

Wills, Trusts & Tax team



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Meditating contentious probate claims

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Introduction



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Strong support for use of mediation in contentious probate / private client disputes: -

Shovelar v Lane [2011] IETLR 147 at [61]

Lilleyman v Lilleyman [2012] EWHC 1056 (Ch) at [23]

(likely) Briggs reforms: mediation mandatory



1. court powers to encourage settlement
2. penalties for unreasonably refusing to mediate
3. Pitfalls in reaching a binding agreement at mediation

1. Encouraging parties to settle



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- Pre-action protocol: parties must consider ADR
- Early neutral evaluation (ENE)
- Chancery FDR
- Directions re ADR

1A. Early Neutral Evaluation



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- Source of power: CPR 3.1(2)(m)
- Non-binding judicial evaluation of merits
- Court can order of own motion
- No set procedures
- Normally without prejudice
- See Chancery Guide @ 18.18 for specimen order

1A. (cont'd) ENE



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Disadvantages to mediation:-

- extra costs
- only looks to merits vs inventive settlements
- less useful on facts vs law/construction

Advantages:-

- more authoritative
- where parties have divergent views of merits

1B. Chancery FDR



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- Origins: Family FDR
- Inheritance- trust- and TOLATA claims
- By consent (vs ENE)
- Non-binding
- Without prejudice
- Judge acts as both facilitator (vs ENE) and evaluator

1C. Directions re. ADR



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- Court can't order parties to mediate (*Halsey*).
But probably will be able to under Briggs.
- Order stay of action to allow mediation
- Order parties to consider mediation/contact mediator
- Ungley / Jordan orders

2. Costs sanctions



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Halsey v Milton Keynes General NHS Trust:

- winner who unreasonably refuses ADR may be deprived of all/part of costs

PGF II SA v OMFS Co 1 Ltd:

- no automatic sanction
- exceptionally winner may be ordered to pay all/part of loser's' costs

2. Costs sanctions (2)



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Note:-

- not offering mediation is not same as refusing
- changing mind after agreeing to mediate is akin to refusal
- unreasonable delay in accepting offer can attract costs sanction
- failing to respond prima facie unreasonable:
PGF
- *Halsey* sanction only applies to unreasonable refusals

2. Costs sanctions (3)



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Penalties for the loser who unreasonably refuses ADR?

Reid v Buckinghamshire Healthcare NHS Trust:-

- award costs on the indemnity basis from the date ADR offer received
- award interest on costs from date earlier than judgment
- no power to award percentage penalty (cf. CPR Pt.36)
- no power to alter rate of interest

2. Costs sanctions (4)



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When is it unreasonable to refuse ADR?

Halsey factors (non-exhaustive):

1. nature of dispute e.g. will construction, "all or nothing" cases
2. merits
3. other attempts to settle
4. cost of ADR (dis)proportionate
5. timing of offer
6. did ADR have reasonable prospects of success

2. Costs sanctions (5)



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Guidance for refusing party

1. don't ignore offer
2. suggest alternatives (vs. outright rejection)
3. reply promptly, in writing, giving reasons (using Halsey factors)
4. raise any lack of information
5. be constructive; suggest other forms of ADR e.g. ENE, Ch FDR
6. make sensible offers
7. pray

2. Costs sanctions (6)



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Guidance for offering party

1. make offer early & in writing
2. don't impose conditions / make it time limited
3. say why ADR is appropriate
4. warn of cost sanction
5. offer to try to resolve any barriers to ADR
6. be pro-active: dates/venues/mediators
7. don't take "no" as final
8. apply for stay / Jordan order
9. get court to formally record your offer of ADR

2. Costs sanctions (7)



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Guidance for lawyers

1. explain to clients early of importance of ADR: advantages, cost risks, etc.
2. put it in writing
3. keep written record of oral advice
4. Keep written record of any refusal & reasons
5. tell them it's against your advice

3. Agreements at mediation: pitfalls (1)



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1. Was there an agreement?

See what was said/done: "without prejudice" no barrier: *Brown v Rice*

2. Need for writing

- not usually an issue: term of mediation agreement. But waiver.
- s.2 Law of Property (Miscellaneous Provisions) Act 1989
 - dispositions of interests in land
 - "side agreements"
 - signatures

3. Agreements at mediation: pitfalls (2)



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3. the further step

- further agreements: bound anyway/in interim or only if further agreement signed?
- protected persons: need for court approval CPR 21.10(1). Contingent vs provisional agreements.

3. Agreements at mediation: pitfalls (3)



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4. does agreement relate to whole dispute?

Pinnock v Rochester

- compromised IP(FD)A 1975 followed by challenge to validity of will
- not barred (on facts) as abuse of process/election
- Lesson - importance of
 - (a) expressly reserving other claims (for Cs);
 - (b) ensuring all potential claims included (for Ds)