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Mediation – An alternative to Detailed Assessment?

The use of ADR is generally on the increase and in conjunction with that, an increase in Courts imposing costs sanctions for the refusal to engage in ADR.

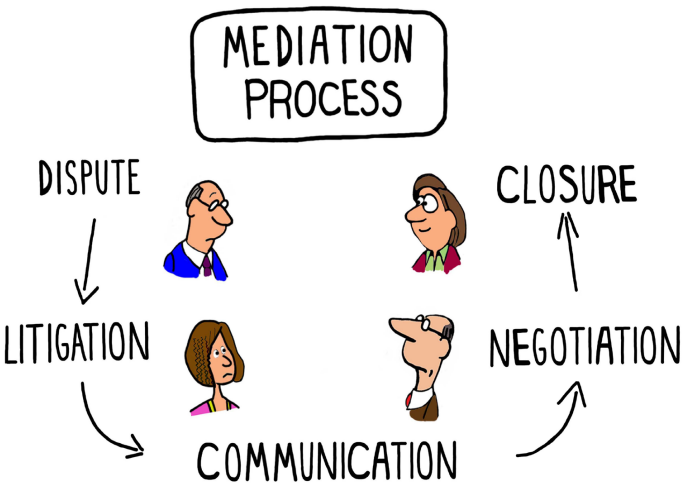
Despite there being no specific statutory obligation for parties to engage in ADR, various Court decisions alongside the CPR overriding objective have reshaped the approach in recent years.

As well as guidance provided at Paragraph 11.56 of the Jackson ADR Handbook, guidelines were provided in the case of *Halsey -v- Milton Keynes General NHS Trust [2004] EWCA Civ 576* giving principles for suitability of cases for ADR and factors to determine whether a refusal to mediate was unreasonable or not.

ADR is now also becoming a recognised alternative to Detailed Assessment, and the Senior Courts Costs Office has produced three judgments in the past twelve months where sanctions have been imposed for unreasonable refusals to mediate.

In *Reid -v- Buckinghamshire Healthcare NHS Trust [2015] EWHC B21 (Costs)* the matter was listed for Detailed Assessment. The Claimant invited the Defendant to mediate. The invitation was ignored for 6 weeks, and thereafter refused. The Claimant had made two Part 36 offers and both were rejected by the Defendant. The matter proceeded to assessment and the Claimant beat its own Part 36 offer, securing a 10% penalty from the Defendant. In addition, Master O'Hare determined that there had been an unreasonable refusal to mediate, ordering the Defendant to pay the Claimant's costs on the indemnity basis from the date of receipt of the invitation to mediate.

In the case of *Bristow -v- The Princess Alexander Hospital NHS Trust and others [2015] EWHC B22 (Costs)* again the matter was set down for assessment. The Claimant invited the Defendant to mediate and the Defendant failed to respond for three months, and then refused on the basis that the matter was already set down and the parties were too far apart in their offers.



At Detailed Assessment the Claimant won and was awarded 80% of the costs. The Court found that the Defendant had unreasonably refused to mediate, ordering the Defendant to pay the Claimant's costs on the indemnity basis.

Finally, in the most recent case of *Various Claimants -v- MGN Limited (04/10/16, as yet unreported)* the Defendant offered mediation. The Claimant responded stating that mediation was unlikely to be successful and therefore it was not prepared to stay the assessment. The Claimant continued however, stating they would engage in a considered and genuine ADR process and suggested engaging a former senior costs judge to mediate. The Claimant also sought confirmation from the Defendant that they would pay the entire costs of the process. The Defendant did not respond, despite chasing correspondence from the Claimant. The Court determined that the silence of the Defendant was a blanket refusal to engage in the process and it had therefore behaved unreasonably. The Court awarded costs to the Claimant on the indemnity basis.

These cases serve to illustrate that when it comes to resolving the costs of litigation, all parties should be mindful of putting forward, and indeed responding to, an invitation to engage in ADR at the appropriate time bearing in mind that sanctions can be applied.

Of course as well as potential costs penalties, ADR can also significantly reduce the time period that is lost waiting for a determination on Detailed Assessment. So, if you have reached a stalemate in your costs negotiations with your opponent, perhaps it's time for ADR?

Interim costs payments – Some fresh perspective on timing

There are two mechanisms by which a receiving party can secure an interim costs payment, under CPR 44.2 (8) and CPR 47.16 (1).

CPR 44.2 (8) reads *"Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so"*

CPR 47.16 (1) reads *"The court may at any time after the receiving party has filed a request for a detailed assessment hearing – (a) issue an interim costs certificate for such sum as it considers appropriate"*

There are key differences between these two provisions, not only in relation to the stage at which they can be used but also in relation to the nature of the orders they can produce.

An application under Rule 44.2 (8) is an application for a payment on account of costs. This rule enables the Court to make an order in advance of the costs assessment process without necessarily scrutinising the receiving party's costs to a great extent. It does not state clearly the stage at which such an order can be made.

An application under Rule 44.16 (1) is an application for an Interim Costs Certificate. This Rule makes it clear that such an order can only be made once the receiving party has filed a request for Detailed Assessment. At that stage, the Court will be in possession of the receiving party's Bill and the parties' points of dispute/response, so there can be no argument that the Court is ill placed to decide whether the sum sought on account of costs is reasonable.

Can the Court order a payment under Rule 44.2 (8) after it has made a costs order?

The main question over timing of an application therefore surrounds Rule 44.2 (8). Can the Court order a payment on account under this rule after it has made an order for costs? This is an issue that has been crying out for judicial guidance for some time.

Prior to April 2013, the then Rule 44.3 (8) stated that where a Court had ordered a party to pay costs, it may order an amount to be paid on account of costs. The new Rule 44.2 (8) states that the Court will order a sum to be paid on account unless there is good reason not to do so (author's emphasis). This represents a significant change, by introducing a clear presumption that a sum should ordinarily be paid on account of costs to the successful litigant and shifting the burden to the losing party to justify why such an order should not be made.

It can of course take many months before a request for Detailed Assessment is filed at Court, and sometimes several more months for a hearing to be listed. In light of the change to CPR 44.2(8) are the Courts now more likely to order a payment on account of costs between the making of the costs order and the stage at which the bill is set down for Detailed Assessment?

A recent case provides some fresh perspective on this topic.

In *Ashman -v- Thomas [2016] EWCH 1810 (Ch)*, Chancery Master Matthews had given judgment on preliminary issues and awarded costs to the Defendant. Following the hearing, when seeking to agree the terms of the order the Defendant sought to include a term for a payment on account of costs, which the Claimant objected to. The Claimant's argument was that a payment on account could only be sought at the time the costs order was made or, alternatively, by way of an Interim Costs Certificate under CPR 44.16 (1).

Consequently, the matter was referred back to Master Matthews, who said:

> *"The substantial point, as it seems to me, is whether a request for a payment on account can only be made at the hearing itself. If so, then, once the parties come to draw up the order for the Court's approval, it is too late to argue for its inclusion."*
>
> *"The general rule is that an order takes effect from the moment it is made by the Court, not when it is entered and sealed by the Court office....but the Court retains power to alter its judgment or order at any time until it is entered and perfected by sealing..."*
>
> *"There is nothing in the rules, nor any case of which I am aware of, to alter the general rule in the context of payments on account of costs. Indeed, the mandatory terms of CPR Rule 44.2(8) (subject to the existence of a 'good reason') mean that there is even more reason to exercise the power when the matter is drawn to the Court's attention than there might otherwise be."*
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> *"Accordingly, I conclude that there is no objection in principle to considering the Defendant's request for a payment on account of costs, and indeed good reason to do so, when this is sought after the hearing but before the order is sealed. I shall therefore do so."* (Author's emphasis)

Based on this reasoning, the Judge awarded the Defendant a payment on account of £17,500 against the costs claimed of £48,647.70.

Whilst this judgment gives clear guidance on a situation where a payment on account is sought after a trial but before the order has been sealed, it does not deal directly with the outstanding question of whether a payment can be sought under Rule 44.2 (8) after that point. However, paying parties seeking to delay payment may take some comfort from the decision and use it to argue that the Judge's reasoning was based on an assumption that the rule can only be applied at the time a costs order is made or sealed, and not after.

What about Part 8 Costs Orders?

In cases which settle without proceedings and where costs cannot be agreed, the receiving party has to secure a costs order using the Part 8 costs only procedure governed by CPR 46.14. Does this afford them the opportunity to include provision for a payment on account under Rule 44.2 (8)?

In the case of ***Travers v Poole Hospital NHS Foundation Trust, Liverpool County Court, DJ Baldwin, 06/06/16*****,** the Claimant sought guidance on the application of rule 44.2 (8).

The Claimant had brought a clinical negligence claim which was settled for the sum of £1,500 plus costs to be assessed if not agreed. The Claimant served an informal bill of costs on the Defendant in the sum of £14,163.60. The parties could not agree costs and the Claimant applied to the Court for a costs order under the Part 8 costs-only procedure, whilst at the same time seeking provision in the order for a payment on account of £7,780.00 under Rule 44.2 (8).

The Defendant disputed this provision and the Claimant applied to the Court for a hearing (although the Judge later stated he considered that the application under the Part 8 costs-only procedure was sufficient to determine the issue and a separate application was not necessary).

At the hearing, the Defendant argued against an interim payment on a number of grounds including (1) that Rule 44.2(8) was intended for the situation where costs were being dealt with at the end of trial, (2) that the Court's power to make a costs order under the Part 8 costs-only procedure did not extend to include provision for a payment on account, and (3) there was insufficient information available to the Court at that stage to determine a reasonable amount to be paid.

The District Judge rejected those arguments and accepted the Claimant's position that there is a positive obligation for the Court to consider making an order for a payment on account unless there is good reason not to do so and that this includes the situation where a costs order is sought under the Part 8 costs-only procedure. He concluded that on a proper reading of Rule 46.14 in the context of the 2013 change to Rule 44.2 (8) the Court is, when exercising that power, making an order for costs of the type envisaged by Rule 44.2 (8). He was also satisfied that the Part 8 Claim Form, as supported by a Statement of Truth, was sufficient quantification of the sum sought, such that the burden then shifted to the Defendant to demonstrate unreasonableness. He therefore included provision in the Part 8 order for a payment on account and because the Defendant had failed to demonstrate unreasonableness this was made in the sum sought of £7,780.00.

This decision was delivered in written form by a well known Regional Costs Judge and could therefore be regarded as having some persuasive influence in the costs realm. However, it is important to highlight that this is a first instance decision without binding effect. It does however provide an interesting perspective on how some Courts may be prepared to interpret Rule 44.2(8) very strictly in favour of receiving parties, even with limited knowledge of the costs issues involved.

Courts may be persuaded to take into account other factors such as conduct and whether there have been any previous payments on account. However, the shifting of burden onto the paying party to show good reason why a payment should not be made has undoubtedly improved the likelihood of payments on account being ordered.

But, in the absence of a binding judicial authority on the wider question of timing arguments over this issue will no doubt continue.