape.[12]

Although policy makers (and members of the senior judiciary) have sought to justify the promotion of ADR on a number of grounds,[13] the economic and practical virtues of ADR are increasingly driving the policy for greater encouragement and integration of ADR procedures within the English civil justice system.[14] This policy rationale has created what the author refers to as the 'orthodox' understanding - that ADR is 'successful' when the process produces an immediate settlement and, as a result, the parties and the court are able to realise ADR's economic (i.e. cost saving) benefits. Conversely, an ADR process that does not produce a settlement on the day (or shortly thereafter) is traditionally perceived

[8] Shipman notes that Italy, for example, has faced numerous successful claims before the ECtHR on the ground that proceedings have failed to be heard within a reasonable time. The Italian Ministry of Justice is hopeful that the recent introduction of compulsory mediation for a range of civil claims will help to deal with the issue of delay (European Conference on Mediation, Turin, December 2, 2012) – see Shirley Shipman 'Waiver: Canute against the tide?' (2013) 32(4) Civil Justice Quarterly 470-492.

[9] The US, for example, has introduced and integrated ADR processes within its court system in order to deal with the high volume of cases.

[10] In 2014, Lord Faulks, the former Minister of State for Civil Justice and Legal Policy, reaffirmed the government's support for mediation in his speech to the Civil Justice Council – available at https://www.gov.uk/government/speeches/mediation-and-government (Accessed 14 June 2017).

[11] Lord Neuberger, 'A View From On High' 12 May 2015 available at https://www.supremecourt.uk/docs/speech-150512-civil-mediation-conference-2015.pdf (Accessed 12 May 2016); Lord Neuberger, 'Equity, Adr, Arbitration and the Law: Different Dimensions of Justice' The Fourth Keating Lecture, Lincoln's Inn, 19 May 2010; Lord Neuberger of Abbotsbury M.R., 'Has Mediation Had Its Day?', The Gordon Slynn Memorial Lecture 10 November 2010. Also see the comments of Lord Phillips of Worth Matravers C.J., 'Alternative dispute resolution: an English viewpoint' (2008) 74 *Arbitration* 406; Lord Clarke M.R., 'The Future of Civil Mediation' (2008) 74 *Arbitration* 419; Gavin Lightman, 'Mediation: An Approximation to Justice', S.J. Berwin, June 28, 2007, available at: *www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/berwins_mediation.pdf* (Accessed 12 May 2016; and Sir Bernard Rix, 'The Interface of Mediation and Litigation', (2014) 80(1) *Arbitration* 21.

[12] See later discussion concerning the Woolf Reforms and Civil Procedure Rules.

[13] Transforming Our Justice System – By the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals available: https://www.judiciary.gov.uk/wp-content/uploads/2016/09/narrative.pdf (Accessed 14 June 2017).

[14] See discussion in Part II regarding successive governments' commitments to ADR.

as having 'failed'.[15] The author refers to these types of ADRs – ADRs that do not result in a settlement - as 'non-settled ADRs.'

This paper challenges the orthodox understanding of what constitutes a successful ADR by arguing that it is far too narrow and misleading. It is narrow and misleading because it focuses only on the 'visible' or 'immediate' economic and practical advantages that are to be gained if the ADR process results in a settlement between parties. This fails to appreciate the 'hidden' economic benefits that may flow from the parties having constructively engaged with the settlement process. The narrowing of issues between the parties during the ADR process potentially has two hidden economic benefits: it may assist the parties to settle at a future date without having to proceed to trial and thereby continue to incur costs; and/or the courts may benefit from the narrowing of the issues following the non-settled ADR in conducting more efficient case management.

The current literature concerning the importance of ADR as an effective 'issues narrowing tool' is limited and superficial.[16] Academic and professional literature as well as judicial and extra-judicial comments make passing reference to the advantages presented by a non-settled ADR as an issues narrowing tool. What is lacking is a detailed investigation and critique of this important aspect of ADR practice and, more significantly, its potential relationship with the court process. This paper provides that investigation and critique and in doing so seeks to tackle a number of questions. Do the parties understand the potential of the ADR process as an issues narrowing tool? If they do, to what extent do the parties actually utilise the ADR process to try to narrow issues between them as well as seeking a settlement on the day? To what extent are issues narrowed and does this necessarily lead to future settlement? And can any benefits (such as the narrowing of the issues) be taken from the non-settled ADR process and be potentially utilised for more efficient judicial case management?

Drawing on doctrinal and empirical research, this paper calls for a rejection of the orthodox understanding of what is meant by a successful ADR in favour of a wider and more pragmatic understanding. It will argue for the need for this re-orientation of our understanding to enable those who engage with the civil justice system (the parties, their lawyers and the judiciary) to perceive ADR process as a success both when it produces an immediate settlement (or later in the court process) *and* when it does not but has the potential to provide the parties and the court with potential future benefits. It will be argued that this will then help promote a more integrated approach to Lord Justice

[15] Lord Justice Briggs, *Chancery Modernisation Review: Final Report* (December 2013).

[16] For example, the leading text on ADR following recent costs reforms, *The Jackson ADR Handbook* (n. 9) fails to mention the potential role of non-settled ADR is an issues narrowing tool or to consider its potential benefits for case management. This is also true of other ADR textbooks such as *A Practical Approach to Alternative Dispute Resolution* (n. 9).

Briggs' nuanced approach to dispute resolution. In his *Chancery Modernisation Review*,[17] Briggs LJ called for a change in culture and understanding towards the role of the courts in managing cases. His Lordship spoke of the need for the courts to manage cases to a resolution, which would now include ADR, rather than simply managing cases through to trial and judgment. This would then have the effect of eschewing the traditional and historic divide between judicial management of disputes to court adjudication on the one hand and ADR on the other, so that we have 'dispute resolution management.'[18]

It should be noted from the outset that this paper does not argue that the economic justifications of ADR are the only ones which have been advocated for the greater integration and utilisation of ADR within the civil justice system. It is recognised that ADR is and has been promoted on principled grounds such as the virtue it presents in preserving the relationship of the parties, providing parties with the autonomy to engage with and structure the process as they wish, providing the parties with the flexibility which the court process lacks and allowing the parties to propose, explore and consider a range of potential solutions which a court cannot do.[19] Rather, this paper argues that the economic justifications are becoming the *dominant* justifications with policy makers and some members of the judiciary and this is having the undesired effect of skewing the wider benefits which a non-settled ADR may present the parties and the courts.

Part I of the paper will discuss recent English civil justice reforms and the extent to which steps have been taken to further integrate ADR processes within court procedure. In particular, Briggs LJ's most recent proposals in his Civil Court Structure Review (CCSR)[20] regarding the introduction of an Online Court and the emphasis on the use of conciliation will be critically analysed. Drawing on government policy and judicial comments, Part II will analyse the emergence and evolution of the orthodox understanding of a 'successful' ADR. Part III will present and discuss empirical data taken from lawyers concerning their views and experiences of having engaged with non- settled ADRs. Finally, Part IV will evaluate options for reform.

1. GREATER INTEGRATION OF ADR WITHIN THE ENGLISH CIVIL JUSTICE SYSTEM AND THE CIVIL COURT STRUCTURE REVIEW

The Woolf, Jackson and Briggs Reforms

[17] Briggs, *Chancery Modernisation Review* (n 13).
[18] ibid Chapter 5.
[19] for example, Brookes LJ in Dunnett v Railtrack stated that one of the parties to the dispute may simply want an apology from his counterpart.
[20] Lord Justice Briggs, *Civil Court Structure Review: Interim Report* (December 2015) and Lord Justice Briggs, *Civil Court Structure Review: Final Report* (July 2016).

In order to appreciate where we are with ADR and recent civil justice reforms, we must briefly consider the continuing influence of Lord Woolf's revolutionary reforms of the 1990's and his influential philosophy that litigation should be concerned with the early settlement of disputes rather than simply allowing parties to pursue their matter to trial which should be the last resort.[21] To give practical effect to his new philosophy Lord Woolf firmly embedded ADR requirements in various parts of the CPR, the most significant being the overriding objective,[22] the rule which lies at the heart of the CPR and which enables the court to deal with cases justly and at proportionate cost.[23] Active judicial case management is the way in which the courts are required to further the overriding objective[24] and this includes encouraging the parties to use an ADR procedure if the court considers that appropriate.[25] A detailed investigation by Shipman argues reveals that the Court of Appeal has adopted a strong stance regarding ADR. Further, Shipman notes judicial encouragement of ADR includes, for example, educating the parties; providing opportunities for ADR and settlement; and, more importantly, through the use of costs sanctions against a party who has unreasonably refused to engage with ADR.[26]

The need for parties to engage with each other in a constructive, non-adversarial manner and to consider the use of ADR before issuing proceedings is embodied in the pre-action protocols,[27] the 'gateways' to the court process. Lord Woolf explained that the pre-action protocols were intended to build on and increase the benefits of early but well-informed settlements which genuinely satisfied both parties to a dispute.[28] To reinforce the seriousness of ensuring that the parties adhered to these ADR requirements the courts have the powers to make various adverse costs orders[29] against a party who has been found to have unreasonably refused ADR or has failed to follow an applicable pre-action protocol.[30] Despite the increased focus on settlement and incorporation of formal court rules

[21] Woolf, Interim Report (n 5).
[22] CPR 1.1(1).
[23] For an excellent discussion of the role and impact of the overriding objective on the English civil justice system see John Sorabji, *The Woolf and Jackson Reforms: A Critical Analysis* (CUP, Cambridge 2014).
[24] The court's case management powers are set out in CPR 3.
[25] CPR 1.4(e).
[26] See Halsey and PGF.
[27] There are currently 14 pre-action protocols available at https://www.justice.gov.uk/courts/procedure-rules/civil/protocol (Accessed 12 May 2016).
[28] Woolf, Final Report (n 5).
[29] The court's cost powers are set out in CPR 44 (General Rules about Costs).
[30] *Nelson's Yard Management Company and Others v Ezrefula* [2013] EWCA Civ 235; [2013] All ER (D) 216 (Mar) the court, in making an adverse costs order, took into account the defendant's unreasonable pre-action behavior in failing to respond to pre-action correspondence and his unwillingness to set out his position or discuss mediation or settlement. For an analysis of this case, see Masood Ahmed and Ewan Archibold, 'Ignore now, pay later' (2014) 164 (7594) NLJ 15.

concerning ADR, Lord Woolf formally rejected the notion of compelling parties to ADR, which the United States had eagerly embraced following the Pound Conference, principally because it would undermine the constitutional right of access to the courts.[31] In a detailed analysis of the doctrine of waiver of article 6(1) of the European Convention on Human Rights (ECHR)[32] where parties have been 'encouraged' or coerced to mediate by the State, Shipman states "The doctrine of waiver requires that an individual waives their art. 6(1) right in an unequivocal manner and that there are sufficient safeguards in place commensurate to the importance of the right. In this cointextr it seems fundamental that an individual who enters mediation is made fully aware that a settlement agreed at the mediation, or subsequently, will preclude access to the courts on the settled claim."[33]

Remaining consistent with Woolf's ADR philosophy, Sir Rupert Jackson, tasked with making recommendations to render civil litigation costs more proportionate,[34] recognised the increasingly significant role played by ADR when he stated 'ADR (particularly mediation) has a vital role to play in reducing the costs of civil disputes, by fomenting the early settlement of cases.'[35] His Lordship chose to place emphasis on the need to educate the parties and courts regarding ADR and its benefits which included economic and practical benefits.[36]

More recently, in his *Chancery Modernisation Review*,[37] Briggs LJ advocated a more nuanced approach to the continued integration of ADR within the civil justice system. Referring to the practice in the Chancery Court, Briggs LJ noted that judicial attitudes towards ADR "has been to treat it as an essentially separate part of the dispute resolution process, save for the occasional imposition of costs sanctions for unreasonable refusal."[38] His Lordship spoke of the need for a culture change in the case management of disputes which he referred to as 'case management for dispute resolution'[39] rather than simply managing cases to trial in the traditional, adversarial sense. This would see ADR as an

[31] Woolf, Interim Report (n 5). See also the controversial comments of Dyson LJ in *Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002 in which his Lordship stated that to compel parties to engage with mediation would be a breach of their article 6 right to a fair trial under the European Convention on Human Rights. . However, this aspect of Halsey has been widely criticised for a number of reasons and primarily for its incompatability with the European Court of Justice decision in *Alassinin v Telecom Italia SpA* [2010] 3 C.M.L.R. 17. In his recent speech to the Belfast Mediation Council Lord Dyson MR appeared to modify his positon in light of the Alassini decision – see Lord Dyson MR, 'Halsey 10 Years On – The Decision Revisited' Belfast Mediation Conference 9 May 2014.
[32] European Convention on Human Rights 1950.
[33] Shirley Shipman Waiver: Canute against the tide? (2013) 32(4) Civil Justice Quarterly 470.
[34] Sir Rupert Jackson *Review of Civil Litigation Costs Final Report,* (14 January 2010).
[35] ibid Chapter 36 para 1.5.
[36] ibid Recommendation 75.
[37] Briggs, *Chancery Modernisation Review* (n 13).
[38] Ibid para. 5.9.
[39] Briggs, *Chancery Modernisation Review* (n 13) 5.9.

integral part of the litigation culture rather than an optional extra. As such, the court would, Briggs LJ made clear, take a "more active role in the encouragement, facilitation and management of dispute resolution in the widest sense, rather than merely case preparation for trial."[40] To implement this cultural change in the management of disputes, Briggs LJ recommended that the parties should be required to focus in more detail upon, and inform the court of their views about, the suitability, type and timing of ADR, before the first case management conference.

Briggs LJ's ADR 'culture change' does not depart from Lord Woolf's ADR philosophy nor does it divert from the consistent approach taken by Sir Rupert. However, Briggs LJ's idea of 'case management for dispute resolution' attempts to break the traditional divide between litigation and ADR and it attempts to re-orientate our understanding of what litigants and their lawyers can expect from the court process. In doing so, Briggs LJ's drive for a culture change through the concept of case management for dispute resolution attempts to merge ADR within the pre-trial court process. In doing so, it requires the courts and the parties to take a more active and focused approach to ADR; an approach which requires the parties to carefully consider and report on ADR options and for the court to ensure that ADR, or at least the consideration of ADR options, is inherently 'part of the process', it is no longer to be seen as separate from the court process. Thus, the parties and the court are required to *actively* engage in what can be described as an 'ADR discussion' with the aim of ensuring that the parties and the court are aware that ADR remains an essential and necessary aspect of the civil justice system.

Briggs Civil Courts Structure Review (CCSR)[41]

In his recent CCSR, Briggs LJ has sought to further integrate conciliation (in this context a synonym for mediation) as a fundamental aspect of his proposed Online Solutions Court (OSC) to deal with lower value cases (below £25,000).[42] As Briggs LJ put it: "The development of the Online Court ("OC) is the single most radical and important structural change with which this report is concerned."[43] Before considering two significant aspect of the online court, the use of conciliation and case officers ("CO") at stage two, it is important to appreciate the routes to Briggs LJ's reforms, that is, the recommendations made by the law reform organisations *Justice* and the Civil Justice Council.

[40] ibid Chapter 5.
[41] See an excellent collection of essays discussing the CCSR in Civil Justice Quarterly Special Issue: Lord Justice Briggs' Civil Courts Strcuture Review and the Online Court (2017) 36 (1).
[42] Briggs, CCSR (n 17) Chapter 6.
[43] Briggs, CCSR (n 17) Chapter 6, para. 6.1.

In response to the continued reduction in public spending on the civil courts and the substantial cuts to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, *Justice* proposed a number of fundamental reforms in its report, *Delivering Justice in an Age of Austerity.*[44] This sharp reduction in funding, the report argued, increased the number of unrepresented litigants or 'litigants-in-person' (LiP) and it had become increasingly difficult for them to 'navigate (the) adversarial system.'[45] Consequently, access to justice for LiPs in particular was in danger of being severely undermined. The solution was to have legally trained court officers called 'Registrars' who would be responsible for managing cases after they had been issued. Registrars would be responsible for seeking clarification of the issues in dispute, determine what evidence is required, review evidence and to determine the appropriate means of resolving the dispute. Those means include striking out the case; carrying out early neutral evaluation; referring the case to mediation or transferring it to a judge for adjudication.[46]

Although Briggs LJ makes reference to the *Justice* report, his Lordship was primarily influenced by the CJC's proposals for reform as set out in its 2015 report, *Online Dispute Resolution for Low Value Civil Claims.*[47] That report called for the implementation of a new online court which would deal with all low value claims. As well as an online, digital system, court officers would be used to perform case management and conciliation duties. The driving force behind the CJC proposals was, as Sorabji succinctly makes the point, "to increase access to justice through making effective use of modern technology. It was, however, equally underpinned by the aim of producing a 'lower cost court system'."[48]

Adopting a similar approach to the one taken by the CJC, Briggs LJ's proposals envisages an OSC which will be structured in three stages.[49] Stage one will have additional stages 0, 0.5 and bypasses.[50] Stage 0 will include guidance concerning the need to treat litigation as a last resort and providing guidance on the law. Stage 0.5 will include provision for a short exchange between the parties designed to ascertain whether there really is a dispute which requires court adjudication. Finally, bypasses allows

[44] Justice, Delivering Justice in an Age of Austerity – A Report by Justice (2015) available http://justice.org.uk/delivering-justice-in-an-age-of-austerity-report-launch/ (Accessed 12 May 2016).
[45] Ibid 1.1-1.17.
[46] ibid Chapter 10.
[47] Available at https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf (Accessed 12 May 2016).
[48] J. Sorabji, 'Austerity's Effect on English Civil Justice', (2015) 1(4) ELR.
[49] Briggs, CCSR (n 17) Chapter 6. M. Ahmed 'A Critical View of Stage 1 of the Online Court' (2017) 36(1) Civil Justice Quarterly 12; John Sorabji 'The Online Court – A Multi-door Courthouse for the 21st Century' (2017) 36(1) Civil Justice Quarterly 86; and Pablo Cortes 'The Online Court: Filling the Gaps of the Civil Justice System?' (2017) 36(1) Civil Justice Quarterly 109.
[50] Briggs, CCSR (n17) para. 6.106-6.111.

legally represented parties not to have to go through the stages that would be needed for those who are not legally represented (i.e. litigants-in-person).

Briggs LJ went on to explain that stage one would consist of a mainly automated process by which the parties are assisted in identifying their case so that it is easily understood by their opponents and the court. The parties will be required to upload any documents and other evidence which the court will need to resolve the matter. The second stage will involve a mix of conciliation and case management to be conducted by Case Officers (CO), who will be experienced civil servants but will not have judicial powers. This second stage will be conducted partly online or by telephone but not face-to-face. The final stage of the OC will consist of determination by a judge either on the documents, by telephone, by video or by a face-to-face hearing. However, Briggs LJ makes clear that there will be 'no default assumption that there must be a traditional trial.'[51]

There is no doubt that an online court which avoids litigation being conducted in a traditional, expensive, adversarial manner, is revolutionary and may be cost effective. Stage two, in particular, is arguably the most significant stage in the court process because the CO is required to further evaluate claim and try to resolve or facilitate its resolution through the most appropriate dispute resolution method in consultation with the parties. If it cannot be resolved or is not suitable for conciliation then the CO must case-manage the claim to stage three for judicial determination. The integration of conciliation at stage two is, in Briggs LJ's words, 'mainly directed to making conciliation a *culturally normal part of the civil court process* rather than, as it is at present, a purely optional and extraneous process…'[52]

If the CO is to adopt a conciliatory role in assisting the parties to resolve their dispute, Briggs LJ recommended that the CO should adopt the role of a facilitative mediator and not of an evaluator (i.e. not early neutral evaluation (ENE) or evaluative mediation).[53] Recognising some of the success ENE has had in the Chancery Division, the Technology and Construction Court and the Mercantile Court,[54] Briggs LJ recommended that the simple telephone mediation model used on the Small Claims Mediation Service (SCMS) was the most appropriate ADR process that should be adopted at stage two.[55] Briggs LJ sought to justify his recommendations on the basis that mediation has a better track record over many years; it is likely to be quicker and cheaper and will place less demands on the CO;

[51] Briggs, CCSR (n 17) 6.7.
[52] Briggs, CCSR (n 17) 6.13. Emphasis added.
[53] Briggs, CCSR (n 17) 7.26.
[54] Briggs, CCSR (n 17) 7.23.
[55] Briggs, CCSR (n 17) 7.26.

and it would not require parties to think that the CO's opinions carried the same weight as the judge who would otherwise decide the matter.[56]

There are a number of concerns regarding the current recommendations for stage two. The first relates to the proposal to adopt telephone mediation to deal with the new, higher financial threshold of £25,000. It should be noted that, for most of, it not nearly all, of its history the small claims mediation scheme was working within the £5,000 limit of the small claims track.[57] That limit was increased to £10,000 in April 2013 and therefore disputes falling within this financial band are referred to telephone mediation.

Although telephone mediation has, no doubt, had success since its introduction with small claims which have a limit of £10,000 it should be approached with caution when dealing with a higher financial threshold of £25,000. The telephone mediation may be suitable for small value claims which do not raise complex issues of fact and law and which typically concern debt recovery issues or simple sale of goods and services matters. However, where the dispute concerns large sums and, in particular, disputes which are at the higher end of the £25,000 threshold, then those claims may raise much more complex issues which the parties may be less willing to resolve by simply engaging in a telephone mediation. Further, the parties who, it is envisaged by the CCSR, will typically be LiPs (including small business who are not legally represented) are potentially less likely to concede issues and agree to make a payment where the sums at stake are high. What is required is investment in the effective training of CO so that they have the necessary skills to manage and mediate a wider range of disputes, including higher value and more complex matters (such as small building disputes).

A further issue concerns the need to maintain, as Briggs LJ put it, 'clear blue water'[58] between the functions and powers of the judge, who should be the only person empowered to determine the substantive rights of the parties, and the CO. Clearly, the determination of substantive rights of litigants is to be exclusively reserved for judges and not CO and there are obvious legal, practical and policy issues which underpin the importance of maintaining a clear divide between the two roles. However, there are potential challenges in ensuring that such a divide is maintained and that CO are not in danger of straying into 'judge territory'. It will be remembered that the CO is required to carry out conciliatory and case management functions at stage two. There are potential challenges to case management. In order to determine the types of directions required to effectively manage a particular dispute to stage three, the CO will be required to have not only have knowledge of the facts but also

[56] Briggs, CCSR (n 17) 7.27.
[57] R. Scott (ed.), *Civil Procedure* (1999), 260. The small claims limit has changed a number of times since its introduction. In 1973 it originally began at £100, rising to £1,000 in 1991 and then to £3,000 in 1996.
[58] Briggs, CCSR (n 17) 7.2.

the key legal issues. These issues may include, for example, causation, damages and quantum, issues which, especially in more complex disputes, will require the CO to understand the legal arguments and to craft directions accordingly. This may lead to parties challenging and appealing case management decisions which would run counter to the policy issues of providing a cost and time effective system. Challenges to case management decisions from CO would increase delays, consume more judicial time and may, inevitably, lead to the system and the parties incurring disproportionate costs.

2. GOVERNMENT AND JUDICIAL APPROACHES TO 'SUCCESSFUL' ADR

An analysis of policy and judicial and extra-judicial pronouncements reveals that although ADR is promoted on a number of grounds including party self-determination; preserving the parties' relationships; and providing greater flexibility in finding solutions for the parties, the increasingly dominant justification (as advocated by policy makers in particular) concerns the economic benefits of ADR over litigation. This has had a profound influence the promotion of 'successful' ADRs as ones which produce a settlement of the dispute and thereby allows the parties and the courts to realise the 'visible' or 'immediate' economic and practical benefits of having engaged in the process. Indeed, early ADR literature vigorously promoted mediation's qualities in saving managerial and legal costs.[59] Also, Hazel Genn's evaluation of the London Pilot Mediation Scheme found that parties were more concerned about settlement and saving costs:

> It was clear from the analysis of parties; motivations for attempting mediating, that the principal interest was in outcome rather than the special characteristics of the mediation process, the parties were primarily seeking a settlement that would bring the litigation to an end and to keep legal costs and the time expended on the dispute to a minimum. [60]

The orthodox understanding has the adverse effect of restricting the wider benefits offered by ADRs that do not produce an economic settlement with the consequence that those wider benefits become hidden or simply ignored and are not therefore fully appreciated by the parties, their lawyers and the courts. This part critically considers how policy makers and the judiciary have influenced the development of the orthodox understanding of successful ADR.

Government approaches

[59] Alexander Bevan, *Alternative Dispute Resolution* (Sweet & Maxwell 1992)
[60] Hazel Genn, Central London County Court Pilot Mediation Scheme: Evaluation Report, 5/98 Lord Chancellor's Department, Research Series 15 (1998) available at http://www.cnmd.ac.uk/laws/judicial-institute/files/Central_London_County_Court_Mediation_Scheme.pdf (Accessed 12 May 2016). See also

Successive governments have remained consistent in their policies in substantially reducing the funding of the civil justice system and, simultaneously, promoting ADR as a viable and legitimate substitute to court adjudication. Genn notes that as pressures on justice budgets in the 1990s became more severe and legal aid expenditure continued to rise, the government 'became more interested in mediation.'[61] De Girolamo makes the argument that the push for mediation in England and Wales appears to be premised on an efficiency argument: streamlining the civil justice system and reducing the government budget.[62]

The government's interest and commitment to ADR was eventually formally reflected in the Access to Justice Act 1999 in which the cost of mediation was included within the legal aid system. The provisions of the Act formally required the parties to engage with ADR before seeking legal aid for legal representation. The government's pro-ADR stance continued and in March 2001 the then Lord Chancellor announced an "ADR pledge" by which all government departments and agencies made a number of commitments including that 'Alternative dispute resolution will be considered and used in *all* suitable cases wherever the other party accepts it.'[63] The Department for Constitutional Affairs subsequently published a report as to the effectiveness of the government's commitment to the ADR pledge.[64] The report identified a number of initiatives that had been introduced as a direct result of the pledge. These included the following initiative on the part of the National Health Service Litigation Authority ("NHSLA"):

> The encouragement of greater use of mediation, and other forms of alternative dispute resolution, is one of the options considered by the NHSLA, who are responsible for handling clinical negligence claims against the NHS. The NHSLA is working with the Legal Services Commission to develop a joint strategy for promoting greater use of mediation as an alternative to litigation in clinical negligence disputes. Since May 2000 the NHSLA has been requiring solicitors representing NHS bodies in such claims to offer mediation in appropriate cases, and to provide clear reasons to the authority if a case is considered inappropriate.[65]

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[61] Hazel Genn, 'What Is Civil Justice For? Reform, ADR, and Access to Justice' (2012) 24(1) Yale Journal of Law & the Humanities 6.

[62] Debbie De Girolamo, 'Rhetoric and civil justice: a commentary on the promotion of mediation without conviction in England and Wales' (2016) 35(2) CJQ 162.

[63] See https://www.gov.uk/government/news/djanogly-more-efficient-dispute-resolution-needed (Accessed 12 May 2016). The pledge was considered by the Court of Appeal in *Royal Bank of Canada Trust Corporation Ltd v The Secretary of State for Defence* [2003] where Dyson LJ argued the judge at first instance had been wrong in attaching "great weight" to the pledge when dealing with the issue of a refusal to engage with ADR.

[64] Available at www.civilmediation.org/downloads-get?id=105 (Accessed 12 May 2016).

[65] *Royal Bank of Canada Trust Corporation Ltd* (n 50).

The government's pro-ADR stance continued to consistently develop. In its *Transforming Justice* agenda in 2010,[66] the coalition government set out its intentions to implement various reforms including the promotion of alternatives to the court process. In the following year, the government issued its consultation paper, *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system-A consultation on reforming civil justice in England and Wales, March 2011*[67] in which the Ministry of Justice set out its aims to reform the civil justice system. One of the key proposals put forward by the Ministry of Justice was the need for the greater utilisation of ADR processes and, in particular, mediation. This meant, in the words of the then Lord Chancellor and Justice Minister 'Fewer cases coming to court unnecessarily, more rapid resolution, lower costs to participants and thus a system that delivers justice more effectively.'[68] The paper went on to outline the objectives of creating a 'new' civil justice system. This 'new' civil justice system was intended to be one in which more citizens '…avail themselves of the opportunities provided by less costly dispute resolution methods, such as mediation – to collaborate rather than litigate.'[69]

Similarly, the former Minister for Civil Justice and Legal Policy, Lord Faulks, reaffirmed the government's desire to continue to use mediation in settling disputes. Speaking at the Civil Mediation Council annual conference in 2014,[70] Lord Faulks referred to the government's own ADR pledge in resolving disputes through ADR which are 'usually quicker, cheaper and provide better outcomes.'[71] And the success of mediation and other ADR processes in diverting unnecessary litigation away from the courts is, Lord Faulks argued, 'a key cornerstone of an efficient and cost effective justice system.'[72]

In seeking to provide small businesses with protection against larger businesses that may take unfair advantage of them, the Minister of State for Small Business, Industry and Enterprise recently

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[66] See http://www.instituteforgovernment.org.uk/sites/default/files/publications/Transformation%20in%20the%20Ministry%20of%20Justice%201st%20Interim%20Report.pdf (Accessed 12 May 2016).

[67] Solving disputes in the county courts: creating a simpler, quicker and more proportionate system, A consultation on reforming civil justice in England and Wales, March 2011, available at:*http://www.justice.gov.uk/downloads/consultations/solving-disputes-county-courts.pdf* [Accessed 12 May 2016]

[68] A consultation on reforming civil justice in England and Wales, March 2011, 5 available at https://consult.justice.gov.uk/digital-communications/county_court_disputes/results/solving-disputes-in-cc-response.pdf (Accessed 12 May 2016).

[69] A consultation on reforming civil justice in England and Wales (n 58) 6.

[70] Lord Fualks, 'Mediation and the Government' Speech to the Civil Mediation Council 2014 Available https://www.gov.uk/government/speeches/mediation-and-government [Accessed 12 May 2016].

[71] Lord Faulks (n 60).

[72] The need to achieve efficiency in the civil justice system was recently reinforced by the current Lord Chancellor who, when outlining his vision of a "one nation justice policy" questioned the need for formal hearings, argued for the need to speed up decision making, give all parties the ability to submit and consider information online, and consider simple issues far more proportionately. https://www.gov.uk/government/speeches/what-does-a-one-nation-justice-policy-look-like

announced the creation of a Small Business Commissioner (SBC) who would '…act as a disincentive to unfavourable payment practices, and build the confidence and capabilities of small businesses to help them to assert themselves in contractual disputes and negotiate more effectively.'[73] It is proposed that the SBC will enable small businesses to avoid court action by signposting small businesses to approved ADR providers or the Commissioner's own complaints handling function. The introduction of the SBC is enshrined in the Enterprise Bill 2016 which is currently going through the parliamentary process.[74]

The government's policy in pushing an ADR agenda is also reflected in the judgment given in *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited*.[75] In that case Teare J upheld a dispute resolution clause in an existing and enforceable contract, which required the parties to seek to resolve the dispute by friendly discussions in good faith and within a specified period of time before the dispute might be referred to arbitration, was enforceable. This was, Teare J held, 'consistent with the public policy of encouraging parties to resolve disputes without the need for expensive arbitration or litigation.'[76]

The economic justifications of ADR are increasingly driving the government's approach to further integrate and promote ADR; it allows for the reduction in the State 'subsidy' of the civil justice system. Pressures on public spending has caused ministers to re-think and re-shape the traditional idea of court adjudication as the primary means for litigants in accessing justice. By doing this, the government can continue to make efficiency savings and thereby meet its fiscal targets by holding ADR out to be 'the right thing to do' and it is promoted on the basis of its economic and practical virtues over court adjudication. The government's strong commitment to ADR as an alternative to the publicly financed court system is captured in Lord Faulks' speech when he said 'The Ministry of Justice is also willing to reconsider compulsory mediation information and assessment meetings – or MIAMs – in civil claims for the first time since our Solving Disputes consultation paper in 2012.'[77] The MIAMs referred to by Lord Faulks is taken from section 10 of the Children and Family Law Act 2014 which obliges parties to attend an MIAM before issuing proceedings for certain types of family disputes. Although attendance at the MIAM is a pre-requisite for court proceedings, the parties are not obliged

[73] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/461675/BIS-15-548-small-business-commissioner-government-response.pdf.
[74] At the time of writing the Bill is at the Legislative Grand Committee: House of Commons stage (12 May 2016).
[75] [2014] EWHC 2104 (Comm).
[76] Lord Faulks (n 60) 22. For an interesting discussion of the impact of the decision on the international commercial arbitration see Louis Flannery and Robert Merkin, *Emirates Trading*, good faith, and pre-arbitral ADR clauses: a jurisdictional precondition? (2015) 31(1) Arbitration International 63.
[77] Lord Faulks (n 57).

to enter into mediation – the status quote remains – citizens should not be compelled to ADR as this would undermine their constitutional rights to access the courts. As Lord Neuberger recently explained 'A citizen's right – and therefore her ability – to go to court to vindicate or to defend a civil or family law claim is an absolutely fundamental ingredient of the rule of law. And that '...mediation must not be invoked and promoted as if it was always an improved substitute for litigation.'[78]

The strong pro-ADR stance taken by the government has, over the years, has the effect of creating an 'orthodox' understanding within the civil justice system that an ADR is successful when it produces a settlement of the dispute. Policy makers speak of the benefits of a quicker and more cost effective system where ADR produce settlements. However, this orthodox notion of a successful ADR fails to adopt a wider approach in demonstrating that an ADR which does not produce a settlement may, nonetheless, provide valuable future 'hidden' economic advantages by assisting the parties in a subsequent settlement and the possibility of more efficient judicial case management if the matter does revert to the court process.

Judicial approaches

In giving his keynote speech to the Civil Mediation Council in 2015,[79] Lord Neuberger spoke of the nature of mediation and its function within the civil justice system. His Lordship began by outlining five principal advantages of mediation over court adjudication. After discussing the fifth advantage – that both parties will emerge as "winners" or at least neither will emerges as "losers" – Lord Neuberger remarked "However, each of these advantages must be qualified by the words *'but only provided that the mediation is successful*.'[80] Lord Neuberger's qualification of the advantages of mediation clearly reflects the 'orthodox' judicial understanding of the notion of a 'successful' ADR. Consistent with the approach taken by policy makers, judicial perceptions of a successful ADR focuses on ADRs that actually produce a settlement and it is only when this happens do the parties reap the benefits that ADR offers. There is no mention of the potential of ADR as an effective issues narrowing tool and there is certainly no understanding of the potential benefits to the court process. Also, in his speech to the Belfast Mediation Council in 2014,[81] Lord Dyson MR reinforced the potential virtues of ADR in reducing cost, delay and emotional strain – potential virtues which only come to fruition when an ADR produces a settlement. This is a common pattern which appears to dominate ADR jurisprudence and extra-judicial comments.

[78] Lord Neuberger (n 8).
[79] Lord Neuberger (n 8).
[80] Lord Neuberger (n 8) para. 8. Emphasis added.
[81] Lord Dyson MR, 'Halsey 10 Years On – The Decision Revisited', (2014) 23(2) Com. Lawyer 32.

Following successive civil justice reform programmes in England and Wales over the past 16 years and coupled with continued government funding cuts, a growing number of the senior judiciary have adopted a pro-ADR stance. The senior judiciary are increasingly advancing their arguments in support of ADR by concentrating on the 'visible' economic and practical benefits of a successful ADR. ADR jurisprudence that developed in the early years of the Woolf reforms such as *Dunnett v Railtrack*[82] and *Halsey v Milton Keynes*[83] have highlighted a range of benefits to the parties from engaging in ADR including, as Brookes LJ pointed out in *Dunnett*, obtaining a simple apology. Further, Lord Woolf MR in *Cowl v Plymouth CC*[84] held that the parties in that case should have engaged in ADR because 'many thousands of pounds in costs could have been saved and considerable stress to the parties could have been avoided.' He also spoke of the benefits available to the parties if they had engaged a mediators including assisting the parties in disposing of some of the issue and helping them to come to a sensible conclusion.

However, greater emphasis on the economic justifications of engaging in ADR were beginning to emerge even prior to the Woolf Reforms and *Cowl*. Mummary LJ in *Muman v Nagasena*,[85] a dispute over the administration of a charity, expressed concern about the substantial sums of money that had been incurred on the litigation involving the administration of a charity. His Lordship made an order that, inter alia, no more money should be spent from the assets of the charity until 'all efforts have been made to secure a mediation of this dispute…..'[86] Mediation was more cost effective than litigation.

Ward LJ's judgment in *Burchell v Bullard*[87] provides further support to judicial promotion of the economic and practical virtues of a 'successful' ADR. *Burchell v Bullard* concerned a small building dispute in which the defendant builder had refused the claimants' invitations to mediate. In rejecting the defendant's excuse that he wanted his day in court, Ward LJ's judgment focused primarily (but not entirely) on the economic virtues of ADR when he held that small building disputes were 'par excellence the kind of dispute which…lends itself to ADR" and that the "costs of ADR would have been a drop in the ocean compared with the fortune that has been spent on this litigation.' Also, in *Egan Motors*, a case concerning a claim for £5,000 but in which the parties had incurred approximately £100,000 in legal costs, Ward LJ referred to ADR as 'a perfectly proper adjunct to litigation.' This case illustrated to Ward LJ that only parties who were 'completely cuckoo' would not use ADR to resolve

[82] [2002] EWCA Civ 303.
[83] [2004] EWCA Civ 576.
[84] [2002] 1 W.L.R. 803, [3].
[85] [2000] 1 W.L.R. 299.
[86] ibid 305.
[87] [2005] EWCA Civ 358

their disputes. In another building dispute, Rix LJ made clear that importance of considering the economic significance of ADR over litigation when he stated:

> the nature of the case, namely a small building dispute between a householder and a small builder, is well recognised as one in which trial should be regarded as a solution of last resort, and *one which is likely to give an unsatisfactory outcome to the parties at disproportionate cost*, to which should be added the cost of disproportionate anxiety.[88]

The conventional understanding of a successful ADR in terms of realising economic benefits is also evident in the more recent case of *Lakehouse Contracts Limited v UPR Services*.[89] In that case the court held that had the parties engage with mediation then this would have resolved the matter without having to commence court proceedings and would have saved valuable time and expense.

By contrast, the Canadian judiciary, supported by legislation mandating ADR within the Canadian civil justice process,[90] have traditionally adopted a more pragmatic understanding to ADR and its wider benefits of offering a valuable forum to narrow the issues in dispute. In Canada's leading decision on mandatory ADR, Mahoney J explained the some of the wider benefits of ADR in circumstances where a settlement was not reached 'Even if a final agreement is not reached on all issues, the parties, by engaging in the process, can address their dispute sooner, learn valuable information to help sharpen their understanding of the real issues, reduce the costs of final resolution, and in some cases, improve their relationship.'[91]

The Court of Appeal Mediation Scheme was also predicated on the basis that of the orthodox understanding of a successful ADR, that ADR is economically beneficial to the parties and the court when it is successful. Under the Scheme, all personal injury and contract claims up to the value of £250,000, inheritance disputes having a value of up to £500,000 and boundary disputes for which permission to ap0peal is sought and obtained are automatically recommended (not compelled) for mediation unless a judge exceptionally directs otherwise. Rix LJ, who led a working group set up by the Master of the Rolls to revitalise the Scheme, emphasised the practical and economic advantages of mediation when he said:

> Judges regularly see cases in the Court of Appeal which could easily have been resolved at an earlier stage though the use of mediation. Parties may not be poles apart, but litigation can

[88] *Rolf v De Gurin* [2011] EWCA Civ 78 [46].
[89] [2014] EWHC 1223 (Ch).
[90] See (n 4).
[91] *IBM Canada Limited v. Kossovan* 2011 ABQB 621.

> have a corrosive effect for which mediation can provide a balm. *Mediation in the Court of Appeal can save a great deal of money and anxiety*.[92]

It is not until Briggs LJ's judgment in *PGF II SA v OMFS Company 1 Limited*[93] and his subsequent *Chancery Modernisation Review*[94] that a wider understanding of the notion of a 'successful' ADR begins to emerge which appears to encompass potential or hidden economic benefits which may flow from an ADR which has not produced an immediate settlement. In finding that silence in the face of invitations to ADR is to be regarded as an unreasonable refusal and thereby making a 'modest extension'[95] to the Halsey principles, Briggs LJ spoke of the 'intense focus' in Sir Rupert Jackson's cost review on achieving proportionality between the cost of litigation and the value of the claim and his 'clear endorsement of ADR as a process which is still insufficiently understood and still under-used.'[96] Briggs LJ concentrated on the visible economic benefits of ADR as a means of saving the courts' finite resources when he said:

> the constraints which now affect the provision of state resources for the conduct of civil litigation (and which appear likely to do so for the foreseeable future) call for an ever-increasing focus on means of ensuring that *court time, both for trial and for case management, is proportionately directed towards those disputes which really need it, with an ever-increasing responsibility thrown on the parties to civil litigation to engage in ADR,* wherever that offers a reasonable prospect of producing a just settlement at proportionate cost."[97]

A wider judicial understanding of the benefits associated with an ADR is more evident when Briggs LJ argued his second justification for his findings that silence was destructive of the real objective of encouraging ADR. His Lordship stated:

> This second reason is partly a matter of practicality, *but also serves the policy of proportionality.* A positive engagement with an invitation to participate in ADR may lead in a number of alternative directions, each of which *may save the parties and the court time and resources*. The invitation may simply be accepted, and lead to an early settlement at a fraction

[92] Available at: https://www.judiciary.gov.uk/announcements/news-release-mediation-pilot-court-of-appeal/. Emphasis added.
[93] [2013] EWCA Civ 1288.
[94] Briggs, Chancery Modernisation Review (n 13).
[95] *PGF* (n 81) [35].
[96] *PGF* (n 81) [26].
[97] *PGF* (n 81) [27].

> of the cost of the preparation and conduct of a trial. *ADR may succeed only in part, but lead to a substantial narrowing of the issues."*[98]

The overall focus and emphasis of Briggs LJ's judgment is on the visible economic benefits for the parties and the courts where of ADR produces a settlement. Indeed, Briggs LJ refers to the saving of time and resources which would otherwise be spent if the matter continued to be litigated. Despite this, a wider understanding of the hidden economic benefits of ADR appear to emerge when Briggs LJ speaks of ADRs which succeed in part and which may, nevertheless, 'lead to a substantial narrowing of the issues.' However, although wider than the orthodox understanding of what constitutes a 'successful' ADR, it is still limited because it only refers to partial settlements; it fails to note the benefits which would also flow from an ADR that does not produce a settlement at all.

It is not until Briggs LJ's subsequent *Chancery Modernisation Review*[99] that an expanded notion of a successful ADR becomes clear. The conventional view of a successful ADR, Briggs LJ argued, was an over simplification. Taking a broader approach to that expressed in his judgment in *PGF*, Briggs LJ explained that an ADR which fails to produce a settlement may 'nonetheless cause or contribute to a substantial narrowing of the issues or increased focus on the key issues, capable of assisting both the parties and the court in the economical determination of the dispute at trial.'[100]

Although Briggs LJ's comments reveal a change in judicial understanding of the notion of a successful ADR, two points should be noted. First, the wider understanding of a successful ADR which fails to produce a settlement has not, at least on the senior judicial level, been appreciated and this is clearly evident from Lord Neuberger's Civil Mediation Council speech when he qualifies the potential advantages presented by mediation with the words 'but only provided that the mediation is successful.'[101] Secondly, although wider than the orthodox understanding of successful ADRs, Briggs LJ's reference to the potential of ADR to substantially narrow the issues is unsubstantiated. This is not to say that ADR does not have the potential to do this. However, the current literature lacks empirical data to support the idea that the parties necessarily understand and utilise the ADR process as an issues narrowing tool. The same weakness concerns Briggs LJ's reference to the potential assistance provided by the ADR process to the parties and the courts in the 'economical determination of the dispute at trial.'[102] The next Part seeks to fill the empirical gap.

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[98] *PGF* (n 81) [39].
[99] Briggs *Chancery Modernisation Review* (n 13).
[100] Briggs *Chancery Modernisation Review* (n 13) 5.31.
[101] Lord Neuberger (n 8) para. 8.
[102] Briggs *Chancery Modernisation Review* (n 13) 5.31.

3. EMPIRICAL DATA

There is no substantive empirical data which investigates whether, in fact, the parties understand and use the ADR process to narrow the issues and if they do, the extent to which this leads to either a future settlement of the dispute or has the potential for more effective and efficient case management. In order to investigate these issues further and to support the call for a change in approach and understanding of what amounts to 'successful' ADR, the author collated empirical data over a period of one year. The data was collated in two stages from lawyers with extensive experience of engaging with ADR processes and, in particular, ADR procedures which did not produce an immediate settlement. The first stage involved sending out questionnaires to respondents to complete and return. The second stage involved carrying out detailed follow-up interviews with respondents.

The sample of respondents was selected using the following criteria. Solicitors were selected who practised 'dispute resolution' a term commonly used by many law firms which encompasses traditional litigation as well as alternative dispute resolution methods such as mediation, arbitration and adjudication. The ADR methods for the study were restricted to mediation and negotiation. Mediation is a popular choice of ADR for civil disputes and, when analysing the initial results from the questionnaires, it was clear that the vast majority of respondents had extensive experience of mediation. The area of work undertaken by the sample was also narrowed to respondents carrying out general civil and commercial dispute resolution work, principally concerning contract and negligence disputes. This was done in order to cover dispute resolution work which falls within the jurisdiction of the general pre-action protocol. The focus of the study was on the pre-action stage of the litigation process for two reasons. First, the pre-action protocols require the parties to consider ADR before proceedings can be issued. This is clear from paragraph 8 of the Practice Direction – Pre-Action Conduct (PD-PAC), which states 'Litigation should be a last resort. As part of a relevant pre-action protocol or this Practice Direction, the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings.'

Thus, narrowing the study to the pre-action stage meant that there was a high likelihood that the respondents would have engaged with an ADR procedure. The second reason for choosing this stage of the litigation process was because the parties, having engaged with ADR as part of their pre-action obligations, would then go on to attend their first case management conference. If the parties were able to benefit from an ADR that did not settle then the study would reveal what those benefits were and whether they could, at least theoretically, assist judicial case management.

In order to ascertain the views of a broad range of legal practitioners, the questionnaires were sent to a range of law firms including small and medium sized national firms and large national and international law firms. In total, 210 questionnaires were distributed and 51 were returned. This gave a response rate of 24%. 18 follow-up interviews were conducted.

General comments: ADR obligations; costs sanctions

One of the most striking general comments that can be made from an analysis of the results is that all respondents demonstrated a detailed and clear understanding and appreciation of the growing significance of ADR, its place within the CPR and, in particular, the need for the parties to consider ADR as part of the pre-action stage. The respondents had extensive experience of engaging with the pre-action stage of the litigation process and of having engaged with, in particular, the requirements of the PD-PAC and therefore ADR.

The respondents were also aware of the likely adverse costs consequences for their clients in the event that the parties did not consider and engage with ADR without a valid excuse. As one respondent remarked:

> The pressure to advise and record everything regarding ADR is so important now. You just don't want to miss it or ignore it or even advise against it even though you may have a good case. The risks are too high because of the courts' powers to penalise you in costs!" [Solicitor]

Similarly, another respondent stated:

> The cost consequences can be pretty bad as we can see from some of the decided cases so we always consider and attempt it, even if it means having a without prejudice conversation on the phone." [Solicitor]

Therefore, the overall picture from the information provided in the questionnaires and interviews was that the respondents were clearly aware of the 'ADR culture' and the ADR expectations of the courts and the ADR requirements under the CPR.

The data revealed that all respondents engaged informal negotiations and the vast majority of had experience of using mediation as the preferred ADR option. Further, all of the respondents indicated that they had experience of ADRs that had produced an immediate settlement as well as having experience of those which had not produced a settlement.

Reasons for non-settlement

The questions which explored the reasons why the ADR may have failed to produce a settlement at the pre-action stage were mixed. Some respondents pointed to resistance shown by the clients in making or accepting a settlement offer during the ADR negotiations. For example, one respondent pointed to the fact that the financial value of the offer was not satisfactory to the parties and that this was the driving force in not reaching a settlement. He stated:

> The matter did not settle because our client was simply not prepared to accept what the other party was prepared to pay on the day. We can only advise our clients are the ones who have to make the final decision! [Solicitor].

The financial value of what was 'on the table' on the day of the ADR appeared to be a common theme as one respondent made clear:

> My client was only interested in getting a deal done on the day of the mediation. He had a bottom line below which he just wouldn't accept any offer made by the other side. He just wanted us to negotiate and negotiate hard on the numbers and get out of there. So when the other side would not budge on their offer my client simply pulled out of the mediation and that was that.

And:

> The money just wasn't good on the day so my client wanted to hold out for a better deal rather than settle. [Solicitor]

Other respondents indicated that they had thought that they had all of the necessary documents before the mediation process but realised during it that some of the key documents were missing and this created an obstacle to reaching a settlement on the day. This point was made clear by one respondent who stated:

> We had followed the pre-action requirements closely, disclosing documents etc. but when we got to the mediation it became clear some of the key pieces of evidence were missing so we couldn't advise our client on settlement but it was a very useful process because we realised what was missing.

Narrowing the issues and future settlement

The questions which explored non-settled ADRs revealed interesting results. When asked whether the ADR process had helped to narrow the legal and/or factual issues in dispute, just under half of the respondents indicated that it had. As one respondent made clear:

> We had gone into this mediation thinking we had a pretty good case on breach and quantum. We had made a calculation of our client's losses but as we continued to go through the mediation it became clear that some of the losses we were claiming for just did not add up and were simply irrelevant to the issues. This helped us to as you would say narrow the issues on damages and quantum and to get a better, clearer and more focused view of the case. It must have helped that other side as well because it meant they would not have to deal with those issues going forward. [Partner]

Another respondent dealing with negligence matters commented:

> The ADR process can reveal a lot to the parties. In my experience during negotiations and mediations the parties have been able to walk away without a settlement but having gained for example by narrowing the heads of loss (or even increasing them!) and taking a U-turn on issues like counter-claims. [Solicitor]

One respondent summed up the benefits of a non-settled ADR as follows:

> The penny drops for all the parties on all sorts of factual and legal issues when they've done a mediation that has not settled. [Solicitor]

Although the respondents spoke positively of the ADR process in narrowing issues of difference, a large proportion were either unaware of the potential of using the process to narrow issues or were simply concerned with, as one respondent put it, "simply doing a deal on the day – it's all about the money." A common theme that emerged from this class of respondent was the idea that ADR was seen as a forum to simply settle the matter, to realise what the parties were prepared to offer and to barter; it was not necessarily perceived as providing a useful opportunity to actively try to narrow differences. If this failed then the whole process was considered as a failure. As one respondent put it:

> I went into a few mediations where we have thought we will either settle or walk away. It's really all about settling on the day, if you can. If it doesn't settle then to my mind it's failed and our clients think the same. All our clients are interested in is whether it settles on the day and for how much. The process isn't really used to narrow issues, it's to do a deal on the day and get home at a decent hour!" [Solicitor]

Also,

> During the whole process the parties and even the mediator is fixated on getting a settlement at the best commercial terms than 'narrowing the issues' or any evaluation of the evidence doesn't even enter our minds! [Partner]

Unsurprisingly, the majority of the respondents indicated that engagement in the ADR process did assist in the future settlement of the dispute. The reasons for this varied but the most dominant factor was the parties ability to focus on the key issues in gaining a better understanding of the case and thereby allowing them to weigh up the financial and legal risks of taking the matter further down the litigation route. As one respondent explained:

> We found mediation useful for getting an idea of the arguments and where the gaps lay in the evidence. Although most of the cases didn't settle at this stage it certainly helped with later negotiations at which stage most did settle. [Partner]

One respondent expressed his frustrations in the lack of focus of his counterpart on the key issues during the mediation process:

> …more needs to be done to get legal representatives to take greater responsibility to drive the dispute to resolution and counter the lack of trust and insecurities that lead to deliberately not focusing on the real issues." [Solicitor]

The potential for case management

Those who found engagement with the ADR process useful in narrowing the issues spoke positively about the potential for more effective case management. There was general consensus that if the parties could narrow key issues in dispute and agree upon those issues then this had the potential for more effective and constructive case management. The confidential and privileged nature of ADR was perceived as the greatest obstacle in preventing the parties and the courts in engaging in any form of post-ADR discussion. There was a degree of reluctance on behalf of the parties to discuss ADR at the case management conference as explained by one respondent:

> We just tell the court we have tried it at the CMC. The judge doesn't really deal with it other than saying 'OK'. There's no discussion of it obviously because of the privileged nature of ADR. We don't want to say anything just in case we waive privilege and then find out we are exposed.

One respondent put the position of the courts on ADR issues succinctly:

> The courts remain shy of investigating ADR histories as they are usually privileged. [Partner]

Another respondent had indicated that the ADR process (in this case expert determination and a without prejudice meeting) had narrowed the issues to such an extent that it was clear that it could have saved the witnesses having to give evidence and could have saved the parties valuable time and stress but that, due to there being no mechanism following the ADR process, the matter simply continued:

> The ADR was ineffective to help case management because before trial there was no mechanism following the ADR for the Accountant to approach the Court to check whether they could glue the pieces at the end of the process to save the key witnesses giving conflicting evidence…. [Solicitor]

Another commented on the need for more efficient case management where an ADR does allow the parties to dispose of some of the issues:

> There definitely needs to be a link of some sort here. The courts are in the dark about what's happened and even if the process has been beneficial the court won't know because they don't want to interfere and the parties are cautious because they don't want to shoot themselves in the foot by revealing anything that may go against them." [Partner]

Overall observations

The ADR culture, that is, the increased focus on ADR by judges and policy makers and its rapidly increasing focus internationally have meant that lawyers are acutely aware of their ADR responsibilities to their client and to the civil justice system as a whole. However, this has not assisted in understanding the wider benefits which non-settled ADR may present the parties and there is no means of extracting and transferring those benefits to assist the court process. Although there is an appreciation that non-settled ADRs do assist in narrowing some of the issues in dispute, there remains a strong belief, at least among the respondents in the study, that a successful ADR is one which actually produces a settlement on the day. In the event that a settlement is not reached, then the ADR process is perceived as having 'failed'.

There appears to be a practice amongst some practitioners to simply see the ADR process as an opportunity to try to 'do a deal', to settle the matter on the day and to either pay as little as possible or to extract as much as possible – it is seen as a purely commercial adventure. By taking this approach lawyers and their clients fail to understand or appreciate the potential of utilising the ADR process as a means of trying to focus on the key issues with a view to narrowing them whilst at the same time trying to settle the matter on the best possible terms.

It is also striking to learn that some mediators are also primarily focused on trying to get the parties to settle on the day. Although mediators are there to facilitate and not to recommend or enforce a settlement on the parties, they have a potentially vital role in informing and educating the parties of the wider benefits of a non-settled ADR and to reinforce, during the settlement process, those benefits.

Finally, it is clear that the narrowing of issues in dispute and the greater focus on the key issues are benefits which respondents felt could have assisted with more effective and efficient case management but that the confidential and privileged nature of ADR prevented the parties and the courts from 'extracting' and 'transferring' those benefits to the court process. This is not surprising. One of the defining features of ADR processes is that it is protected by privilege so that communications between the parties cannot be taken from the ADR process and used in the court process without the consent of all the parties. The rationale that underpins the protection offered to parties engaged in ADR is simple: it is to protection the public policy of encouraging and promoting the settlement of disputes. The parties should be free to propose and engage with ADR in order to explore whether a settlement is possible. As Lord Scott explained in *Ofulue v Bossert,*[103] a case concerning the without prejudice privilege 'Communications made with a view to an amicable settlement ought to be held very sacred; for if parties were to be afterwards prejudiced by their efforts to compromise, it would be impossible to attempt an amicable arrangement of differences.'[104] Despite these reservations it is interesting to note that respondents were, at least theoretically, keen for any benefits from a non-settled ADR to be used during judicial case management.

4. SOLUTIONS AND CONCLUSION

The increasing significance of ADR within the civil justice system requires a fundamental reappraisal of what is understood as a 'successful' ADR. Does it simply mean that an ADR which produces an immediate settlement is to be regarded as successful? This appears to be the perception of the majority of respondents in the study. Although respondents acknowledged that ADR processes did help in promoting a better understanding their client's case and assisted in narrowing issues in dispute, the fact that the matter did not settle on the day meant that in their eyes (and in the eyes of their clients) the ADR was a 'failure'. It was a failure because a 'deal was not done on the day' and it meant having to revert to the court process and having to continue to litigate. It meant that the visible economic and practical benefits of ADR had not been realised by the parties and the courts. However, this orthodox understanding of what constitutes a successful ADR is no longer viable. It undermines

[103] [2009] UKHL 16.
[104] *Ofulue* [32].

the true value of what engagement with ADR procedures can offer the parties and the court process, especially at a time when government fiscal policy continues to reduce public spending on the civil justice system and, as a result, putting greater strain on court resources. Therefore, the true nature and the 'hidden' benefits of non-settled ADR must be better understood and appreciated and brought to the fore.

To achieve a re-orientation of thinking of what amounts to a successful ADR so that it encompasses the hidden benefits for the parties and the courts, there must be theoretical as well as practical change. In theoretical terms, a change in thinking is required amongst those who engage with the civil justice process (the parties, their lawyers and judges) and amongst those who train to enter the legal profession so that the ADR process is considered as one which can and should be utilised as an issues narrowing tool which can assist in the settlement of the dispute and/or assist the courts in more efficient and effective case management. Connected to this theoretical change is a need for a change in practice which must be given effect through appropriate changes to the Civil Procedure Rules. Let us consider these in more detail.

The need for a change in how ADR outcomes are perceived is fundamental and cannot be underestimated. Lawyers, the parties and judges must appreciate more clearly the wider benefits of ADR which go beyond simply reaching a settlement on the day. A wider understanding of ADR outcomes is required to include the 'hidden' benefits where a settlement is not reaches. When this is done then the 'hidden' economic and practical benefits of ADR will become 'visible' so that the parties and the lawyers utilise the process more effectively. Indeed, Briggs LJ in his *Chancery Modernisation Review* called for a 'culture change' but noted the practical difficulties with the issue of the confidential nature of ADR and the reluctance of the parties to discuss anything in relation to the process with the court. As his Lordship explained:

> There is little that I can do by way of recommendation to meet these two difficulties save by way of encouraging a measure of culture change……a greater perception that an ADR process which just misses that target may nonetheless greatly contribute to the narrowing of the ambit of a dispute, and to the economical disposal of the remaining issues, is worth emphasis. It can be conveyed to parties by judges at CMC's, and to the mediation profession by the endorsement and publication of this report.[105]

It is submitted that, although a culture change is required and will go some way in transforming the perceptions of those who engage with the civil justice system, more can and must be done to ensure

[105] Briggs *Chancery Modernisation Review* [n 13] 5.33.

that a culture change is *affected* and that a re-orientation of thinking of non-settled ADR outcomes actually occurs rather than simply leaving it to mediators and judges as suggested by Briggs LJ. There must be a greater effort and drive to educate the profession (as well as those training to enter the profession) and the judiciary. This can be done by simple changes to the Solicitors Regulatory Authority (SRA) Conduct Rules[106] and the *Bar Standards Board Handbook*[107] to incorporate rules, practice notes and commentary dealing with ADR and the need to perceive the non-settled ADRs in a wider sense.

More widely, consideration should be given to instilling in those entering the legal profession with a better understanding of ADR outcomes. This would mean better coverage of the nature and role of ADR on appropriate modules on the undergraduate law degree. Better education of ADR outcomes should also take place on the judicial level so that the Judicial College trains judges in having a more pragmatic understanding of the nature and benefits of ADR outcomes.

There must also be practical change so that there are appropriate and effective mechanisms which facilitate a change in culture and perceptions of non-settled ADR outcomes and distil the positive ADR outcomes for the parties and the courts. The following options may be considered:

1. An amendment to the pre-action protocols to make *explicit* the nature and role non-settled ADR could play;

2. Inclusion of a standard clause in ADR agreements that the parties agree, as far as possible, to narrow any legal and factual issues during the ADR process as well as seeking a settlement *and* to produce a list of agreed issues in the event that the ADR does not produce a settlement;

3. Introduce a post-ADR issues meeting for those non-settled ADRs at which a list of agreed issues may be produced.

The first option requires amendments to the pre-action protocols to make explicit the role which a non-settled ADR could play, both in terms of assisting the parties in a future settlement and potentially assisting the court process. The pre-action protocols currently encourage the parties to consider whether ADR would be beneficial in settling the dispute but there is no compulsion to engage in ADR although there are likely to be adverse costs consequences where a party has been found to have

[106] Available at http://www.sra.org.uk/solicitors/handbook/code/content.page (Accessed 12 May 2016).
[107] Available at https://www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/ (Accessed 12 May 2016).

unreasonably refused ADR.[108] There is also a 'stocktake' requirement on the parties. For example, the PD-PAC states:

> Where a dispute has not been resolved after the parties have followed a pre-action protocol or this Practice Direction, they should review their respective positions. They should consider the papers and the evidence to see if proceedings can be avoided and at least seek to narrow the issues in dispute before the claimant issues proceedings.[109]

Although the stocktake provision refers to the need to narrow issues, it fails to explicitly link it to the possibility of future settlement or case management. It may be argued that this link exists, albeit implicitly. However, what is required is an explicit reference to the link between non-settled ADR, future settlement and, more significantly, the court process. This provides clarity to those who engage with the CPR. It brings to the fore what is expected of them and why. The vast majority of potential litigants would have to engage with the pre-action protocols and therefore would be immediately aware of the need to better utilise the process. Consequently, the 'hidden' economic and practical benefits will become 'visible' and therefore better utilised.

The second option would require the inclusion of a standard clause in ADR agreements requiring the parties to agree to narrow issues and produce a list of agreed issues in the event that the ADR process fails to produce a settlement on the day. This option would operate outside of the formal court rules and as such it would provide the parties and ADR service providers the flexibility to incorporate such clauses into ADR agreements. It would be cheaper that option three (discussed below) because it would not require a separate post-ADR meeting. However, by operating outside of the formal court process may mean that it is not followed.

It will be remembered that some respondents expressed the need to have a link between benefits from non-settled ADRs and case management. Indeed, some had indicated that they believed that it would assist in more efficient case management. The third option would attempt to address make the link between non-settled ADR and the court process but without undermining the privileged nature of ADR. The second option is to introduce a 'post-ADR issues meeting'. This would take place immediately after the non-settled ADR process has concluded and would be similar to an experts

[108] *PGF* (n 81); *Phillip Garritt-Critchley v Ronnan* [2014] EWHC 1774 (Ch); *Laporte v The Commissioner for the Police of the Metropolis* [2015] EWHC 371 (QB); *Northrop Grumman Mission Systems Europe Limited v BAE Systems (Al Diriyah C41) Ltd* [2014] EWHC 3148 (TCC); *Reid v Buckinghamshire Healthcare NHS Trust* 28 October 2015 Case No: HQ13X01778 Royal Court of Justice Senior Courts Costs Office.
[109] PD-PAC 12, available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct#12.1 (Accessed 12 May 2016).

meeting[110] where the parties come together to list those issues which they believe have been narrowed and can, consequently, be presented to the court at the case management conference. By doing this the courts and the parties will be able to determine the most appropriate directions to manage the dispute to trial and to consider whether (and possibly when) ADR should be revisited. To address the sensitive issue of the privileged nature of ADR and the concern that this may be lost or in danger of being undermined, the post-ADR meeting, like the ADR process itself, would be protected by the without prejudice cloak. This way the parties would be comforted with the thought that they can speak and discuss the issues freely without anything being used against them in subsequent court proceedings if, for example, the parties were unable to agree on a list of issues. However, once the list has been agreed and filed with the court the without prejudice protection would, obviously, fall away. This option provides an effective mechanism which enables the parties to extract the benefits of ADR which can be then utilised in the court process as well as affording the parties with a safe forum to discuss the issues.

The potential disadvantages of the post-ADR issues meeting is that, by adding another layer to the ADR process, the parties will incur time and cost in addition to the costs already incurred in having to engage with an ADR process that has not produced a settlement. However, the list of issues approach may be justified on two grounds. First, the courts have the jurisdiction to order parties to engage with ADR and this is clear from, for example, the commercial court's powers to make ADR orders and judicial practice of exercising those powers.[111] Therefore, if courts maintain the power to order parties to engage with ADR then surely the parties should be required to report back to the courts on any issues which have been narrowed? Further, the parties are obliged to assist the court in furthering the overriding objective[112] – the central tenant of the CPR. The overriding objective enables the court to deal with cases justly and at proportionate cost and proportionality will include the courts exercising their case management powers to dispense proportionate justice; this may mean requiring the parties to engage with ADR and the issues meeting.

There is no doubt that ADR mechanisms that produce an immediate settlement save the courts and the parties' costs and time. However, as this paper has shown, to perceive ADR as being 'successful'

[110] CPR 35.

[111] See for example *Shirayama Shokusan Company Ltd v Danovo Ltd* [2003] EWHC 3306 (Ch); [2004] B.L.R. 207 in which Blackburn J suggested that the court retained the jurisdiction to compel parties to ADR. Also see the comments of A. Colman, "Mediation and ADR: A Judicial Perspective" (2007) 73 *Arbitration* 403 and Lord Clarke M.R., "Mediation -- An Integral Part of our Litigation Culture", Littleton Chambers Annual Mediation Meeting, Gray's Inn, June 8, 2009 in which extra-judicial comments have been made endorsing the court's powers to compel parties to ADR. For a detailed discussion, see M. Ahmed, 'Implied Compulsory Mediation' (2012) 31(2) CJQ 151.

[112] CPR 1.1(1). The obligation on the parties to assist the court in furthering the overriding objective is set out in CPR 1.3.

only when it produces a settlement is no longer viable. It is thus necessary for those who engage with the civil justice system to re-orientate their understanding of ADR outcomes, to reject the orthodox understanding of a successful ADR and to appreciate the wider economic and practical benefits of non-settled ADR. This will, it is submitted, lead to more efficient utilisation of the courts' and parties resources.