Building a Brighter Future
for Injured People

T: 0115 943 5400
E: mail@apil.org.uk
www.apil.org.uk

Carl Poole

Secretary to the Civil Procedure Rule Committee

c/o Access to Justice Policy Division

Ministry of Justice

Post Point 10.24

102 Petty France

London

SW1H 9AJ

United Kingdom

22 May 2024

By email: CPRCconsultation@justice.gov.uk

Dear Mr Poole

Alternative Dispute Resolution consultation

APIL welcomes the opportunity to comment on the Civil Procedure Rule Committee's (CPRC) alternative dispute resolution (ADR) consultation. We have highlighted below where the proposed changes go further than the Court of Appeal's judgment in *James Churchill v Merthyr Tydfil Borough Council*.

We have provided broader comments concerning alternative dispute resolution, including current issues with engagement reported by our members.

Changes to 1.1

We have no issue with the proposed change to the overriding objective. We agree that a reference to ADR in the overriding objective will highlight that the use of ADR should be considered by parties.

Changes to 1.4 and 3.1

APIL also supports the proposed draft changes to 1.4 and 3.1. However, we suggest that to further clarify the Court of Appeal's position in *Churchill*, there should be a non-exhaustive list of factors relevant to the exercise of the court's discretion to stay proceedings or order parties to engage in a non-court-based resolution process. The list should be set out either in the rules, practice direction or other guidance. This could include the suggestions submitted by the Bar Council in the judgment. We believe that this addition would help clarify the circumstances in which ADR is likely to have a positive impact and reduce the likelihood of satellite litigation.

Changes to Parts 28 and 29

Building a Brighter Future for Injured People
T: 0115 943 5400
E: mail@apil.org.uk
www.apil.org.uk

We have reservations about the amendments to both Parts 28 and 29. The wording proposed in the draft rules seems to go further than *Churchill.* The Court of Appeal held that the court "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 (…)". The amendments to both Parts seem to suggest that the court must consider ordering or encouraging ADR in all claims. We suggest the following amendment to Part 29.2(1A):

"(1A) When giving directions, the court must consider and may then order or encourage the parties to participate in alternative dispute resolution."

Changes to Part 44

APIL supports the suggested change to Part 44 regarding failure to comply with an order for ADR or unreasonable failure to participate in ADR. The question of reasonableness must be addressed in both scenarios under the proposed Part 44.2(5)(e). Without the suggested amended wording for Part 29.2(1A) we are concerned that will not have been expressly addressed in the circumstances in which a court has ordered the ADR cycle. We agree, subject to that, that a failure to comply should come under the court's consideration of the conduct of parties when exercising its discretion as to costs.

General comments

APIL has some further comments in relation to the rules surrounding ADR.

We suggest that the amended rules should be supported by the introduction of guidance on best practices for parties participating in ADR – either via a separate ADR protocol, or within the relevant practice direction. This guidance should include examples of good behaviour from parties in relation to ADR. We believe this guidance has the potential to ensure that the benefits of ADR are optimised.

Our members have reported issues with the current default position at the directions stage of having to provide 'good reason' not to participate in ADR within 21 days. The direction is currently not working effectively, as often the time limit to withdraw from participation is not respected. We suggest that the timing for withdrawing from participating in ADR should be more clearly defined. Another issue raised by our members is that the default court order in situations where a party refuses to participate in ADR is a stay of proceedings, which ends up being more beneficial to the party who is refusing to engage, and particularly to a party defending a claim.

We believe the Scottish approach which requires a stocktake before trial should be considered. In Scotland, a pre-trial meeting must be held no later than 4 weeks before the hearing. A similar approach could be adopted in any directions given in the England and Wales jurisdiction to allow parties to take stock and narrow down the issues in dispute thereby saving court time and resources.

We hope our comments prove useful.

Yours sincerely,

Ana Ramos

Legal Affairs Assistant

Building a Brighter Future
for Injured People

T: 0115 943 5400
E: mail@apil.org.uk
www.apil.org.uk