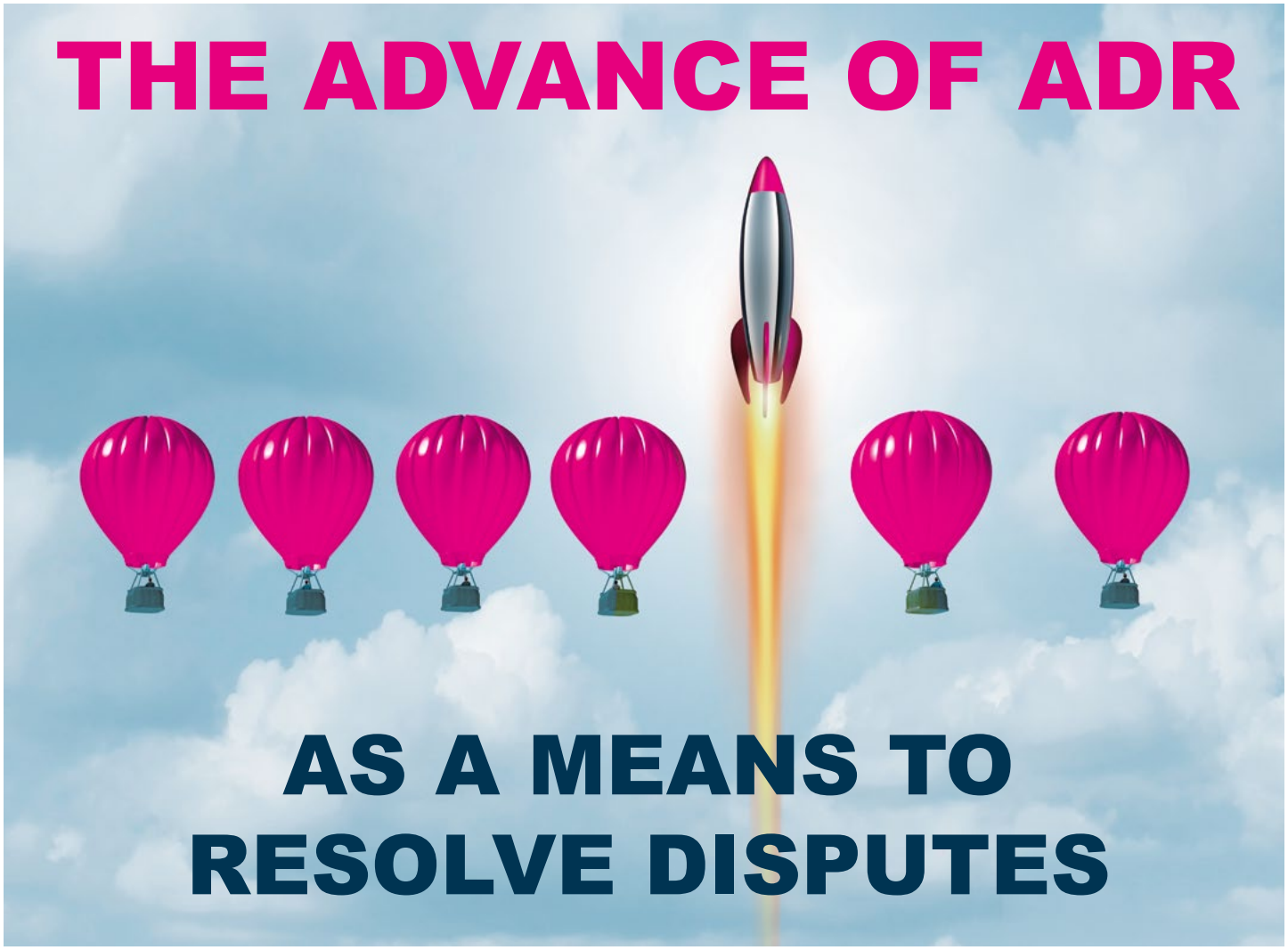
THE ADVANCE OF ADR AS A MEANS TO RESOLVE DISPUTES



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During 2021, no doubt to some extent because of the pandemic and the pressures that has brought to bear on the court system, I am sure I am not the only person who has found an increasing willingness on the part of the judiciary to look at other ways to resolve disputes outside the formal court process.

Without even mentioning mediation or arbitration, there has been an enormous increase in the encouragement of the use of Private FDRs or Early Neutral Evaluations and whilst there are some who argue that these are to all intents and purposes a privatisation of the court systems and are only available to those who can afford to pay for the private judge or evaluator, undoubtedly these options are increasing in popularity. The reasons for that that are pretty obvious as the benefits of a private FDR are huge. Not only do you have an experienced acting judge of choice, but you know they will have read the papers fully before the start of the session and that they will have time to hear submissions and then consider the issues carefully before giving their indication on how the matter could be settled. Many of these judges provide a written summary of the indication which can be invaluable in assisting in subsequent negotiations as it ensures your client can be taken through the points made by the judge and why they have been made so that they understand the indication fully. Again many judges will provide spreadsheets to show the effect of their indication in terms of sharing of assets or for payment of periodical payments and again these can be incredibly useful tools to help in negotiations. The fact that you can also go back to the judge for further input as negotiations proceed is a significant difference from the position increasingly in court where your client's case is only one of many that the judge is having to deal with and juggle their time accordingly.

Where agreements have been reached at a private FDR (or ENE) with the assistance of an experienced practitioner as judge, it is also more than likely that the draft order setting out the terms agreed will be approved by the court without questions being raised which means that often, the time between reaching an agreement at the private FDR and having a sealed order is very short.

Whilst the use of FDRs and ENEs is still voluntary, the courts themselves seem to be increasingly keen to use their powers to resolve disputes without lengthy and costly proceedings. I had direct experience of this in the early part of 2021 with the case I was involved in which has been reported as WL v HL 2021 EWFC B10. I was instructed by a client who needed to see a variation of an order made in 2018 to ensure the costs of childcare were met in part by her former husband, so that she could continue to work. Clearly an application had to be made to vary the original order as attempts to reach agreement on the issue were unsuccessful, but even if we were going to be able to use the fast-track process, a determination of issues through the usual court process was unlikely to happen swiftly enough to avoid serious financial difficulties for my client who in addition to needing funds to meet child care costs, would then be facing a quite considerable legal costs burden with little or no prospect of recovering those from her former husband.

When the application was issued in late 2020, we made an application for interim orders too. After exchanging financial statements by agreement at an early stage, we were fortunate enough to be given an early date for the interim application and for directions to be heard before Mr Recorder Allen QC. His approach from the outset was robust and extremely helpful in being able to bring matters to a satisfactory conclusion.

After dealing with the application for interim orders which provided my client with some means of helping to meet the child care costs in the short term, he then turned his focus to the powers available to him under FPR 2010 Part 3 which is entitled 'Non-court Resolution'.

Rule 3.3 states

(1) The court must consider, at every stage in proceedings, whether non-court dispute resolution is appropriate.

Mr Recorder Allen QC did just that. Rather than accede to any suggestion of largely standard directions being given with the aim being of having a final hearing listed at some unknown point in the future to determine the issues, he expressed his view that he would exercise the powers available to him under Part 3 of the Family Procedure Rules including the power to adjourn proceedings. He made it clear that he thought the parties could and should be able to resolve matters in mediation although neither party was very confident that that would be successful. He therefore made an order which adjourned the hearing for 4 weeks on the basis that the parties should avail themselves of the opportunity of going to mediation. He further required that a joint letter should be written by solicitors to provide an explanation of progress being made to determine what further action was necessary.

The parties did agree to go to mediation and although they were not able to agree matters there, no doubt conscious of the ongoing duty of reporting back to the judge on their progress though their solicitors, they did manage to come to a substantive agreement on all but one issue after further discussions between themselves. This was reported to the court and the hearing was adjourned again for a further short period of time given the progress that was being made. However when the parties were not able to agree the final issue, we were able to ask that Mr Recorder Allen QC determine that one outstanding matter on paper, it being agreed that the parties were Xydhias bound with regard to the other issues.

Short written submissions were made and considered by the judge who made a determination on the final issues so that an order could be drafted and approved. This occurred in less than 3 months after the initial hearing and well ahead of any expected final hearing had matters proceeded in the usual way. But in addition to the speed of the process, the costs savings for the parties was significant and as the substantive terms were agreed by them, they were both invested in the outcome with less likelihood of the order not being complied with.

It was the first experience I had of a judge taking such a proactive approach and making the most of the options open to him under Part 3 but it made a world of difference for my client.

It stands to reason then that if they find themselves in a similar situation, solicitors and counsel should not be afraid to ask their judge to remember their duty and powers under Part 3.

I understand that more and more of the bench are receptive to the idea that Part 3 should be made use of for the benefit not just of our clients but also to see court time being used effectively and efficiently. It will be interesting to see where we go from here.