FRESH CARROT, BIGGER STICK: Forthcoming rule changes and the 'encouragement' of NCDR

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1. Family Procedure Rules 2010, Part 3, has historically been underused. This is strange given that r.1.4 provides that the court *'must further the overriding objective by actively managing cases'* and r.1.4(2)(f) states that active case management includes *'encouraging the parties to use a non-court dispute resolution'*, or 'NCDR', *'procedure if the court considers that appropriate and facilitating the use of such procedure.'*

2. Perhaps because of this, the Family Procedure (Amendment No. 2) Rules 2023 (SI 2023/1324) – which were laid before Parliament on 7 December 2023 and will come into force partly on 8 April 2024 and partly on 29 April 2024 - provide for a major overhaul of Part 3 and a significant amendment to Part 28.

3. A new r.3.3(1A) will allow the court to require parties to file and serve *'a form setting out their views on using non-court dispute resolution as a means of resolving matters raised in the proceedings'*.

4. In this context, the definition of NCDR at r.2.3(1)(b) has now been widened to mean *'methods of resolving a dispute other than through the court process, including but not limited to mediation, arbitration, evaluation by a neutral third party (such as a private Financial Dispute Resolution process) and collaborative law'*.

5. The making of an order under r.3.3(1A) will be closely akin to the making of an *Ungley* order (so-called because it was first devised by Master Ungley to encourage the use of NCDR in clinical negligence cases), by which a court may require a party to file a statement to similar effect and thereafter make an adverse costs order if there have been no reasonable invitations made to engage in NCDR, or if such invitations have either been ignored or unreasonably refused. The only substantive difference is that whereas the statement filed pursuant to an *Ungley* order is 'without prejudice save as to costs', one filed pursuant to this rule will be open, meaning that the court will be aware at all stages of the case of the parties' positions regarding NCDR.

6. An *Ungley* order was made in ***Mann v Mann*** **[2014] 2 FLR 928**, by Mostyn J, who also noted that what was then r.3.3(1)(b), but later became r.3.4(1)(b), permitted the court to adjourn for NCDR only *'where the parties agree'* and called for consideration to be given by the Family Procedure Rule Committee to the removal of that proviso.

7. From 29 April 2024, that provision will be deleted and an amended r.3.4(1A) will provide that where *'the timetabling of proceedings allows sufficient time for these steps to be taken'*, the court may adjourn proceedings to *'encourage parties'* to *'undertake non-court dispute resolution.'* The agreement of the parties will therefore no longer be required.
8. Most importantly, in financial remedies cases, this power to *'encourage'* will be backed with an amended r.28.3(7), which will expressly make a failure, without good reason, to engage in NCDR a reason to consider departing from the general starting point that there should be no order as to costs.

9. Given other recent rule changes, and the more robust approach to the making of costs orders encouraged in cases such as ***OG v AG*** **[2020] EWFC 52**, this may well create conditions in which many parties will have to ask themselves whether they can really afford not to participate in appropriate NCDR.

10. Taken together, the new provisions go close to, but do not quite amount to, the mandation of NCDR, which was the subject of a separate Ministry of Justice consultation, the outcome of which is not yet determined.

11. Of course, very recently, on 29 November 2023, the Court of Appeal handed down judgment in ***Churchill v Merthyr Tydfil CBC*** **[2023] EWCA 1416 (*'Churchill'*)** in which case the court declined to follow its earlier decision in ***Halsey v Milton Keynes General NHS Trust*** **[2004] EWCA Civ 576** and held that, in civil proceedings, the courts do have the power to compel parties to participate in NCDR.

12. Having reviewed international and domestic cases on the constitutional right of access to the court, Sir Geoffrey Vos MR concluded in ***Churchill*** that the power does exist to stay proceedings for, or order the parties to participate in, NCDR.

13. That power must be exercised in such a way that does not impair a claimant's Article 6 right to proceed to a judicial hearing, and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost.

14. If applied to family proceedings, that element of the court's reasoning might be considered to pose an interesting question as to whether arbitration under the IFLA scheme is among the forms of NCDR which the court can *'encourage'*, almost to the point of mandation (arbitration being specifically referred to in the amended definition of NCDR). This may turn on whether the court's residual discretion, to decline to uphold an arbitral award which is subject to a successful challenge, tantamount to an appeal, provides sufficient access to a full judicial hearing.

15. Sir Geoffrey Vos MR declined to lay down fixed principles as to what will be relevant in determining the question of any stay of proceedings or an order that the parties engage in NCDR, although he set out in paragraphs [61] to [63] of his judgment some factors that may be relevant.

16. The decision in ***Churchill*** was not unexpected. The Court of Appeal had previously held that, pursuant to Civil Procedure Rules 1998, r.3.1(2)(m), the consent of the parties was not necessary for a case to be referred to Early Neutral Evaluation (***Lomax v Lomax* [2019] EWCA Civ 1467** on appeal from ***Lomax v Lomax (Referral to Early Neutral Evaluation)* [2020] 1 FLR 30**) and in *Compulsory ADR* (a report of the Civil Justice Council published in June 2021) it was said that any form of compulsory NCDR which is *'not disproportionately onerous and does not foreclose the parties' effective access to the court'* is lawful.

17. Time will tell whether the forthcoming amendments to the Family Procedure Rules 2010 will herald a change in culture and interest in NCDR, as PD28A, paragraph 4.4, and recent case law have incentivised cultural change with regard to the making of open offers.

18. Likewise it will be interesting to see if the Family Procedure Rule Committee, emboldened by ***Churchill***, now chose to go further and permit the court to require parties to engage in NCDR, with or without awaiting the outcome of the Ministry of Justice consultation before deciding whether or not to do so.

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ST IVES CHAMBERS

Law is correct as at 15 December 2023