SUBMISSION TO THE FAULKS' INDEPENDENT REVIEW OF ADMINISTRATIVE LAW

On behalf of the All Party Parliamentary Group on Alternative Dispute Resolution (APPG ADR)

Introduction

1. The purpose of the APPG ADR is to help change the culture of Alternative Dispute Resolution (ADR) in the country by providing a valuable forum within Parliament to discuss the latest development in ADR and to promote its wider use[1]. It is in this context that this Submission is being made jointly by John Howell MP ACIArb, its Chair, and, its public law technical adviser, John Pugh-Smith FCIArb, barrister, mediator and arbitrator practising from 39 Essex Chambers.

2. The APPG ADR has held a number of evidence sessions since its inception in 2015 including two specific sessions on the use of ADR in the public law context, most recently into the land-use planning and compensation sectors in May 2020[2].

Overview

3. Drawing from these sessions together with a paper presented by John Pugh-Smith and his colleague, Katie Scott at the Lawyers in Local Government Conference in March

[1] http://www.ciarb.org/policy/uk-appg-on-adr#:~:text=UK%20All-Party%20Parliamentary%20Group%20for%20ADR%20CIArb%20serves,desire%20to%20get%20them%20on%20the%20political%20agenda.

[2] https://www.ciarb.org/policy/uk-appg-on-adr/appg-projects/.

https://www.localgovernmentlawyer.co.uk/planning/318-planning-features/43737-how-does-adr-help-to-do-better m

2018[3] this Submission explains the context for mediation (and its facilitation techniques) within disputes involving public bodies, how the current system can be improved and why this Independent Revie needs to highlight and urge the more active use of mediation with the context of judicial review and its equivalent by way of statutory challenges .

The Case for Mediation and Facilitation in Administrative Law

Dispute avoidance

3. Mediation is generally considered once a dispute has crystallised. Increasingly, however, the mediation process is being used more strategically for early dispute management and with impressive results. This is where early review and intervention are deployed with the aim of identifying and managing conflicts. The principles underpinning the process include: restarting communication between the parties; providing a 'safe' arena for open discussion about the problems and the options; encouraging consideration of options for settlement that can include those a court could not consider. Experienced practitioners frequently see the damage to contracts and valuable relationships and understand that structured negotiation at an earlier stage would probably have conserved more resources a good deal sooner and achieved a better commercial outcome. The involvement of an independent professional early on can help the parties rationalise the legal issues, rebuild the trust and the good will necessary to find agreement, assist with risk assessment and support the parties in making good decisions for themselves and their respective organisations. As facilitators, they can chair public meetings or oversee consultation exercises bringing an objective eye and guidance to ensure that issues are addressed and not buried.

4. Co-incidentally, this type of pragmatic and proactive approach reflects the aspirations contained in the Government's Dispute Resolution Commitment, announced by the then Justice Minister, Jonathan Djanogly MP, on 23 June 2011. It included:

- Being proactive in the management of potential disputes and in working to prevent disputes arising or escalating, in order to avoid the need to resort to the use of formal dispute mechanisms wherever possible.
- Using prompt, cost effective and efficient processes for completing negotiations and resolving disputes.

[3] See Local Government Lawyer "Bringing it Home" (July 2018): https://protect-eu.mimecast.com/s/a__uCoQ2wcXZDN9I1rwXg

- Choosing processes appropriate in style and proportionate in costs to the issues that need to be resolved.
- Recognising that the use of appropriate dispute resolution processes can often avoid the high cost in time and resources of going to court.
- Educating employees and officials in appropriate dispute resolution techniques, in order to enable the best possible chance of success when using them

Mediation generally

5. The case for mediation generally is widely accepted. Quoting Lord Neuberger's key note address on 12 May 2015 to the Civil Mediation Council's Annual Conference:

'*First, mediation is quicker, cheaper and less stressful and time-consuming than litigation. Secondly, mediation is more flexible than litigation in terms of potential outcomes. Thirdly, mediation is less likely to be harmful to the long term relationship between the parties. Fourthly, mediation is conducted privately, under less pressure and in somewhat less artificial circumstances than a court hearing. Fifthly, it is far more likely that both parties will emerge as "winners" or at least neither party will emerge as a disgruntled "loser"*

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6. Furthermore, the Courts have regularly commented on its benefits in a variety of disputes. The most recent case examples are set out in Annex A attached.

7. Nevertheless, it has to be recognised that, unlike litigation, where the dispute will always be resolved one way or the other, a mediation may not deliver a settlement on the day. There are many reasons why some mediations do not settle. It is rare for those mediations to be a complete waste of time and money: issues may be narrowed and some resolved or discarded, priorities better understood, options and opportunities identified and even if the result is a heightened determination to litigate then arguably that is a result. For local authorities in particular, this can be of real value when justifying a course of action to cabinet members.

8. Much depends on the type of ADR used; and below are some of the benefits that have been identified by those who have engaged in mediation in particular:

a) It has a different tone and atmosphere to litigation which tends to foster agreement.

b) It is flexible and can be adapted to the particular characteristics of the parties and the dispute.

c) The process is usually by consent, and if not the attendance then certainly the participation and any agreement reached thereby giving the parties greater control over their decisions.

d) The parties can choose the third party to mediate or arbitrate the dispute. This gives them greater confidence in the process.

e) The parties can choose the input from the third party i.e. whether it is helping the parties to formulate their own propositions or when asked to use his/her expertise to offer independent views to the parties.

f) The parties can choose how the mediation is conducted; and it is one of the core skills of the mediator to adjust the process to facilitate the conduct of the negotiations in consultation with the parties and their legal advisers.

g) The negotiations and the outcome can be confidential.

h) It can be cheaper and quicker than litigation. Most mediations only last one day.

i) It can be used to settle all or part of a dispute.

j) It can be used to narrow issues.

k) The outcome can be by way of formal agreement or otherwise as circumstances dictate.

l) . A far wider range of outcomes (e.g. an apology or an explanation) is available, rather than the narrow range of remedies available to the Court.

m) . It can improve and restore relationships between the parties which is particularly important in sectors where there are fewer players or the costs of termination greatly outweigh the quantum in a particular dispute.

Mediation in administrative law

9. As far back as 2001 Lord Woolf LCJ articulated the capability of this field to embrace mediation. In *Cowl v Plymouth City Council [2001] EWCA Civ 1935 @* para. 1 he remarked:

"*The importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible. Particularly in the case of these disputes both sides must by now be acutely conscious of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves time, expense and stress*."

Further, at paragraph 27:

"*This case will have served some purpose if it makes it clear that the lawyers acting on both sides of a dispute of this sort are under a heavy obligation to resort to litigation only if it is really unavoidable. If they cannot resolve the whole of the dispute by the use of the complaints procedure they should resolve the dispute as far as is practicable without involving litigation. At least in this way some of the expense and delay will be avoided."*

10. In the context of this Submission, we initially address the three points that are often cited by practitioners as a reason why mediation is not suitable in the public law context. First, some consider there to be a tension between the constitutional and supervisory role of judicial review on the one hand and the private and confidential nature of mediation on the other. The principle that judicial review is an important constitutional check on the power of government does not, for some, sit easily with the idea that disputes could be settled in a confidential mediation.

11. Indeed, the special status and function of administrative law was recognised in the 2001 Government pledge to use ADR to resolve disputes involving government departments wherever possible[4]. The pledge specifically excluded public law and human rights disputes. The exclusion reflected the then Lord Chancellor Lord Irvine's view that, while ADR has an expanding role within the civil justice system, *'there are serious and searching questions' to be answered about its use and that it was 'naïve' to assert that all disputes are suitable for ADR and mediation'.* Examples cited by Lord Irvine included cases concerning the establishment of legal precedent, administrative law problems, and cases which 'set the rights of the individual against those of the state'. These, he said, must be approached 'with great care'.

12. However, it seems to us that this is more of a theoretical problem than a real one. Save in a very few cases, what a Claimant is trying to achieve in a "public law challenge" is the best outcome for that particular Claimant. There is therefore no principled reason why that outcome should be achieved by way of Judgment rather than a mediated settlement. Seemingly, the fact that the vast majority of judicial review claims settle[5] suggests that having a public airing of the issues is not, for most Claimants, a priority.

13 The second consideration goes to the nature of public law disputes. Whereas in private law disputes, parties are free to reach settlements that are based on their

[4] The ADR Pledge was replaced by the broader Dispute Resolution Commitment (2011).

[5] Information provided by Sophie Byron, University of Birmingham, following a Pilot Study as presented by her to The Hart 10th Annual Hart Publishing Judicial Review Conference (Dec. 2016): 60% of all disputes are settled before issuing proceedings (after Pre-Action Protocol Letter ('PAPL')); 34% of all claims are settled/withdrawn after the Claim is issued; and of the remaining cases 40% were granted permission, and, of these 63.6% settled before a full hearing. Only 46 cases out of a sample of 1000 disputes with a PAPL reached a full hearing

interests rather than legal entitlements, it can be rather different in a judicial review claim. There can be issues to consider such as *vires*, resources and issues of wider public interest that might limit the scope for settlement. It seems to us however that this concern can, in the vast majority of cases, be ameliorated by having a mediator who is familiar with the powers and decision-making processes of the public body in question or with the area of law in dispute and who is able to reality check the proposed settlement with the public body to ensure that it is one that the public body can properly agree. We discuss below the particular issues that arise in this respect in mediating disputes in relation to those who lack capacity.

13. The third consideration is a practical one. The majority of judicial review disputes settle without requiring any sort of intervention from the Court. The nature of the remedies in judicial review is such that public bodies can avoid the challenge simply by agreeing to reconsider and come to a fresh decision. This is often the quickest and cheapest way out of a dispute for a public body. In this context many practitioners consider that mediation has perhaps a limited role to play in public law disputes. We are not so sure that this is the case. In the first instance it seems to us that mediating a dispute early on is likely to lead to substantial cost savings as well as provide greater certainty over likely outcomes. Further, the fact that the mediation may well lead to the public body reconsidering the decision at hand is precisely what may make it an attractive option for Claimants as, in effect, it is all that they can hope to achieve through the judicial review process.

14. We do acknowledge that as a result of regulation 5A of the Civil Legal Aid (Remuneration) Regulations 2013 (which effectively prevents a claimant from obtaining legal aid in judicial review proceedings once issued unless permission is granted) publicly funded Claimants are unlikely to be willing to mediate a dispute between issue and the permission hearing.

Is the dispute suitable for ADR?

15. We acknowledge that not all disputes are suitable for this kind of dispute resolution. Factors to consider include the following:

a) the nature of the dispute or claim

b) whether the claim can be settled by negotiation

c) what outcome the client wants

d) what added value the involvement of a mediator might bring

e) . whether the client wants to be involved in the decision-making process

f.) time considerations – is it urgent?

g). cost considerations – what will it cost to mediate, and how does this compare to the anticipated cost of litigation.

16. Factors that might make a dispute unsuitable for anything other than litigation include:

i) . The nature of the dispute. For example, those requiring the declaratory function of the Court (for example the inherent jurisdiction of the Court) where the court is the means by which the State ensures compliance with the ECHR for example in a DOLS challenge, where issues of child protection or adult protection arise, or where injunctions or other coercive or prohibitive orders are required, perhaps with penal notices and powers of arrest attached.

ii) . Cases which are less suited to mediation (although not necessarily wholly unsuited) would include claims based on alleged *ultra vires* issues, where

iii) . Where ADR may not ultimately resolve the dispute, for example in the planning context where the impact of the decision is sufficiently wide that it may not be possible to engage with all those with an interest in the dispute, or alternatively where the agreement arising from the ADR requires a further consent which itself may give rise to objections from those who were not involved in the ADR process.

iv) . The personalities of those involved in the dispute. There are some litigants who struggle with any decision making or are unable of reaching an agreement with a statutory body with whom they perceive themselves to have been at war or who l renege on agreements; and so a court order along with the ability to enforce that order is required. Attempting ADR may for such cases simply add another layer of cost and more delay into the process. Having said that, there have been some remarkable success in mediating with such people.

17. On the other hand, we suggest that ADR, and in particular mediation should be actively considered where:

(1) . The dispute is complex, involves multiple parties and were it to be litigated would take up significant court time. Active consideration is being given to what, if any, parts of that dispute can be mediated so that the contested issues are reduced.

(2) It is important to conserve the relationship between the parties, so for example where they need to work together in the future.

(3) Negotiations have broken down but where the introduction of an independent neutral third party can help re-start dialogue especially where the parties are in general agreement about the course of action required to resolve a dispute but need help to agree the detail.

(4) . A claim for damages is included in judicial review proceedings. The flexibility of the mediation process enables the parties to take a more needs based view of the dispute.

(5) There is an imbalance between the parties, making negotiation very difficult. We have in mind where one party is not legally represented. The mediator can ensure a more level playing field and that all voices are heard.

Mediation in the Administrative Court?

18. Unfortunately, because of the confidential nature of both ADR and, largely, pre-action and related judicial review correspondence it is difficult to point to any specific examples, bearing out the types of case identified above, other than anecdotally. Furthermore, the study work undertaken by Sophie Byron of University Birmingham in conjunction with Richard Gordon QC of Brick Court Chambers (reflected in the 2016 Hart Judicial Review Conference paper footnoted at [4] above), and from a peer group conference held in October 2016 (attended by John Pugh-Smith and leading members of the various specialist Bar associations and judicial representatives including Lord Carnwath SCJ and Sir Ernest Ryder) it was clear that there had been a surprising uptake and success in the use of ADR across the broad range of specialisms covered by administrative law . Unfortunately, the Birmingham study project had to cease thereafter due to lack of funding and manpower to undertake a detailed study of Administrative Court files.

19. Nonetheless, we provide a worked example as Annex B.

20. We further draw attention to two recent cases and the willingness of judges to advocate the use of mediation in an administrative law context. The first is *R (Archer)v HMRC [2019] EWCA Civ 1021*, details of which are found in Annex A. .

Recommendations

20. Despite the current lack of publicly accessible empirical examples, we suggest that there are a number of areas of administrative law, for example in planning, where ADR is already been used which can be more effectively utilised in either the pure judicial review or parallel statutory challenge contexts[6].

[66] e.g. to experimental traffic regulation orders under the Road Traffic Regulation Act 1984, Sched. 9, Part VI, para. 35 within six weeks

21. We strongly recommend that a more effective "triage system" is adopted by the Administrative Court both as part of Pre-Action Protocol requirements and also at permission stage. This should make it a requirement that the prospective parties should explain what steps have been taken to use ADR, why they have, so far failed, and, whether they could still be utilised[7]. .

22. Furthermore, we suggest that greater use should be made of stays to the proceedings, similar to that now adopted by the Upper Tribunal (Lands Chamber) in Section 16 of its Practice Direction[8] In such a way the parties could then have time for some or more meaningful dialogue with the procedural "time-clock" paused.

[7] For example, where a procedural error could be overcome by a fresh round of, or, more intensive consultation and/or re-presentation to the decision-maker (e.g. to Committee Members)

[8] https://www.judiciary.uk/wp-content/uploads/2010/11/Practice-Directions-UTLands-Chamber-19-Oct-2020_-1.pdf

16.0 Stays of proceedings and alternative dispute resolution ("ADR")

16.1 Parties may apply jointly to the Tribunal at any time for a short delay in the proceedings (referred to as a "stay of proceedings") to allow time for them to reach agreement outside the Tribunal process by negotiation or alternative dispute resolution ("ADR"). No fee is payable for such an application.

16.2 If both parties apply jointly the Tribunal will usually grant a stay of the proceedings for up to two months to allow mediation or another form of ADR to be attempted. During the stay the parties will not be required to take any step in the proceedings other than to engage actively in efforts to reach agreement.

16.3 A second or longer stay may be granted if the parties satisfy the Tribunal that it is justified and has a good chance of leading to a settlement. A fee must be paid for such an application. A second or subsequent stay may only be granted by a Judge or Member.

16.4 The Tribunal will not grant lengthy or repeated stays where there is no evidence of progress being made towards a settlement of the dispute. If final agreement has not been reached after a second stay the Tribunal will usually expect the parties to continue negotiations, including ADR, while preparations are made for the final hearing of the case.

16.5 If a party unreasonably refuses to engage in ADR at the request of another party the Tribunal will take that refusal into consideration when deciding what costs order to make at the end of the proceedings, even when the refusing party is otherwise successful. The Tribunal will not treat every refusal of ADR as unreasonable, for example, where the chances of settlement are reasonably considered to be too low

Conclusion

23. We urge the Review members to highlight to Government the tangible benefits that can be derived from the greater promotion and use of ADR within the current administrative law system. Furthermore, there are simple but effective ways of conveying these benefits within even the current system.

24. We conclude that the encouragement of a less adversarial and more nuanced approach to administrative law disputes can also improve the quality, speed and certainty of decision-making, and, thereby reduce the uncertainties arising from the threat of potential legal challenge with its consequent costs and delays, and, improve relationships, all benefits in the wider public interest.

26th OCTOBER 2020

JH/JPS

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ANNEX A – Recent Case Law Examples

Judicial Encouragement and Facilitation of Mediation

Parties were urged in a number of cases to try mediation to seek to resolve their differences - see ***Ingram v Green Cape Ltd*** [2020] EWHC 821 (QB); ***Re Ethiopian Orthodox Church of London*** [2020] EWHC 1493 (Ch); and ***Preventx v Royal Mail Group*** [2020] EWHC 2276 (Ch). In ***UKIP v Braine,*** [2020] EWHC 1794 (QB) the court ordered a stay for mediation to be tried.

In ***McParland & Ptnrs v Whitehead*** [2020] EWHC 298 (Ch)**,** the court was asked to give detailed guidance on disclosure. In doing so, Sir Geoffrey Vos recommended that mediation be tried as soon as disclosure had been completed.

In ***Daimler v Wallenius*** [2020] EWHC 525 (Comm) the defendants sought a split trial. The court rejected this on the basis that mediation was less likely to succeed if quantum was deferred by ordering a split trial on liability only.

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Right to Life and "Best Interests of Child" Mediations

While it may appear that mediating over whether a child should live or die is pointless, as the family and medical profession will always be at loggerheads over such matters, in ***Great Ormond Street Hospital v X and others*** [2020] EWHC 1958, GOSH sought permission to give only palliative care to a grievously ill child. Mediation was encouraged – even insisted on – by the court.

No overall agreement was reached, but the judge observed that it had improved communications between clinicians and family, and the family did come to accept that there should be no more elective surgery, only palliative surgery. The Court carefully set terms over other future medical treatment. As there were no signs of campaigning or threats to staff, as had occurred in other cases, the judge allowed GOSH to be named as the applicant, while keeping the identities of all medical staff and family members confidential.

In ***Re M (declaration of death of a child)*** [2020] EWCA Civ 164, a NHS Trust obtained a declaration from Lieven J in the Family Division that M was dead (based on demonstrable brain stem death) and that ventilation could be removed, despite opposition by the parents, who sought permission to appeal.

Refusing permission, on the basis that there was no reasonable ground for appealing, in dealing with criticism about the time taken to reach a hearing, the President of the Family Division commented in the Court of Appeal:

In so far as the Trust chose to exhaust options one-by-one before issuing proceedings, including attempts at mediation, they are not to be criticised. However, in future cases, it should not be thought that the mere issue of an application to the court is such a negative step as to compromise other attempts to resolve the matter by way of second opinion, further tests or mediation. Indeed, in a proper case, where an early application is made, as well as adjourning to allow the parents to obtain legal representation, the court itself might direct and facilitate reasonable further testing and may encourage mediation.

Mediation in cases like this remains very important, and was first recognised as such in the case of ***GOSH v Yates and Gard*** [2017] EWHC 1909 (Fam), just to ensure that an independently conducted conversational process makes it possible for those involved to explore all avenues before referring anything unagreed back to a judge for an agonisingly serious decision. Indeed, partial or delayed agreement has emerged following mediation of such cases.

Costs Sanctions for not Mediating

Two significant cases have shown how risky it is to place much reliance on the *Halsey* factors to excuse refusing to mediate, one leading to loss of expected costs by a winning party who refused to mediate, the other leading to indemnity costs against a losing party who refused.

In ***Wales v (1) CBRE and (2) Aviva*** [2020] EWHC 1050 (Comm), the claimant C had managed a pension scheme for CBRE (D1), who changed their platform, rendering C's services superfluous.He sued D1 and Aviva (D2) for commissions either unpaid or wrongly clawed back. His solicitors indicated, both prior to proceedings and subsequently, their willingness to utilise mediation, but D1 declined at the outset, though agreeing to the usual Fontaine direction that ADR should be considered at all times.

In response to this direction, D1's solicitor filed a witness statement saying that it would be premature to convene a mediation before close of pleadings. D2 were prepared to mediate but only if D1 joined in, as they argued that D1 were the claimant's primary target. D1 took no steps about mediation when pleadings did close, but offered a drop hands settlement, "subject to contract", thus not being an offer capable of acceptance by C. C did not pursue this, but after D2 had amended their defence, a mediation was again proposed in the weeks leading up to trial.

D2 again agreed so long as D1 agreed to participate but D1 again declined, now saying that time was too short to prepare.

At trial, C lost against both defendants, but at a separate costs hearing argued that the defendants' failure to mediate deserved costs sanctions.

The judge declined to penalise D2 on this basis, though depriving them of 20% of their costs for much of the case because they had put their case on an initially misleading basis.

But he accepted that D1 should be penalised for unreasonably refusing to mediate, applying the six factors on *Halsey* fully and carefully. He had no problem over four of the factors.

But as to D1's asserted beliefs in the strength of their case and that mediation had no reasonable prospect of success, the judge rejected D1's arguments on both of these. He criticised them for not mediating in response to the relevant pre-action obligation to consider it, and rejected the excuses given by D1's solicitor in her witness statement for her initial and later refusals.

On D1's belief in the strength of their case, HHJ Halliwell found that C had a genuine and not a merely tactically contrived sense of grievance which D1 had themselves fostered by dealing inadequately with C's claims in the first place. On prospects of success for a mediation, the judge had no difficulty or reluctance in finding that mediation might well have succeeded whenever tried. As support for his approach, the judge quoted both *Halsey* and *Dunnett v Railtrack* in showing the value that mediated discussions can bring, often unexpectedly and imaginatively, to the resolution of litigation. The judge imposed different sanctions for different stages of the case, reflecting varying degrees of D1's culpability.

In ***DSN v Blackpool FC*** [1] [2020] EWHC 595 (QB) – the trial judgment; and [2020] EWHC 670 (QB), the claimant C alleged that he had been sexually assaulted by a volunteer coach working for the defendants DD on one occasion during a youth team football tour of New Zealand in 1987 when aged 13.

The perpetrator had earlier been convicted of offences relating to other boys and imprisoned. Limitation expired when C attained 21 in 1995. He only disclosed what had happened in the wake of the Jimmy Savile scandal. He first saw solicitors in 2017 and his claim was issued in January 2018. DD maintained a robust denial throughout the litigation.

They pleaded a limitation defence; required the claimant to prove the facts of his claim; denied vicarious liability for the perpetrator; and challenged both medical causation and quantum. Directions included the "Fontaine" direction requiring ADR to be considered at all times. DD's solicitor filed a witness statement explaining that because of the strength of their case, no purpose would be served by ADR. C made three Part 36 offers: £50,000 in March 2018, £20,000 in February 2019 and £10,000 in December 2019.

The first two were ignored by DD, and they rejected the last one. The trial lasted five days, and Griffiths J found for C in every respect and awarded him just under £19,000 damages. As C had beaten the last Part 36 offer, the judge found little difficulty in awarding indemnity costs to C from late December to the end of trial, but he was scathing about the way DD had behaved, and he awarded indemnity costs against them from one month after the Fontaine direction was made to the end of the case. Paragraphs 27 to 32 of his judgment repay reading.

The decision in ***BXB v Barry Congregation of Jehovah's Witnesses*** [2020] EWEHC 656 (QB) followed a similar path. The claimant C sued DD for a rape allegedly committed by an Elder in DD and succeeded at trial. She was awarded more than her Part 36 offer to settle, but

sought indemnity costs for her whole claim on the basis that DD had refused to mediate or to enter settlement discussions.

Again a Fontaine Order was made, but DD did not file a witness statement excusing their decision. Chamberlain J awarded indemnity costs from the date when DD conveyed an unreasoned refusal to enter negotiations.

In ***DBE v Biogas*** [2020] EWHC 1285 (TCC), C was found to have substantially won, but D secured a 10% reduction in the standard basis costs payable by D because C declined to mediate. C also claimed the costs of complying with the Pre-Action Protocol and of a "failed" pre-issue mediation. The judge found that C had not complied with the protocol and as there was no waiver of privilege as to what happened at the mediation, and no information as to what happened, the judge made no order as to either.

Even late participation in a mediation did not rescue the defendant DD from an indemnity costs order in ***Rihan v Ernst & Young*** [2020] EWHC 1380 (QB), when DD continued to cast unjustified attacking aspersions at C during the later trial.

Judicial Review examples

The case of ***R (Shirley Archer) v HMRC*** [2019] EWCA Civ 1021 involved a claim by Mrs Archer to recover the costs of her judicial review proceedings concerning an accelerated payment notice or "APN" issued to her by HMRC in 2014. concerning an accelerated payment notice or "APN" issued to her by HMRC in 2014. The APN required the payment of £6,116,598.95 tax in respect of a tax scheme she had deployed in order to avoid tax on a capital gain of £15.3m in the 2005/06 tax year. Under the APN regime, there is no right to apply to HMRC or to the tax tribunal to postpone payment of the tax demanded. However, section 222 of Finance Act 2014 allows the taxpayer to make representations to HMRC objecting to the APN and/or the amount demanded if the taxpayer believes that the statutory conditions for issuing the APN were not met or the amount shown in the notice is incorrect. Mrs Archer's APN was issued on 4 November 2014 and the 90 days for payment of the tax ended on 5 February, 2015. Yet less than four weeks after the issue of the APN, the legal services department of KPMG wrote to HMRC on 28 November, 2014 stating that they would be applying for a judicial review and that they would be sending a copy of the sealed claim form when it had been issued by the Administrative Court. In fact, the claim form was issued on the same day although not served on HMRC until 2 December, 2014. KPMG then made representations under section 222 of Finance Act 2014 but not until two weeks after service of the judicial review claim form.

On 22 December, 2014, HMRC withdrew the APN, but in their defence against the judicial review, said that (1) KPMG's letter had failed to comply with the pre-action protocol for judicial review and in any event was written on the date the claim form was issued; and (2) the claim was premature because Mrs Archer. It was argued on behalf of Mrs Archer that HMRC should pay the whole cost of the judicial review because Mrs Archer had been fully

successful in her claim. Total costs were put at £601,552.20, including that of Mrs Archer's husband who had faced a similar APN. This level of costs was described by the judge hearing the original costs application as extra-ordinary, particularly as there had been no detailed preparations at that stage for a trial.

The Court of Appeal dismissed the claim for costs. Henderson LJ held that Parliament must have intended taxpayers to take advantage of section 222 before having resort to judicial review. Judicial review is a remedy of last resort and the facility to make representations to HMRC under section 222 provides a relatively cheap and simple way for a taxpayer to challenge an APN without resorting to the Administrative Court.

A further ground to refuse costs was held to have been the litigation conduct of Mrs Archer's advisers. No serious attempt was made by KPMG to comply with the pre-action protocol for judicial review. Indeed, HMRC were presented with a *fait accompli* on 24 November, 2014 instead of being given time to respond. Far from using judicial review as a last resort, KPMG had employed it as the first line of attack and the very substantial costs of preparing the proceedings had already been incurred.

The recent decision of Sir Ross Cranston, Sitting as a Deputy High Court Judge, in **R (Janice Hemms) v Bath and North East Somerset Council & Chubb** [2020] EWHC 2721 (Admin) is also illustrative of the concern of the Administrative Court that pre-issue negotiation has not been attempted. Here, the judicial review was against the Council's decisions, for the icon time, not to issue a planning revocation notice under section 102 of the Town and Country Planning Act 1990 against stock fencing within an AONB, erected by Ms Chubb, as they did not consider it expedient. By way of postscript, the Judge (a former Head of the Administrative Court, and, it is understood prime mover behind its initial Judicial Review Guide in July 2016 (https://www.gov.uk/government/publications/administrative-court-judicial-review-guide), remarked @ para. 58 as follows:

In addressing the court, the interested party, Miss Chubb, stated that if the claimant had approached her at the time of the alterations to her property, the situation could have been resolved. For the claimant Ms Dehon replied that it was not through lack of trying on the claimant's part that matters had escalated and has added that the claimant had made a number of attempts to mediate. Miss Chubb has written to the court to dispute aspects of Ms Dehon's claims. It is not for me to establish the facts, to attribute blame, or to suggest a resolution. However, I understand from what Ms Chubb told me that she is now willing to negotiate to resolve matters between the claimant and herself. Given Ms Chubb has given this indication in open court I very much hope she will follow through with a suggestion to the claimant as to how matters can be resolved. That would be to the public benefit, not just to the benefit of these two parties."

ANNEX B – Worked Example

The claimant, Sir Marcus Setchell, (a retired senior clinician representing a heritage preservation action group) issued urgent judicial review proceedings in late summer 2014. They challenged, on several inchoate grounds, the decision of the City of London Corporation to grant planning permission for a Maggies Cancer Care Centre to be constructed next to the Grade I Barts Great Hall to complement the Hospital's palliative care facilities. The High Court, as part of the paper permission exercise, granted an initial stay at the request of the Corporation, later renewed, to enable a formal four party mediation to take place .JPS was appointed as mediator. Over the course of five weeks, he engaged both plenary and individual sessions with the parties, their architects, planners and solicitors as a result of which consent terms were agreed including a press statement, in early December 2014, by which the new building and the heritage resource could be better integrated and managed.

See press coverage still available:

https://www.homesandproperty.co.uk/property-news/band-of-friends-vow-to-save-historic-wing-of-st-bartholomew-s-hospital-33413.html

https://www.architectsjournal.co.uk/news/hopkins-maggies-centre-should-be-located-elsewhere

https://www.architectsjournal.co.uk/news/row-over-holls-st-barts-maggies-gets-personal