ADR and private client disputes

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Published on 22nd September 2016

Introduction

1. *ADR is an increasingly important aspect of litigation. Practitioners must not only know how to mediate effectively; they must also advise clients as to the implications of (not) mediating, protect their interests during the (mediation and litigation) process and ensure that any agreement reached is legally enforceable.*

2. *Private client disputes (e.g. probate claims, trust disputes, estoppels, Inheritance Act claims) are no exception. In Shovelar v Lane [2011] IETLR 147, 169-70 - a case concerning disputed mutual wills - the court said (at [61]):*

   "… The great British public must think that something has gone wrong somewhere if litigation is conducted [so that costs exceed the value of the estate]. I share that sense of horror. One answer has to be to engage in mediation constructively and at the very earliest stage…" (emphasis in original)

And in Lilleyman v Lilleyman [2012] EWHC 1056 (Ch) at [23] the court deprecated

"… a "no holds barred" approach … in the context of claims under the Inheritance Act, where, even in a big money case, the costs are likely to form an ever-increasing part of the subject matter of the dispute until … it is the costs burden alone which prevents settlement."

3. There are no specific ADR rules applicable to private client disputes but there are particular features about them which (on the one hand) make ADR appropriate, if not imperative, and (on the other) pose particular problems in reaching a resolution. In particular, the usually close connection of the parties and the emotion which the dispute itself and/or the circumstances leading up to it often generate.

4. I will look at three aspects of ADR in the context of private client disputes:

(1) what can/will the court do to encourage the parties to settle?

(2) what is the penalty for not mediating and when may it apply?

(3) what are the pitfalls in reaching a binding agreement at mediation?

1. Encouraging parties to settle

Pre-Action

5. The Practice Direction – Pre-action Conduct and Protocols ("the Protocol") lists the steps parties should take before a claim is issued. So far as relevant, it says (para 3) the parties will be expected to have exchanged sufficient information to "… (d) consider a form of [ADR] … to assist with settlement". And para 8 says

"*Settlement and ADR*

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.

The usual sanctions for failing to observe the Protocol apply: ibid. paras 13–16.

Early Neutral Evaluation ("ENE")

6. So far there has not been a great use of ENE – in effect the civil version of FDRs – in private client claims. But it should now be considered as a component of the ADR "landscape". However

6.1 It remains to be seen if a refusal to engage in ENE will be treated the same as a refusal to mediate.

6.2 If ENE is exceptionally, conducted on a Calderbank basis (para 10 below) courts may sanction in costs a failure to beat an informal ENE indication as they currently do failures to beat Pt.36 offers. That will be the case if the other side either make that offer or possibly indicate it is prepared to agree to it. But query if aside from those scenarios a failure to beat an ENE indication will result in no order as to costs / an adverse cost order.

7. ENE stems from CPR r.3.1(2)(m) which came into effect on 1 October 2015. It says the court may

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

See also Chancery Guide (Feb 2016) at [18.7] (https://www.judiciary.gov.uk/wp-content/uploads/2016/02/chancery-guide-feb-2016.pdf). As Seals v Williams [2015] EWHC 1829 (Ch) said in the context of Inheritance Act proceedings:-

"3... The advantage of [ENE] over mediation itself is that a judge will evaluate the respective parties' cases in a direct way and may well provide an authoritative (albeit provisional) view of the legal issues at the heart of the case and an experienced evaluation of the strength of the evidence available to deploy in addressing those legal issues. The process is particularly useful where the parties have very differing views of the prospect of success and perhaps an inadequate understanding of the risks of litigation itself."

8. Unlike ADR, ENE does not depend on the parties' consent; the court can order it of its own motion, as part of its power to manage the case. The decision is not a provisional judgment; it is a non-binding indication of the likely result. Any resolution which results stems from the parties' agreement following on from it.

9. If ENE is ordered, the parties must consider what consequential directions are needed to conduct it. For example, is the dispute one of fact or law? If fact how much information (and in what form) is to be made produced? The order should direct that the judge conducting the ENE should take no further part in the action.

10. The Chancery Guide says:-

"18.11 The Chancery Division does not have set procedures for ENE. The judge who is to conduct the ENE will give such directions for its preparation and conduct as he considers appropriate. The parties may consider that the judge will be in a position to provide an opinion about the claim or an issue based solely upon written position papers provided by the parties and a bundle of core documents. In many cases, however, it will be preferable for there to be, in addition, a short hearing of up to half a day. The opinion of the judge will be delivered informally.

18.12 Two important points which need to be addressed are as follows:

(a) The norm is that the ENE procedure and the documents, submissions or evidence produced in relation to the ENE are to be without prejudice. However the parties can agree that the whole or part of those items are not without prejudice and can be referred to at any subsequent trial or hearing.

(b) The norm is that the judge's evaluation after the ENE process will not be binding on the parties. However the parties can agree that it will be binding in certain circumstances (e.g. if not disputed within a period) or temporarily binding subject to a final decision in arbitration, litigation or final agreement.

18.13 Assuming the ENE is without prejudice and not binding, the court will not retain on the court file any of the papers lodged for the ENE or a record of the judge's opinion.

18.14 In any event the judge will have no further involvement with the claim, either for the purpose of the hearing of applications or as the judge at trial, unless both parties agree otherwise."

11. Specimen draft order directing an ENE (adapting Chancery Guide at 18.18):

Upon the parties requesting at a CMC [ ] ("the Judge") to provide an opinion about the likely outcome of the claim [or the issue defined in the Schedule hereto]

IT IS ORDERED THAT:

1. The Claimant and Defendant shall exchange position papers by 4pm on [date].

2. The parties shall agree a core bundle of documents for the Judge which shall be lodged by 4pm on [ ]

3. The parties shall attend before the Judge [in private] at [ ] on [date].

4. The parties estimate the judicial pre-reading to be [ ] hours.

5. The Judge shall consider the submissions made by the parties and provide an informal non-binding opinion about the likely outcome of the claim [or the issue].

6. The opinion shall be without prejudice to the claim and the opinion shall remain confidential to the parties.

7. The court shall not retain any papers filed for the ENE hearing or any record of the opinion provided by the Judge. No non-party shall be entitled to obtain a transcript of the hearing.

8. The Judge shall have no further involvement with this claim or any associated claim.

9. The costs incurred by the ENE shall be costs in the case.

Comparison to mediation

12. Disadvantages of ENE over mediation:-

12.1 Potentially the extra cost involved in the ENE e.g. preparing disclosure, witness statements (if appropriate), instructing counsel etc. which may be saved by an *early* mediation.

12.2 The parties may have already incurred significant costs in the action by the time the court orders ENE.

12.3 An ENE judge will simply look at the merits of the dispute; a mediation can produce a more "inventive" settlement, involving matters not strictly in issue.

12.4 It is more useful for cases which turn on the construction of a document (e.g. a bequest in a will or a term of a trust deed) than disputed questions of fact.

13. Advantages of ENE over mediation:

13.1 The parties are likely to give a judge's view more weight than a mediator's. A mediator is constrained in what (s)he can say as to merits; a judge is not.

13.2 So ENE is more helpful to parties who have widely divergent views of the merits and is more likely to generate a settlement. Particularly in those

(e.g. 1975 Act, CICT, proprietary estoppel) claims where the result on the merits/quantum is more "open textured", an indication from the "horse's mouth" may bridge the gap.

Chancery Financial Dispute Resolution (Ch FDR)

14. The origins of Ch FDR lie in Family money claims. It is now widely used in certain types of private client disputes, particularly TOLATA 1996 proceedings, trust disputes and inheritance claims. It is most valuable where there is strong personal animosity between the parties.

15. Like ENE, Ch FDR is non-binding and without prejudice. The judge who conducts it will have no further involvement in the case unless the parties agree. The court will not retain any papers produced or any notes of it. But unlike ENE, Ch FDR:-

15.1 is a form of ADR where the judge acts both *as facilitator* and evaluator of the claim/elements of it. The court may direct the parties to exchange and file W/P position papers (and direct what they are to address) and lodge a bundle. It can order non-CPR compliant reports if expert evidence is needed. The parties are usually ordered to attend before seeing the judge. The meeting is a dynamic process with similarities to the initial round-table mediation meeting. If the parties ask, the judge may express an opinion about the issue or claim.

15.2 is consensual; the court will not direct Ch FDR unless all the parties agree to it: Chancery Guide para 18.18.

Directions in relation to ADR

16. A court cannot, as yet, *force* parties to mediate: Halsey v Milton Keynes General NHS Trust [2004] 4 All ER 920 at [9-10]. NB this is very likely to change under the Briggs reforms.

17. But it can make various directions to encourage them to do so. See generally Chapter 18 of the Chancery Guide. In particular:

17.1 Where an applicant issues proceedings to comply with the 6-month time limit in s.4 of the I(PFD)A 1975 before complying with the Practice Direction, a stay of proceedings should be sought to allow them to comply: para 17 Pre-Action Protocol.

17.2 The court may, of course, stay proceedings at any stage to allow ADR to take place: CPR 26.4(2A).

17.3 A party, when filing its directions questionnaire, can apply to stay the action to allow ADR: CPR 26.4(1). If the other parties agree, the action will be stayed (initially) for one month: CPR 26.4(2). The period can be extended: CPR 26.4(3).

17.4 The court can require the parties to *consider* mediation and to contact a mediator: Halsey v Milton Keynes General NHS Trust above.

17.5 It can also direct the parties personally to attend a CMC, where it can urge them to use ADR and point out directly the (dis)advantages/risks of (not) doing so.

17.6 It can make an "Ungley" or – more usual now – "Jordan" order:-

"The parties shall by [ ] consider whether the claim is capable of being resolved by ADR and

(a) if either party considers that the claim is unsuitable for ADR that party shall not less than [ ] serve on the other party a witness statement giving the reasons upon which that party relies in saying that the claim is unsuitable

(b) a party served with such a statement may within 14 days after receiving it serve on the other party a witness statement in response

(c) all statement so served shall be disclosed to the trial judge at, but not until the conclusion of, the trial"

(d) at the conclusion of the trial when deciding on the appropriate costs order to make the trial judge shall taken all such statements into account in considering whether such means of resolution were appropriate; and

(e) a party who has objected to ADR but has not served such a statement may be presumed to have objected for no good reason"

The purpose of the order is three-fold:-

(1) First, to put the offeree under pressure to agree to mediate or at least to articulate their reasons for not doing so

(2) Second, if (s)he has legitimate concerns about undertaking ADR (e.g. costs, or the need for prior disclosure), to allow the offeror the chance to address them

(3) Third, to make the offeree "pin their colours to the mast" when the offer is made. So if the court has to decide costs, it can judge whether *those* reasons were (not) reasonable. And it may discount any extra, unstated reasons deployed when it comes to costs on the basis they did not influence the offeree's mind at the time.

2. Penalties for unreasonably failing to conduct ADR

(a) The winner who unreasonably refuses ADR

18. A party who *unreasonably* refuses to mediate may be penalised in costs: Halsey v Milton Keynes General NHS Trust above at [13]. That refusal is a conduct issue under CPR 44.2(5).

19. The normal remedy is to deprive the winner of all or part (e.g. from the date of the refusal) of his costs. The burden is on the party offering mediation to show that the other's refusal was unreasonable: ibid.

20. But in *PGF II SA v OMFS Co 1 Ltd* [2014] 1 All ER 970 at [51] the court emphasised that a failure to engage with ADR did not mechanistically disentitle the successful party from claiming costs:

> *". . . a finding of unreasonable conduct constituted by a refusal to accept an invitation to participate in ADR or, which is more serious in my view, a refusal even to engage in discussion about ADR, produces no automatic results in terms of a costs penalty. It is simply an aspect of the parties' conduct which needs to be addressed in a wider balancing exercise. ... the proper response in any particular case may range between the disallowing of the whole, or only a modest part of, the otherwise successful party's costs.*

21. Can the Court go further and order the winner to pay all or part of the loser's costs? In *PGF the Court said* (at [52]):-

> *"While in principle the court must have that power, it seems to me that a sanction that draconian should be reserved for only the most serious and flagrant failures to engage with ADR, for example where the court had taken it on itself to encourage the parties to do so, and its encouragement had been ignored."*

As such exhortations are now routine, this "exceptional" power may not be so exceptional.

22. This sanction is not limited to post-issue unreasonable refusals to mediate. The court can also penalise a failure to agree to a *pre-issue* offer of mediation: P4 Ltd v Unite Integrated Solutions plc [2006] EWHC 2924 (TCC).

23. Note:-

23.1 a mere failure to offer mediation is not treated in the same way as a *refusal* of the other side's offer to mediate.

23.2 if a party changes their mind after initially agreeing to do mediate, that is likely to be treated as a refusal, attracting a costs sanction. Worse, (s)he can hardly then say – unless there has been a radical change in circumstances – that it was unreasonable to mediate, since their original actions speak otherwise.

23.3 since mediations are (almost) always conducted on a W/P basis, the Court cannot explore whether one/other party behaved unreasonably during it. The only recourse for the "innocent" party faced with unreasonable conduct at the mediation is to repeat offers on a Pt.36/Calderbank basis.

23.4 an unreasonable delay in accepting an offer to mediate can also attract a costs sanction. Typically the offeree says (s)he cannot mediate unless/until certain information is to hand (e.g. valuations, disclosure of income/assets/needs in 1975 Act applications, disclosure of medical evidence in disputed will claims concerning lack of capacity/want of knowledge and approval). Of course such arguments get short shrift if the offeree could get that information. But if not then it all depends on the circumstances. The arguments deployed in these cases are as follows:

- (for the offering party) the purpose of mediation not to conduct a mini-trial but to reach a commercial settlement which meets the parties' interests, going forward. Delaying mediation only increased costs and reduced the chances of a settlement if/when it did take place. The information sought could have been made available during the mediation process;

vs

- (the refusing party) one could not make an informed decision about the strength of its/the other side's case until then. A premature

mediation was likely to fail and that would only have increased costs/reduced the scope for settlement. (S)he was entitled to have time to consider the relevant information, not have it "landed" on them at/shortly before the mediation

Even so, lack of information is very rarely accepted as a good reason for *refusing* (vs *delaying*) mediation: *PGF II SA v OMFS Co 1 Ltd above;* Rana v Tears of Sutton Bridge [2015] EWHC 2597 (QB).

(b) Ignoring (vs refusing) an offer to mediate

24. A party who is reluctant to mediate may be tempted to simply ignore the offer rather than refusing it outright. What then? In *PGF II SA v OMFS Co 1 Ltd above* the court said (at [34]):-

> *"... silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds. I put this forward as a general rather than invariable rule because it is possible that there may be rare cases where ADR is so obviously inappropriate that to characterise silence as unreasonable would be pure formalism. There may also be cases where the failure to respond at all was a result of some mistake in the office, leading to a failure to appreciate that the invitation had been made, but in such cases the onus would lie squarely on the recipient of the invitation to make that explanation good."*

(c) The loser who unreasonably refuses ADR

25. Halsey and PGF discussed the sanction applicable to a winning party who unreasonably refuses to mediate. Where the *unsuccessful* party

refuses he is likely to be ordered to pay the other side's costs anyway under CPR 44.2(2)(a).

26. In Reid v Buckinghamshire Healthcare NHS Trust [2015] Lexis Citation 293 the Court said:-

"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 … 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 ... and in other cases, penalties are imposed upon winners. They do not involve the imposition of further penalties upon losers...

...

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."

(d) When is it unreasonable to refuse to mediate?

27. The sanctions only apply to an *unreasonable* refusal to mediate. Courts are rightly not keen for parties to engage in private client disputes, which can be costly and personally damaging, if there is a realistic alternative. So parties who refuse an offer of mediation may struggle to persuade a court that their refusal was reasonable. But it is ultimately a highly-fact sensitive question. As the Court said in Halsey above at [16], you must have regard *to "all the circumstances of the particular case".* It listed some factors, although these are not exhaustive and other factors will often be relevant in the particular circumstances before you. Dealing with the Halsey factors:-

(a) the nature of the dispute

28. It is difficult to think of a *type* of private client dispute that is *not* suitable for mediation. But there may be particular factors that may make it reasonable not to do so e.g. if:

- the point is one of statutory construction or possibly general public importance
- urgent relief is sought (e.g. one side is threatening to sell what the other side claim are trust assets) although that should only justify delaying (vs. refusing) mediation
- allegations of criminality/serious impropriety by a party (e.g. a trustee's misappropriation of trust assets)
- (possibly) in "binary" cases where there are only two possible outcomes: total victory or total defeat, where there is no realistic "mid-way" solution.

(b) the merits of the case

29. The fact a party reasonably believes their case to be very strong, on advice, is a relevant factor: Swain Mason v Mills & Reeve [2012] EWCA Civ 498. But not if that view was unreasonable: Halsey above at [19]. If only because a good mediator can expose the weaknesses of a case, which a party has missed.

30. But a successful party who refused to mediate but offered to settle on a drop-hands basis is unlikely to be penalised in costs: Swain v Mills & Reeve *above at [62 et seq].*

(c) the extent to which other settlement methods have been attempted

31. A party may avoid being penalised in costs if (s)he made reasonable attempts to settle in some way other than mediation e.g. Pt.36/Calderbank offers, ENE, Ch FDR, round-table meetings, etc. But again it depends on the facts: if there have only been direct discussions (i.e. no ENE, Ch FDR etc.) the court may conclude a mediator/third party could have been able to bridge the gap between the parties and so deprive a successful party of part of its costs for failing to engage more constructively with mediation. See e.g. Vernacre Ltd v Environmental Pulp Products Ltd [2012] EWPCC 49.

32. If these offers were made by the winner, this may show there was little prospect of mediation producing a settlement and therefore it was reasonable to reject the loser's offer of mediation: ADS Aerospace Ltd v EMS Global Tracking [2012] EWHC 2904 (TCC). But that is not fool-proof: mediation may succeed where direct negotiations have failed and the court may adjust the costs accordingly: Halsey above at [20].

33. But overall where a successful party has made a concerted effort to settle by other means, it has a fair chance of arguing it should not be

penalised in costs simply because it refused the loser's offer of ADR. Particularly if (a) the loser's case was weak (b) (s)he took an unreasonable view of their chances of success (c) (s)he was responsible for negotiations failing.

34. That argument is particularly difficult to run where there *was* a settlement, which left the court to decide costs. Then it is very largely a matter of speculation as to whether mediation would have produced an earlier deal: Corenso (UK) Ltd. v Burnden Group plc [2003] EWHC 1805 (QB).

(d) whether the costs of the ADR would be disproportionately high

35. This is a relevant to small/medium value claims, where the argument that the loser could instead have made W/P offers or a round-table meeting is strong. But the cost of mediation is usually relatively modest compared to the cost of litigating a matter to trial. And even for low-value claims a court may take the view one of the free/low-cost mediation providers should have been used.

(e) timing of the offer

36. A very late offer of ADR (close to trial) is unlikely to be given much weight on the issue of costs or result in the winner being penalised in costs. See e.g. Palfrey v Wilson [2007] EWCA Civ. 94 (2 months before trial); SITA v The Wyatt Co. (UK) Ltd. [2002] EWHC 2401 (3 weeks); Park Promotion Ltd. v Welsh Rugby Union Ltd. [2012] EWHC 2406 (QB) (13 days)

(f) whether the ADR had a reasonable prospect of success.

37. This is probably the most often deployed argument in private client cases, because of the very personal nature of the dispute/issues. The

burden is on the loser to show that a settlement at ADR was realistic. But it is not a high one: (s)he need not show it *would have* resulted in a settlement, merely that there was a *reasonable prospect* it would: Halsey at [28].

38. Nevertheless, courts have refused to penalise the winner where there was no such prospect because:-

- the loser's character / attitude was such that they were incapable of a balanced evaluation of their chances: Hurst v Leeming [2002] EWHC 2501 (Ch).
- where the parties' relationship was appalling meaning a settlement was unrealistic: Re Midland Linen Services [2005] EWHC 3380 (Ch)
- where there was "insufficient room for manoeuvre": McCook v Lobo [2002] EWCA Civ. 1760
- where the winner had a strong case and the loser indicated it was not willing to accept a nuisance offer and there was no evidence that they would have settled at that level even at mediation: Aerospace Ltd v EMS Global Tracking above

39. For a useful (but dated) list of decisions on costs/refusals to mediate see http://www.fenwickelliott.com/files/key_case_law_on_mediation_and_costs.pdf.

(e) Advice for parties

40. In all cases the parties/lawyers must have one eye on trying to reach a reasonable settlement (if that is possible) and (if it is not) the other on how both sides' conduct will look to a court when it comes to decide costs.

For the refusing party

41. Preferably don't refuse the offer. But if you do:-

(1) Don't ignore the other side's offer of ADR

(2) Constructively engage with the suggestion of ADR rather than respond with a flat rejection

(3) Reply promptly in writing, giving clear and full reasons why ADR is not (yet) appropriate, with reference to the Halsey guidelines

(4) Raise any lack of information/evidence or other factor which you consider to be an obstacle to ADR and consider how that might be overcome. If it is information the other side has, ask for it and if they refuse seek disclosure.

(5) Agree to mediate if/when that issue is resolved.

(6) Suggest some other form of ADR e.g. ENE, Ch FDR, round-table meetings etc.

(7) Make sensible offers

For the offering party

42. Press the other side / try to paint them into a corner:-

(1) make your offer in writing / keep written records of them

(2) don't make your offer time-limited

(3) tell the other side why you consider ADR is appropriate

(4) warn them of the cost sanction for unreasonably refusing to mediate

(5) be pro-active: suggest mediators, times, dates etc.

(6) don't take a refusal (or silence) from the other side to your offer. Specifically

- repeat it, preferably several times. The more you offer, the stronger you make your case for costs
- ask their reasons for refusing. Say that they may be resolvable.
- ask for any reasons for delaying mediation, offer to help in resolving any issue that is delaying them accepting and say you will be prepared to mediate when it is resolved

(7) apply for a stay and a "Jordan" order (above)

(8) get the court at a CMC to record the fact you have offered mediation and the other side refused.

For the lawyers

43. Generally:-

(1) Explain to your client(s) at an early stage the importance of constructively engaging with mediation, the potential risks of not doing so, etc.

(2) Keep a written record of your advice

3. Making sure there is a binding agreement at mediation

44. When parties have mediated and apparently agreed terms, an issue can arise as to whether (and what) they have settled.

(a) was there a binding agreement?

45. Even though what is said at a mediation is normally W/P the court can look at the parties' dealings to decide if a binding agreement was reached, if that is in dispute: Brown v Rice [2007] EWHC 625 (Ch).

the need for writing

46. Normally that will be obvious. Mediation agreements (almost) always contain a term requiring any agreement to be by way of signed writing. But the parties can waive it so an oral agreement will bind, if that is what they really intended. At most the term creates an evidential presumption against any binding oral agreement.

47. If the contract involves the disposition of an interest in land, it must be in writing, signed by the parties/agents and contain all the agreed terms: s.2 Law of Property (Miscellaneous Provisions) Act 1989. This:-

47.1 prevents the parties "hiving off" part of their deal into some "side agreement" unless it is entirely independent of the main contract: Grossman v Hooper [2001] 2 EGLR 82. If it is it not, then the whole deal, not just the side agreement, is void: Keay v Morris Homes (West Midlands) Ltd. [2012] 1 WLR 2855 at [9, 42].

47.2 means that solicitors who sign for their clients must have their actual authority to sign; they do not have apparent authority to do so. In reality the clients should always sign to avoid any issues of authority.

47.3 only applies to contracts by which interests in land are disposed of. So if (say) a constructive trust/proprietary estoppel claim to such an interest is settled on the basis the legal owner will sell and give the claimant a share of the sale proceeds, s.2 is not engaged: Simmons v Simmons (CA unrep'd 14.2.96).

the further step

48. Where the agreement contemplates some further step will be taken by the parties to implement it, it is a question of construction of the agreement as to whether:-

(1) the parties are bound immediately; or

(2) they are not bound unless/until that step is taken

49. Of course in cases involving unascertained beneficiaries, minors or persons who lack capacity (protected parties) court approval for any settlement will be needed. Unless/until it is obtained, any agreement between those who are of full age and capacity is only provisional: CPR 21.10(1); Drinkall v Whitwood [2004] 1 WLR 462. PD 21 para 5 contains

a checklist of what must be supplied; "except in very clear cases" this must include an opinion on the merits of the settlement.

(b) does the agreement relate to the whole dispute between the parties? is it meant to?

50. *Those representing the defendant – usually the legal owner or PRs/trustees – in any ADR or, for that matter, any settlement negotiations must be live to the possibility of the claimant bringing an alternative claim in a second action and advise their client(s) accordingly. Such a claim may not be barred by the doctrine of election. So in Pinnock v Rochester [2011] EWHC 4049 (Ch) an* applicant, who had received a payment from his father's estate pursuant to a consent order compromising his Inheritance Act claim, was not prevented from later challenging the validity of the will: it was held the two claims were conceptually different and it was not inequitable or unfair for him to do so after accepting payment under the 1975 Act. However the court said (at [20]) that

"… a party who waits to bring a second claim to challenge the validity of a will may run a risk of those later proceedings being found to be an abuse of process on the basis of the doctrine in Henderson v Henderson (1843) 3 Hare 100, on the grounds that there is something vexatious or oppressive in the bringing of the second claim based on similar facts. This possibility might particularly arise where the facts relied on in support of a claim under the 1975 Act are closely bound up with the facts relied on in support of a challenge to the validity of a will"

51. *In Pinnock the applicant had repeatedly warned of the possibility of a second claim before the parties compromised his Inheritance Act application; there was therefore no argument that the second action was an abuse. It is not authority that a party can in all cases safely "keep its powder dry" and surprise the owner/PRs/trustees by having*

another "bite at the cherry". Doing so runs the risk of the second action being categorised as an abuse, but in what particular circumstances that will be so is uncertain.

52. *It is good practice therefore for the owner, etc. to include a term in any compromise that it is in full and final settlement of any claim that the other party may have, whether or not asserted. And for the other party to expressly reserve any alternative claim(s) (s)he might have. Both parties – and their representatives' insurers – take a risk if the contract is silent.*

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22 September 2016