

PEBA Good Practice Memorandum 4: The use of ADR in Planning Court litigation

Introduction

1. This Good Practice Memorandum considers the scope for, and use of, alternative dispute resolution (ADR) in the Planning Court. It was produced by PEBA following a workshop convened by PEBA, involving PEBA members, including some who practice as mediators, and some solicitors. It reflects what PEBA considers to be good practice and is intended as to assist PEBA members practising in the Planning Court. It covers what Planning Court cases might be suitable for ADR and what considerations need to be taken into account in conducting ADR.¹ It is intended to be a helpful commentary on matters as they stand at today's date, to help inform advice by PEBA members in practice, especially in relation to how, if ADR is to be employed in a Planning Court case, it should be done to avoid disrupting the Planning Court process. The role of ADR within the litigation landscape continues to develop, and PEBA will keep this document under review.
2. In [Churchill v Merthyr Tydfil CBC](#) [2023] EWCA Civ 1416, the Court of Appeal held that a court can lawfully stay proceedings for, or order, the parties to engage in ADR, provided that it is done in a way which does not impair the very essence of the claimant's Article 6 rights and is proportionate. In controlling its own process, the court can stay or delay proceedings to allow an ADR process to be undertaken. The Court said that it is extremely beneficial for parties to disputes to be able to settle their differences cheaply and quickly, that, even with initially unwilling parties, mediation can often be successful, and that mediation and other forms of non-court-based dispute resolution are, in general terms, cheaper and quicker than court based solutions. It also said that whether a court should order ADR in a particular case is a matter for the court's discretion, to which many factors would be relevant. It noted that trial judges would be well-qualified to decide whether a particular process is or is not appropriate for the purpose of bringing about a fair, speedy and cost-effective solution to a dispute, in accordance with the overriding objective.
3. Amendments to the Civil Procedure Rules were subsequently made in order to reflect the judgment of the Court of Appeal in the *Churchill* case.² Until the amendments were made, the Court could encourage ADR, but not order it. [CPR Part 1](#) now establishes ADR as integral to achieving the Overriding Objective and the Court has the power to order ADR, and in exercising its discretion as to costs it can take into account whether a party has unreasonably failed to engage in ADR.

¹ It should be noted that the acronym ADR covers a wide range of techniques (see paragraph 10 of the [Pre-Action Protocol for Judicial Review](#)).

² Which came into force on 1 October 2024 (see the Civil Procedure (Amendment No 3) Rules 2024 ([SI 2024 No 839](#))). The Civil Justice Council has recommended amendments to pre-action protocols, but no changes have yet been made.

The scope for use of ADR in the Planning Court

4. There is scope for the use of ADR in the Planning Court, albeit likely only in a minority of cases and less than in some other areas of litigation.
5. Local planning authority defendants, and those contemplating bringing claims, should consider ADR at the pre-action stage in respect of local authority committee resolutions to grant planning permission, where there might be scope for re-consideration of a decision by taking the application back to committee prior to the issue of the decision notice formally granting planning permission. Potential challengers should not save-up potential grounds for later use in judicial review proceedings rather than trying to resolve them by raising them prior to the grant of permission. Under [CPR r 1.3](#), the parties to a Planning Court claim are required to help the court to further the overriding objective, which includes ensuring that cases are dealt with proportionately and expeditiously, as well as promoting or using ADR. Defendants and interested parties in Planning Court claims should consider whether they should accept in summary grounds of defence that the claim is, or some grounds are, arguable. Permission should generally be resisted only where there are knock-out blows against the claim. Conceding permission, avoiding the need for paper decisions and some renewal hearings, will allow the swifter resolution of Planning Court claims.

What Planning Court cases might be suitable for ADR?

6. Planning Court claims which might be suitable for ADR include:
 - a. where a claim is based on procedural grounds (eg consultation, procedural fairness and the like), and so the decision could be quashed and re-taken after a fresh procedure
 - b. where a declaration, without quashing, would be an appropriate remedy
 - c. where a practical solution could be imposed by a s106 obligation, either unilaterally or by agreement, for example to limit the adverse impacts of a development³
 - d. where a development might be amended under a new planning permission or a non-material amendment, for example to omit an objectionable element of a

³ In a case reported to PEBA, a challenge under s289 of the Town and Country Planning Act 1990 (TCPA 1990) was stayed for the parties to discuss how to avoid the need for full demolition of a building, the matter being resolved subsequently through a negotiated s106 TCPA agreement.

development or to impose a new planning condition to limit the impacts of the development⁴

- e. in a planning enforcement case, where a practical solution might be negotiated rendering the Planning Court claim academic or unnecessary⁵
- f. where the grounds of challenge represent viable legal grounds to challenge a decision and not necessarily the true underlying objections to a proposal
- g. where there have been negotiations but they have broken down or are struggling to reach a conclusion (including as to the detail of any settlement)
- h. where there is an on-going working relationship between the main parties which ought to be preserved
- i. where court timescales mean an undesirable delay in resolving an urgent issue, which could be solved more swiftly by ADR.
- j. where the merits of a claim are strong one way or the other, so a claimant could be persuaded to discontinue their claim (perhaps on a no costs basis), or a respondent could be persuaded to consent to judgment, with the benefit of a steer from an independent professional following early neutral evaluation (see para 27 below).

7. Challenges to the effective use of ADR in Planning Court claims, which may need to be navigated in deciding whether to use ADR in particular cases, include:

- a. the public interest in the objective determination, rather than compromise, of public law claims in the planning field
- b. the multi-party nature of some Planning Court claims
- c. the starkly different views which objectors and developers often have about the acceptability of proposed developments
- d. the potential for there to be an imbalance of resources between a challenger and respondents
- e. that potential for other persons and organisations, who may not be parties to a claim, wishing to be involved in any ADR process
- f. the potential for mediation to be used as a tactical device to delay the resolution of claims

⁴ In a case reported to PEBA, a judicial review challenge to a grant of permission for an urban extension was withdrawn following agreement that an application under s96A TCPA 1990 would address local concerns by amending the condition of a planning permission which was said to be defective. In another reported case, where a judicial review challenge related to an urgently required new build facility attached to a listed building, an amended design was granted through a negotiated, amended planning application under s73 TCPA 1990 following mediation sessions over a month, enabling construction to commence

⁵ In a case reported to PEBA, relating to a long-running enforcement case, judicial review proceedings were stayed whilst a solution satisfactory to all parties was put to the local planning authority; mediation assisted the process albeit at a late stage.

- g. the risk of public authorities being unwilling to recognise errors in their processes or preferring the matter to be taken out of their hands and determined by the court
 - h. the limits of local planning authorities' schemes of delegation, which may present challenges to decision-making in negotiation to settle Planning Court claims
 - i. the need to conduct ADR within the court timescales, especially for significant cases, and avoid delays in the process and reaching settlements only close to the hearing date
 - j. fitting the costs of ADR into the Aarhus costs protection regime.
8. These complexities, many of which are not exclusive to Planning Court disputes, might be raised as concerns by parties and serve as disincentives to ADR in a given case, and might even make it reasonable to decline to pursue ADR depending on the circumstances. However, there is no in-principle bar against ADR, and the Courts have not set down any fixed threshold test to be met. As the Court of Appeal said in the *Churchill* case: "Whether the court should order or facilitate any particular method of non-court-based dispute resolution in a particular case is a matter of the court's discretion, to which many factors will be relevant".
9. A list of general factors relevant to whether or not a Planning Court claim would be suitable for ADR would likely include :
- a. the nature of the dispute or claim
 - b. whether the dispute needs to be litigated to a conclusion
 - c. whether the claim could be settled by negotiation
 - d. what outcome the parties actually want
 - e. what difference involvement of a neutral person might bring
 - f. time and cost considerations.
10. ADR might be suitable for some issues in a Planning Court claim, even if not all issues, and so could be used to narrow the issues which will require determination by the court. ADR might, however, be disproportionate where it would be unlikely to resolve most of the grounds in a claim, so that the claim would need to proceed to a hearing in any event.

How should ADR be carried out in Planning Court claims?

11. It should be recognised that:

- a. there is a public interest in the expeditious resolution of planning disputes, a point underlying the creation of the Planning Court
 - b. lawyers and judges in Planning Court claims are usually alive to the ability to settle such claims without the need for a full hearing, including by the negotiation of consent orders
 - c. Planning Court judges do sometimes consider the potential for settlement, including by ADR, in such claims, and encourage parties accordingly
 - d. judicial approval of consent orders, including those withdrawing claims, is an important safeguard to ensure that the public interest is protected in the compromise of Planning Court claims, including where ADR is involved
 - e. additional burdens cannot be placed on judges in relation to ADR in the Planning Court.
12. The parties to a Planning Court claim ought to have considered ADR at the pre-action stage,⁶ before proceedings are commenced, under either the [judicial review pre-action protocol](#)⁷ or the general [Practice Direction on pre-action conduct](#)⁸ which would apply to non-JR statutory challenges. This is also encouraged by the [Administrative Court Judicial Review Guide](#).⁹

⁶ The [August 2023 CJC report on pre-action protocols](#) included a recommendation that a new general pre-action protocol should include “an obligation to engage in pre-action dispute resolution” (para 1.7(iii)). It explains that, where parties have engaged in mediation at the pre-action stage and the dispute has not settled, the parties will not be required to engage in another mediation if court proceedings are started. The [November 2024 CJC Phase 2 final report on pre-action protocols](#) said that there are “some judicial review cases where ADR will be appropriate and the court can make case management directions to enable it to happen”. This report recommended a revision to the judicial review pre-action protocol to: “prompt the proposed claimant to confirm in their pre-action letter that they have considered ADR, indicate whether they believe any form of ADR is appropriate before and/or after the proposed claim is issued and, if so, why. It should also prompt the proposed defendant to indicate in its response whether it is willing to engage in ADR and, if so, the form it considers is appropriate. If a proposed defendant rejects an ADR proposal made by the proposed claimant, it should give its reasons. This will mean the parties’ respective positions on ADR are clear at an early stage. In cases where ADR is appropriate, it should encourage ADR to be attempted (for example, during an agreed stay if proceedings have had to be issued) and assist the court in considering whether case management directions should include provision for ADR.”

⁷ “9. The courts take the view that litigation should be a last resort. The parties should consider whether some form of alternative dispute resolution (‘ADR’) or complaints procedure would be more suitable than litigation, and if so, endeavour to agree which to adopt. Both the claimant and defendant may be required by the court to provide evidence that alternative means of resolving their dispute were considered. Parties are warned that if the protocol is not followed (including this paragraph) then the court must have regard to such conduct when determining costs. However, parties should also note that a claim for judicial review should comply with the time limits set out in the Introduction above. Exploring ADR may not excuse failure to comply with the time limits. If it is appropriate to issue a claim to ensure compliance with a time limit, but the parties agree there should be a stay of proceedings to explore settlement or narrowing the issues in dispute, a joint application for appropriate directions can be made to the court.”

⁸ “8. Litigation should be a last resort. As part of a relevant pre-action protocol or this Practice Direction, the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings”.

⁹ “13.2.1 The parties must make efforts to settle the claim without requiring the intervention of the Court. It is preferable to settle the claim before it is started. However, even after the claim has started, the parties must continue to evaluate their positions, especially after any indication from the Court (such as the refusal or grant of permission to apply for judicial review). The parties should consider using alternative dispute resolution (for example, mediation) to explore settlement of the case, or at least to narrow the issues in the case.”

13. If the parties are agreed that there is scope for ADR, then they can ask for any necessary case management directions to be included in the directions given in the order granting permission. They can, prior to the permission decision (if not with the claim form), provide agreed draft directions to the court to that effect, together with an explanation in support.
14. As noted above, [CPR r 1.4\(2\)\(e\)](#) now provides that the Court must further the overriding objective by actively managing cases and that this includes encouraging or ordering the parties to use an ADR procedure if the court considers that to be appropriate, and facilitating the use of such procedure.
15. Parties should be aware that, when deciding whether or not to provide for ADR in case management directions, the Judge may wish to consider, for example: any need for urgency or expedition in the listing of the claim; whether the claim was subject to the timescales applying to significant planning claims; any likely listing window (including whether the claim could be listed before or after the long vacation and how that might affect the potential for ADR, and vice versa); the general availability of the type of judge needed to hear the claim (eg a specialist HCJ rather than a deputy HCJ); and, the potential for adverse impact on the efficient use of the Court's resources. These matters might mean that ADR could not in practice be accommodated in some claims which might otherwise be suitable for ADR.
16. The existence of Aarhus costs protection in many Planning Court claims would affect the extent to which costs could be used as a sanction for not engaging in ADR in such claims. Adding ADR to a Planning Court claim might give rise to pressure for Aarhus costs caps to be amended to allow for the additional costs of the ADR process, and generate more applications to vary such caps. However, undertaking ADR should not normally lead to a need to adjust Aarhus costs caps. The parties would be able to make provision on the costs of mediation in a mediation agreement or in a settlement reached at mediation.
17. The appropriate time for ADR in Planning Court claims – whether mediation or early neutral evaluation (ENE) – will generally be after the grant of permission. Parties, especially respondents, might be unlikely to want to commit resources to ADR unless and until the Court has recognised that the claim should go to a substantive hearing.
18. However, if the parties agreed, it would be possible to conduct ADR prior to a permission decision and that should not be discouraged. Whilst in most cases permission decisions are taken quite quickly, there are cases where permission decisions can take some time, thus providing a window for ADR (eg where a claim started in the regions is transferred to London or where there is a paper refusal but permission is granted after a renewal hearing). Where permission is refused on the papers but then renewed, there might also be a window for ADR prior to the permission decision at the oral permission hearing, which should also not be discouraged.

19. Leaving ADR until later in the process (eg after detailed grounds and any claimant's reply had been served) would present risks of the need for adjournment requests or settlement being reached only shortly before the substantive hearing. The appropriate time for ADR (whether mediation or ENE) to be undertaken in a Planning Court claim would generally be as soon as possible after the permission decision. Any ADR used in Planning Court cases should be conducted swiftly to avoid delay. It should not normally be necessary for a Planning Court claim to be stayed to allow ADR to be undertaken, as ADR ought to be able to be conducted in parallel with the Planning Court proceedings.
20. Where ADR is conducted following the grant of permission, it would be done in parallel to the preparation of the detailed grounds and evidence, and any claimant's reply. That period would normally be some 8 weeks from the grant of permission to the issue of any claimant's reply (35 plus 21 days).
21. It should be possible for an ADR process to be agreed, arranged and concluded quickly and in any event within 8 weeks. This depends on the parties progressing agreement of ADR arrangements promptly following the grant of permission. A fast-track mediation suitable for Planning Court claims should allow four weeks for the mediation, from the point of the agreement to mediate to the conclusion of the mediation. The claim bundle (including the statement of facts and grounds), the summary grounds of defence (and any evidence served with the summary grounds), and the permission decision, along with short ADR position statements, should be all that is required to provide the context for either a mediation or an ENE. An ENE could also be concluded within a four-week period.
22. Any ADR process could thus take place in parallel with the preparation of detailed grounds and evidence, and a claimant's reply. This twin-tracking should be manageable for most parties in Planning Court claims. If a party could not fully resource such twin-tracking, they could ask for tailored case management directions which provide a longer period for the preparation of the detailed grounds and evidence and any claimant's reply, rather than a stay. Any stay which was required ought not need to be longer than a few weeks, which ought not in turn to delay the substantive hearing.
23. Conducting an ADR process within this timeframe – so that the ADR would be concluded one way or the other by the time that a claimant's reply was due – ought to ensure that settlements are reached sufficiently far in advance of a hearing date to allow the redeployment of judicial resources in cases which are listed and then settle. If it was considered that there was a good chance of settlement being reached in a particular case, then listing (which would normally take place soon after the grant of permission) could in practice be delayed until the outcome of the ADR was known. This would not be a stay of the proceedings, merely the listing taking place at a later point in time than would normally be the case. This might delay the date of hearing some cases (depending eg on timing in relation to the long vacation), but it should help avoid the risk of listed hearings being vacated at a late stage.

24. Mediators in Planning Court cases should understand public law procedure and how any mediated settlement could be implemented in the context of public law litigation. It is expected that PEBA barristers who are qualified mediators would be prepared to offer a fast-track Planning Court mediation service.
25. This approach should allow mediations to be conducted within four weeks from the point of agreement to mediate. This in turn should avoid the need for any stay of proceedings and ensure that settlements are reached sufficiently in advance of any substantive hearing date to avoid listing problems.
26. A fast-track Planning Court mediation could include an option for evaluative mediation where agreed by the parties. Evaluative mediation involves the mediator expressing their own view on the merits or elements of the case in order to encourage settlement. It could involve the mediator giving a view on the issues (either orally at the end of the mediation or briefly in writing very shortly thereafter) if settlement is not reached during the facilitative mediation phase. This means that, even if the mediation does not lead to a formal settlement, parties might subsequently decide not to prosecute/contest at least elements of the claim.
27. As well as mediation, the other form of ADR which might have utility in some Planning Court claims is early neutral evaluation (ENE). ENE is where a senior, specialist lawyer considers the papers in a claim (eg the claim bundle and summary grounds of defence) and then produces a short and non-binding written opinion on what they think the Planning Court would be likely to decide on the issues in the claim. This provides an informed, independent, objective view of the merits of a claim. ENE could be especially helpful in persuading a respondent to concede a claim or to persuade a claimant to discontinue an arguable claim which was unlikely to succeed at trial.¹⁰

July 2025

¹⁰Further and more detailed guidance is provided here: <https://www.barcouncilethics.co.uk/wp-content/uploads/2024/11/Bar-Council-Guide-to-NE-final.pdf>