Joint submission by the CMC, CEDR and Ciarb to the CPRC consultation on amendments to the CPR

Having submitted a joint intervention to the Court of Appeal in *Churchill v Merthyr Tydfil CBC,* the CMC, CEDR and Ciarb are pleased to submit this joint response to the CPRC consultation on the proposed amendments to the CPR consequent on the *Churchill* decision.

In addition, an annex is attached. This highlights some areas for further discussion and change, which we recognise go beyond the scope of this consultation.

The CMC is a registered charity which was established 20 years ago under the Chairmanship on Sir Brian Neill. It is the recognised authority in England and Wales for all matters related to civil, commercial, workplace and other non-family mediation and is the first point of contact for the Government, the judiciary, the legal profession and industry on mediation issues. The largest mediation providers, including CEDR, Ciarb and the Royal Institution of Chartered Surveyors ('RICS') are all members of the CMC. Although there is no statutory regulation of mediators, all mediators and providers registered with the CMC are required to abide by a Code of Conduct, which makes appropriate provision for training, insurance, and accountability through a formal complaints procedure.

CEDR is also a registered charity which has, for more than 30 years, provided mediation and alternative dispute resolution services on a not-for-profit basis. It is a body widely regarded as setting appropriately high standards in this field as is acknowledged in the Civil Justice Council's Report on Compulsory ADR dated July 2021. It has also, for more than 20 years, produced a biannual audit, which is the most comprehensive survey of the Commercial Mediation Marketplace in the United Kingdom.

Ciarb established in 1915, is a Royal Chartered body and registered charity which object is to "promote and facilitate worldwide the determination of disputes by all forms of private dispute resolution other than resolution by the court (collectively called "private dispute resolution")" It does this in 150 jurisdictions across the world, with 44 branches, 18,000 members, including nearly 5,000 trained mediators, more that 1,100 of whom practice principally in England and Wales. Ciarb sets global standards in ADR, as it requires all members, whether mediators, arbitrators or adjudicators to comply with Ciarb's Code of Conduct.

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Section 1 A summary of our views on the proposed amendments

We welcome the integration of 'ADR' into the Civil Procedure Rules following the Court of Appeal's decision in *Churchill.* The proposed changes will give both the courts and court users the confidence that 'ADR' can and should be used alongside the court-based system. These amendments will mean that:

(1) judges across England and Wales recognise their inherent and legitimate powers and responsibilities to order parties to engage in ADR;
(2) parties and representatives will be required to engage proactively with ADR processes; and
(3) parties and representatives who fail to participate in ADR can expect to receive adverse costs orders.

The proposed amendments exactly reflect the effect of *Churchill,* which decided that the court has the power to order parties to use ADR, or to order a stay for this purpose. It is right that the court's management powers be clarified, and the suggested amendments do just this. Brief comments are provided in relation to each of the areas of consultation in the following sections 2. Section 3 provides some brief ancillary comments related to the proposed Rule changes which we believe the CPRC may find helpful.

Both the Court of Appeal in *Churchill* and the Ministry of Justice are clear that non-court-based dispute resolution processes are no longer to be seen as "alternative" and are to be integrated into the dispute resolution system. Although for expediency we agree that the term Alternative Dispute Resolution ('ADR') is to be used in the currently proposed CPR amendments, we would welcome future discussion on a replacement of the acronym "Alternative Dispute Resolution 'ADR', and would be fully committed to contributing to such a debate. However, given the complexity of this issue and the international recognition of the term ADR, we recognise that this discussion is clearly beyond the scope of this consultation.

Section 2 Detailed comments on the proposed Rule changes

CPR 1.1

"using and promoting ADR"

The word "using" is presumably to remind everyone that CPR 1.3 emphasises that parties themselves along with their representatives "are required to help the court to further the overriding objective".

The word "promoting" will serve as a reminder to the judiciary and parties' legal representatives that they should offer parties other forms of dispute resolution alongside the court-based system.

This is a logical reflection of the new culture which sees ADR integrated into the fabric of the civil justice system. As all three organisations have long supported integration, it is gratifying to the mediation community to see this proposal, and we would like to express our whole-hearted support.

CPR 1.4 (cf also CPR 28.7(1)(d), 28.14((1)(f) and 29.2(1A))

"encouraging or ordering the parties to use an ADR procedure"

In the light of *Churchill*, the court's case management duty should now include encouraging, or ordering, parties to use ADR. The amendments to CPR 1.4, 28.7, 28.14(1)(f) and 29.2(1A) are therefore welcome and clearly correct. It is again gratifying and welcome to CEDR, CMC and Ciarb to see ADR being woven into the fabric of the rules.

Is there significance in the word order in 1.4, as the amendments to CPR 28 and 29 are reversed to read "to order or encourage"? If not, for the sake of consistency we would advocate "to order or encourage" throughout.

CPR 3.1(2)(o)

… "order the parties to participate in alternative dispute resolution"

The CMC, CEDR and Ciarb see the addition of CPR 3.1(o) as a vital amendment. With this proposed amendment, judges in England and Wales will now be in no doubt that they have the powers to order parties to engage in 'ADR'. As this consultation states in its pre-amble, Vos MR's judgment in *Churchill* clearly defined judicial powers in this regard, namely that the courts can:

> *'lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process provided that the order made does not impair the very essence of the claimant's 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.'*

CPR 44.2(5)(e)

…"whether a party failed to comply with an order for 'ADR', or unreasonably failed to participate in 'ADR' proposed by another party."

The proposed amendment to CPR 44 is welcomed both in the light of this specific extension of the definition of "conduct" and in combination with the proposal of adding "using and promoting alternative dispute resolution" to the overriding objective in CPR 1. These changes reaffirm and further embed the responsibility and expectation of all parties to comply with the overriding objective through participation in active case management and ADR.

For completeness we therefore suggest it might be wise to add the words: *…"whether a party failed to comply with an order for 'ADR', or unreasonably failed to* ***[agree to]***[1] *participate in 'ADR' proposed by another party,* ***or as encouraged to do so by the court****"*

The changes also reaffirm the right and duty of judges to be active and directive (when necessary) if parties do not comply with these expectations and directions. Judicial powers to deal with costs issues early in the life of a claim by sanctioning unreasonable refusal to mediate already exist in the CPR and require no amendment. Judges perhaps need a reminder to exercise these powers in the light of the culture change effected by the proposed amendments.

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[1] See below under the heading "Unreasonable refusal and mediation confidentiality" for the explanation for this insertion.

Consistent with the principles of active case management and early resolution, judges should take a view on the (un)reasonableness of the failure to engage in ADR *at the time the decision is made* or *as soon thereafter as possible*. The post-hoc approach of waiting until the conclusion of the trial (if there is one) flies in the face of the requirements of the overriding objective.

Various judgments of recent times have reflected this post-hoc approach, its resulting difficulties and issues of personal preference having led to the rejection of costs sanctions. The case of *Gore v Naheed* is a good example:

> *Speaking for myself, I have some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated. But, as Briggs LJ makes clear in his judgment* [in *PGF v OFMS*]*, a failure to engage, even if unreasonable, does not automatically result in a costs penalty. It is simply a factor to be taken into account by the judge when exercising his costs discretion.*

Several recent cases[2] have applied the *Gore v Naheed* dictum about the failure to mediate being only one of "a number of factors for consideration" post-hoc, as a result of which failure to mediate has not been sanctioned.

Unreasonable refusal and mediation confidentiality

It is, however, also suggested by us that "unreasonably failed to participate in ADR" should never be interpreted as permitting judges to allow themselves - either of their own motion or on the application of one party when opposed by another party - to enquire into whether any party's participation in the mediation once started was whole-hearted, appropriate, or otherwise open to criticism, so long as such conduct falls short of "unambiguous impropriety".

A party should never be open to judicial criticism for declining to make an offer, or deciding not to settle during a mediation. For this to be permitted would offend the principle that settlement and indeed the making of an offer of settlement

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[2] See *Richards v Speechly Bircham* [2022] EWHC 1512 (Comm); *Philip Warren & Co v Lidl* [2012] EWHC 2372 (Ch); and *Moon v Deane* [2022] EWHC 2659 (Ch)

is never compulsory, and itself would amount to a potential breach of ECHR Article 6. For this reason we have respectfully suggested that the addition of the words 'to agree' to participate would make this absolutely clear.

Section 3 Correction of other Existing Anomalies

In preparing this response we have found two other anomalies which lie within the purview of the CPRC which we draw to your attention for completeness.

Section 8 of the Pre-action Protocol for Commercial Dilapidations

This still reads:

> *It is expressly recognised that no party can or should be forced to mediate or enter into any form of alternative dispute resolution.*

This rubric has been removed from all other PAPs and in the light of *Churchill* is plainly wrong and needs to be deleted.

Paragraph 4.10 of the Practice Direction to CPR 29

(one of the Rules currently under review) deals with the situation in multi-track cases where (rarely) the court is to give directions on its own initiative without holding a case management conference and it is not aware of any steps taken by the parties other than the exchange of statements of case. This then sets out several considerations, sub-paragraph (9) of which relates to 'ADR' and reads as follows:

> *(9) in such cases as the court thinks appropriate, the court may give directions requiring the parties to consider ADR. Such directions may be, for example, in the following terms:*
>
> *The parties shall by [date] consider whether the case is capable of resolution by ADR. If any party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the trial, should the judge consider that such means of resolution were appropriate, when he is considering the appropriate costs order to make.*

> *The party considering the case unsuitable for ADR shall, not less than 28 days before the commencement of the trial, file with the court a witness statement without prejudice save as to costs, giving reasons upon which they rely for saying that the case was unsuitable.*

This reproduces the outdated so-called "Ungley Order", which was replaced long ago by the so-called "Fontaine Order", now in general use in the King's Bench and Chancery Divisions and the County Court. The main differences are to impose a duty to consider 'ADR' at all times', and not just by a given date; and to require an excusing witness statement at the time of refusal and not 28 days before trial[3].

Whether this provision should now be deleted altogether in the light of the other proposed amendments to the CPR, or amended in some other way we leave to the CPRC.

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[3] The significance of this change was recently noted in the Court of Appeal decision of *Northamber v Genee World*

Annex to the CMC, CEDR and Ciarb Submission to the CPRC consultation on amendments to the CPR

The Ciarb, CEDR, and the CMC draw the CPRCs attention to the following considerations, which are highly relevant to the broader picture of integrated 'ADR' but which are perhaps outside of the defined scope of the current consultation.

Section A "Alternative Dispute Resolution" ("ADR") in the amended rules

The approach to terminology and the scope of which processes the courts should consider ordering parties to use is the one controversial and difficult area in this debate.

i. The meaning and scope of 'ADR'

We start by noting that the glossary to the CPR deals with 'ADR' as follows:

> *Alternative dispute resolution*
> *Collective description of methods of resolving disputes otherwise than through the normal trial process.*

As Vos MR[4] reminds both us and Lord Dyson, who said in *Halsey* that 'ADR' was "defined" in the Glossary, the rubric to the CPR Glossary cautions that:

> *This glossary is a guide to the meaning of certain legal expressions as used in these Rules, but it does not give the expressions any meaning in the Rules which they do not otherwise have in the law.*

It is not therefore a legally binding definition of 'ADR' but merely a guide to its meaning. What as it stands does 'ADR' encompass? On the face of it, it includes any and every type of dispute resolution process usually associated with settling litigation excluding "the normal trial process". However, it is not clear whether "the normal trial process" includes, or excludes, settlement steps *included* in the CPR, such as Part 36 offers.

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[4] in para 12 of the *Churchill* judgment

We see this range of processes as being classifiable as follows:

1. Exclusively bilateral processes, such as direct negotiations between disputants or their lawyers, and round table meetings
2. Internal complaints processes, such as that discussed in *Churchill*, set up by and controlled by of one of the disputants (e.g. a large corporation, service provider, local/national government department or agency). These are also often purely bilateral, with no neutral management, usually conducted pre-issue, very often without legal representation.
3. Independently run ombuds-services (and some external complaints schemes), such as the financial and local authority ombudsman services. They have a neutral element, variety in their exact processes and jurisdiction, are often conducted at arms-length, combine facilitative and adjudicative elements, and the decision is often binding for at least one party. In many cases the ombudsman services will cease to have jurisdiction if legal proceedings are started by the party on whom the outcome is not binding. In addition, such decisions can (and are) appealed to a court via judicial review.
4. Adjudicative processes where a neutral decision-maker renders a binding decision, including arbitration, construction dispute adjudication, government and private financial compensations schemes, and certain forms of expert determination.
5. Adjudicative processes where a neutral decision-maker renders a non-binding advisory decision (e.g. neutral evaluation; certain forms of expert determination and conciliation) where parties are free to enter or continue court litigation without adverse consequences.
6. Non-adjudicative processes where the neutral facilitates the process including potential settlement but does not render an advisory 'decision', and from which parties are free to enter or continue court litigation without adverse consequences.
7. Court integral procedure, such as CPR Part 36 offers and discontinuance.

Using the general concept of 'ADR' in the proposed amendments to the CPR reflects the reluctance expressed by the Court of Appeal in *Churchill* to lay down precise guidance as to what processes the court might stay proceedings to accommodate or specifically to order.

On this point Vos MR made the following comments in the unanimous *Churchill* judgment:

60….As a matter of legal principle, in my judgment, the court can properly regulate its own procedure so as to stay proceedings or order the parties to proceedings to engage in any non-court-based dispute resolution process. I have no doubt, however, that the characteristics of the particular method of non-court-based dispute resolution process being considered will be relevant to the exercise of the court's discretion as to whether to order or facilitate it.

64 ….we heard some argument about whether an internal complaints procedure of the kind offered by the Council is properly to be regarded as a species of ADR at all. That definitional issue seems to me to be academic. The court can stay proceedings for negotiation between the parties, mediation, early neutral evaluation or any other process that has a prospect of allowing the parties to resolve their dispute. The merits and demerits of the process suggested will need to be considered by the court in each case.

65….The court should only stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process provided that the order made does not impair the very essence of the claimant's 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.

66 It would be undesirable to provide a checklist or a score sheet for judges to operate. They will be well qualified to decide whether a particular process is or is not likely or appropriate for the purpose of achieving the important objective of bringing about a fair, speedy and cost-effective solution to the dispute and the proceedings, in accordance with the overriding objective.

The problem remains as to what in practical terms this means for the ordering of 'ADR' or stays for 'ADR', especially in the light of Vos MR's clearly expressed distaste for the acronym, especially the word "alternative". In a speech to Hull University in 2021, he said:

What we are lacking, I think, is the ultimate integration of 'ADR' into the dispute resolution process. As Head of Civil Justice, this is what I am hoping to achieve in the months and years to come. There is perhaps a linguistic problem: why do we keep on talking about 'Alternative Dispute Resolution'? Dispute resolution should be an integrated whole. Mediated interventions should be part and parcel of the process of resolving disputes wherever they arise in our society – whether

> *between businesses and consumers, amongst families or between the citizen and the state. There is nothing alternative about either mediation, early neutral evaluation, or judge led resolution. What I hope to achieve is take the "alternative" out of 'ADR', to focus on hard data and make sure that every dispute is tackled at every stage with the intention of bringing about its compromise.*

The *Churchill* judgment and the draft rule changes certainly take the "alternative" out of 'ADR' in practice, with both of them signalling its full integration into the fabric of civil justice. But the "A" standing for "alternative" currently remains in the draft Rules and is not even placed in the brackets that Vos MR suggested on another occasion.

It is the view of the CMC, CEDR and Ciarb, that ultimately, the terms 'Alternative Dispute Resolution' and 'ADR' should be changed to be more reflective of the fact that all processes are available to disputants to resolve their disputes. We however recognise some of the practical obstacles in achieving this.

ii. A temporary solution?

The acronym 'ADR' has been a familiar term in civil justice terminology since the early 1990s, well before the CPR, and also retains broad recognition in the global context, particularly due to the absence of a different clearly agreed term. As we understand the importance of the introduction of these very significant rule changes in a way that is broadly compatible with the Court of Appeal's decision in *Churchill,* we entirely understand and support this temporary solution to a tricky problem.

This is however not helpful in the long term, given its embedding and integration into the court process both by way both of the civil procedure rules and schemes such as the HMCTS. 'Alternative' is therefore clearly rendered inappropriate as a descriptor to this set of processes by these proposed amendments to the CPR.

Precise use of language is important in a jurisdiction in which one of the more important tasks for the judiciary is the accurate construction and interpretation of statutory and regulatory language. We feel strongly that a solution needs to be found by substituting a generally accepted descriptor for the acronym "ADR". We will be glad to engage in further debate on this topic at the appropriate time.

One way of doing this would be to try to agree on a broadly acceptable new adjective or set of adjectives. Vos MR struggled bravely with this in *Churchill,* but we doubt if "non-court-based dispute resolution processes (NCBDRPs) will be embraced enthusiastically, even though it is accurate enough.

The CMC would encourage consideration of the use of the shorter 'Non-Court Dispute Resolution' ('NCDR'). Such a change in terminology would seamlessly align with the current Family Court Rules Part 3 – 'Non Court Dispute Resolution'[5].

CEDR is still slightly hesitant about this acronym, as some mediation processes are likely to be court-based. These already include FDRs in the Family Court, and also neutral evaluations conducted by judges under CPR 3.1(2)(p) or in the TCC or Business and Property Courts.

Ciarb's view of both NCDR and NCBDRP is that whilst they may be helpful from the perspective of the courts and a lawyer well-versed in the court system and history of England and Wales, what would fall within them and without would be opaque and particularly given that schemes such as the HMCTS one might well be perceived as a court-based process from a user perspective.
In addition the term 'Private Dispute Resolution' is also a well recognised term which clearly delineates processes over which parties retain control and can be conducted confidentially as opposed to the processes of the court which are a matter of public record.

"Integrated" ('IDR') has received favour of late but may still not command general approval, not least as once integrated it may not be seen as such. There are other contenders, such as Embedded Dispute Resolution (EDR), Negotiated Dispute Resolution (NDR, as features in the Commercial Court Guide) and Facilitated Dispute Resolution (FDR) (though with NDR and FDR we would accept that there are hybrid processes of ADR that can be used by the parties which are not negotiated in the traditional sense).

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[5] See: https://www.justice.gov.uk/courts/procedure-rules/family/parts/part_03, which encourages use of NCDR and mainly deals with setting up MIAMs., but does not deal with FDR "hearings" (which are essentially judge-led mediations).

Ciarb, CEDR and the CMC all have slightly different views on what the amended term should be. This clearly illustrates how difficult it is to land on a consensus in order to make such a change. However, all organisations believe it should be changed in time, and would contribute to a full stakeholder consultation on this, to try to evolve beyond the term Alternative Dispute Resolution.

iii. Amending the glossary to the CPR?

Another approach is to define accurately what types of process are to be regarded as properly to be the subject of court order or an order for a stay (which may not necessarily be the same) and amend the CPR glossary to reflect accurately what processes fall into what the CPR regard as 'ADR' (with or without a different adjective). We would suggest, for instance, that of the seven categories listed in Section 4.1 above which might be regarded as covered by the present gloss on 'ADR', the following should be declared as <u>not</u> being processes which judges might order or order a stay:

1. Bi/multi-lateral negotiation:
   as it is a fundamental expectation of the CPR that parties make an effort to resolve their issues through direct communication and negotiation, and that it is not a defined "process" as such.
2. Internal Complaints Procedures (ICPs):
   as there is no neutral management element and therefore the perception of the outcome will always be different from neutrally managed processes and procedures.
4. Binding-adjudicative procedures:
   As Judges themselves are adjudicators and will not deprive themselves of jurisdiction by referring cases to another type of adjudicator except that judges will
   - enforce the terms of a clear and certain party-defined contractual dispute resolution clause; and will
   - permit adjudicative options requested and procured by mutual consent.
7. Part 36 offers, which are not something that judges should order.

This would leave only processes which have an identified element of neutral management like category 5 and 6 cases (mediation and private or judicial neutral evaluation pursuant to CPR 3.1(2)(p)), and perhaps also category 3 cases (externally

managed complaints procedures), although the adjudicative functions of some might complicate these. Judicial decisions might be made one by one in the light of their respective features[6]. This would accord with the distinction proposed by the Civil Justice Council's Final Report Part 1 on reform of the Pre-Action Protocols, between neutrally managed and non-neutrally managed processes. It recommends that when a court comes to consider whether ADR should be ordered, it should still be able to order use of a neutrally managed process like mediation if the parties have only previously used a non-managed process, like an ICP[7].

Amending the definition of 'ADR' in the CPR Glossary would be a relatively easy way to clarify the position without having to make lots of minor changes throughout the CPR. We have ideas to suggest if this course of action is adopted in any later consultation.

In this section we raise several disparate ancillary matters which indirectly relate to or flow from the suggested amendments to the CPR, in case they are of interest to the CPRC and other policy-makers in this area.

Section B Costs sanctions

The proposed changes do of course clarify the position over sanctioning unreasonable failure to mediate. It is clear too that costs sanctions will probably remain a significant feature of the litigation landscape in this area, even if it is very likely that whether mediation is used will be clarified far earlier than a costs hearing after a full trial. Sanctions may still be relevant in cases like *Churchill* where the unreasonable refusal to mediate was pre-issue, or where a given process will not be ordered, but that costs sanctions will be ordered by the court.

In *Churchill,* the DDJ adjourned any question of sanction to the notional trial judge rather than considering a sanction immediately. The CJC's Final Report on the Pre-Action Protocols strongly suggests that earlier consideration of costs sanctions

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[6] As for instance the stays in *Andrews v Barclays Bank* for decisions by an FSO-supervised scheme; and in *Hamon v UCL* for decisions by the OIA Office of the Independent Adjudicator for University disputes

would be proper, and would generate a far better deterrent effect than postponing all costs questions to the end of a trial that will very rarely take place. On this topic, their report reads:

> *Some judges during the consultation also indicated that the judiciary might be reluctant to make orders about the costs of proceedings over PAP non-compliance before those proceedings were resolved. The Working Group would urge the judiciary to resist that sentiment as a general approach. First, there is no jurisdictional barrier that would prevent the courts from exercising their powers to make costs orders at an early stage of the proceeding. Secondly, the tendency to address costs only at the end of proceedings is arguably just as bad for promoting PAP compliance as it is for promoting proportionate costs. We know detailed costs assessments at the end of litigation are not effective either at keeping costs proportionate or even their stated objective of ensuring the successful party recovers their reasonable costs. Prospective costs orders, like prospective costs management, carries a risk that a court will make an order it would not have at the end of the proceeding with the benefit of full hindsight, but given the deleterious effects that dealing with costs at the end of proceeding has had on the administration of justice – a phenomenon recognised in virtually every review of the civil justice system – we think there is a strong case to be made for courts being prepared to make more costs orders at an early stage of proceedings due to PAP non-compliance and its likely impact on the litigation. The same response can be made to judicial concerns about compliance disputes taking up court time. Deferring compliance disputes can only save court time if the issue is never addressed, and if compliance disputes are never addressed, it is hardly surprising that levels of compliance would become variable at best.*

Judicial powers to deal with costs issues early in the life of a claim by sanctioning unreasonable refusal to mediate do of course already exist in the CPR and require no amendment.

Judges perhaps do need to be reminded to consider exercising those powers in the light of the change in culture these proposed amended Rules will effect. We feel strongly that a judge should take a view on the reasonableness, or

unreasonableness of a decision not to mediate *at the time the decision is made* or shortly thereafter.

A post-hoc approach of waiting until the conclusion of the trial (if there is one) flies in the face of the logic that parties should make serious attempts to resolve their issues early and in a way that is proportionate with the case (and/or). To wait until the conclusion of the trial, or post-arguments on costs often means the judge is too easily influenced by events that have taken place *since* the decision not to mediate. Various judgments of recent times have reflected this post-hoc approach.

Section C Further Rules or Directions about use of 'ADR' processes?

The CMC, CEDR and CIArb wonder whether there may be scope to go further with the proposed amendments and whether this might bring clarity to issues likely to arise once the changes are in place. For example, as mediation is likely to continue to be the most used form of 'ADR', mediation-specific rules might be added in respect of process.

For example, as regards directions, at CPR 28.7(1)(d), 28.14((1)(f) and 29.2(1A) perhaps the insertion of:

> 'Where the court orders mediation as the form of ADR best suited to the dispute, the parties must jointly appoint a mediator within 14 days.'
>
> 'If the parties are unable to agree a mediator an application should be made to the court under Part 23.'

Furthermore, with Vos MR's statement in the Court of Appeal judgment of *Churchill* in mind, that any order made be

> *"proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost"*

and noting, for example, that for contentious trusts, wills and probate disputes, the ACTAPS Code states that '*the parties should seek to conclude a mediation within 42*

days of the appointment of the mediator', in keeping with the overriding objective, it may that a similar rule is desirable within the CPR.

We would perhaps suggest:

> *'Where the court has ordered the parties to engage in ADR [or mediation] the parties should seek to conclude the matter within 60 days [of the appointment of the mediator]'.*

Such a rule would allow for cases to be worked through the process of ADR relatively swiftly and would prevent parties dragging their heels and potentially increasing costs on all sides. If the matter did not settle, then this would allow for its swifter resolution through the courts.

Alternatively, it may be felt that such further steps would best be housed in an extended Practice Direction to CPR 3.