CHAPTER FOUR

MEDIATION AS A COURT ANNEXED SERVICE

INTRODUCTION

With the exception of family practice, the legal profession in the UK has very low levels of knowledge about mediation and is largely indifferent to it. The profession divides itself into a small but active and enthusiastic band of mediation converts and the rest, who at best have heard of mediation and its acclaimed benefits. There is a prevailing view that mediation has nothing to do for or with legal practice.

London started to trial court annexed mediation in 1990.[1] Gradually other courts have followed suit.[2] The government perceives that court annexed mediation can help to save time and money for the court service. In 2005 Her Majesties Court Service (HMCS) launched an initiative aimed at ensuring that eventually mediation services would be made available in every civil court throughout England and Wales.

In June 2005 HMCS organised a brain storming session for HMCS central offices, regional court staff, mediation provider organisations and mediation associations. Individual mediators were designated as the practitioner contact point for a wide range of courts. The list of courts with designated mediators is growing continuously.

The objectives of HMCS appear to be to save court time and costs and (the carrot) to lower the costs of settlement for court users wherever possible. The incentive (the stick) is s44 Civil Procedure Rules cost penalties.[3]

The strategy adopted is firstly to encourage the courts to advise mediation in all suitable cases and to ensure that judges understand which cases are suited to mediation and secondly to increase awareness of the mediation process within the legal profession and in the community at large.

Throughout the UK mediation proponents mounted court based mediation activities, ranging from meetings with the judiciary to mediation advice desks for the public and briefing sessions for court stag, together with discussion forums for the legal profession. It would appear that mediation has entered the main stream, with a generous helping hand from the government, as a central plank of the administration of justice reform initiative. To this extent at least, practitioners can no longer afford to ignore mediation and could benefit by embracing it and learning to use it to their and their client's advantage.

HISTORICAL BACKGROUND

The concept of mediation, that is to say peer assisted negotiation, has been with us since time immemorial. That said, the roots of the modern mediation movement are firmly grounded in the fertile soils of the Southern US States. Much water has passed under the bridge since the giddy days of Woodstock and the free love movement, when all that was required to bring about peace and harmony was to talk to your neighbour, reinforced with a kiss, a smile or small bouquet of wild flowers, before sailing off into the sunset on a low slung customised Harley, trailing a sweet white haze and gaudy bandanna to boot.

Whether or not the concept of talking through problems was really anything new is debateable, but in an era of civil unrest, with previously excluded sectors of the community demanding a voice and faced with the reality of a quagmire in Vietnam when many felt the authorities were not listening, it at least appeared to be novel.

[1] See **Court-based ADR initiative for non-family Civil Disputes: The Commercial Court and the Court of Appeal. P**rofessor Hazel Genn, Faculty of Laws, University College London. First Published 2002. ISBN 1 84099 036 8

[2] Manchester, Birmingham, Exeter, South Wales, Midlands.

[3] See Chapter Three above.

The public had an appetite for the notion, which provided a small group of pioneering lawyers with the opportunity to experiment with new ways of helping clients (for a modest charge of course) to negotiate their way out of conflict. Much of the impetus lay in the ever rising costs of litigation, the uncertainty of trial by jury and massive judicial dockets that resulted in pre-trial listings in excess of seven years. As the movement gathered pace the judiciary found their dockets reducing to manageable proportions. The authorities made substantial savings and by the late 1980'ies embraced the process, introducing in some instances court mandated mediation. State and Federal legislation gave mediation an official standing.

INTRODUCTION OF MEDIATION TO THE UK

The movement was studied by visitors from the UK and led to the establishment of CEDR and a sustained period of promotion for the concept in the UK as the new wonder cure all for those plagued by disputes. Fifteen years later, where do we now stand? Is mediation a valuable concept that lawyers in the UK should embrace, or has it turned out to be nothing more than a bottle of snake oil, peddled by quacks in travelling sideshows, to exploit the gullible? It is curious to note that whilst US lawyers developed and embraced mediation, it is widely viewed within the profession in the UK with suspicion as a bag of false promises, promoted by unqualified meddlers, which at best achieves settlements which lawyers routinely broker in any case and at worst deprives lawyers of income, all the while adding unnecessary costs to the litigation process.

When the mediation movement was first launched here mediation was a popular C.P.D. topic exposing practitioners to the "benefits of mediation". Though many were not convinced, there was nonetheless a modest rush by practitioners to train as accredited mediators. Then gradually, it would appear, the rot set in. The unconvinced have by enlarge ignored the entire movement. Whilst undoubtedly many disputes have been settled by mediation, to date, unlike the US where in excess of 40% of civil work is now dealt with by mediation which forms a significant proportion of the professions work load, the take up of civil mediation in the UK barely registers in the grand scheme of things. Far from leading to new streams of income, the paucity of appointments has meant that many who trained as mediators never got to put their new found skills into practice. Perhaps then, the detractors have been vindicated?

THE CURRENT STATE OF PLAY

It is submitted that this is not the case. Mediation is not a fragile desert flower that rushes into bloom then fades away, never to be seen again. Rather, like a fungi, it slowly develops in the subsoil, spreading its roots out far and wide, before emerging into the light of day, an integral and indivisible part of its host.

Mediation is part of a popular movement which has been embraced by the community (or at least by the bureaucrats within it). It is not restricted to civil dispute settlement. It is a flexible concept which can be and has been adapted to meet a wide range of needs by diverse organisations in society who have discovered its potential as a structured mechanism for discourse in a society where pre-existing structures have crumbled.

Mediation has been adopted by an ever growing list of agencies[4] as their preferred mechanism for dispute management in spheres of operation that traditionally have not had any major impact upon the legal profession. Consequently, whilst the concept has been largely ignored by the profession, public awareness of the concept has grown exponentially as it is encountered by employees and others in their daily lives.

The way that mediation is used by its various proponents is far removed from that which a practitioner does and has helped to reinforce the prevailing view within the profession that mediation is not something that it should be concerned with. It is submitted that whilst practitioners were correct to note that they already engaged in negotiated settlement on behalf of clients they were wrong to conclude that mediation challenges or threatens this role. It does not. It merely offers an alternative way for them to engage in settlement negotiations and where appropriate, to continue it after an impasse has brought the process to a premature end.

Legal practice is not static. It continuously evolves and adapts to reflect the demands placed upon it by the system within which it operates. The Civil Procedure Rules have ushered in a prolonged (and continuing) period of change for practitioners. Case management is central to the CPR.

[4] eg workplace mediation; community mediation; victim offender mediation; school mediation; peer mediation etc. The insurance industry has also embraced mediation with in excess of £2B worth of disputes being settled annually by P&I Clubs using the process since 2002.

The objective has been to streamline civil procedure; to reduce court costs and the demands upon the judiciary's precious time.

The rules encourage dispute resolution, requiring practitioners to explore ways of reaching beyond the impasse points that would previously have seen cases proceeding to trial. In reality there is nothing new in this. It simply takes earlier developments by the courts such as the ***Calderbank Offer*** costs regime a step forward and formalises the process.

If we examine sections 1, 28 and 44 of the CPR it will be noted that references to mediation are merely one element of a regime designed to facilitate pre-trial settlement and to penalise those who do not take the rules seriously. By contrast with the US, in the UK we do not have a "Mediation Act". Thus mediation for the courts is not a distinct or separate concept. It is an integral part of the post 1998 regime and it is increasingly making its presence known.

It is submitted that whilst the mid nineteen nineties appeared to herald a false dawn for mediation the reality is that in fact it has taken till now for the process to cast down roots and entwine itself into the civil justice system. The government perceives that mediation has something of value to offer and has embraced it.

It will no longer be possible for practitioners to turn a blind eye to mediation. The cost consequences for clients ensures that this is no longer possible.[5] The courts are robustly enforcing the CPR and examples of cost penalties being imposed bound, whether it be for failing to pursue available avenues to avoid litigation or for unsuccessfully pursing litigation, where success is judged by whether or not the claimant has beaten any offer that was on the table prior to the trial.

It is only a matter of time before a client who has been deprived of costs seeks to recover those "lost" costs from his legal team for failing to make the danger of cost penalties sufficiently clear to the client, thereby depriving him of the opportunity to make a considered decision about the risk of ignoring a settlement offer or an offer to negotiate further.

The key factor to be understood here is not that like it or not, the profession must embrace mediation, but rather that the profession needs to understand what the courts require of a party in order to comply with the CPR. In the immediate wake of Halsey there was a rush by practitioners to exploit apparent loopholes in the regime. The reports are littered with accounts of parties making tentative offers to mediate which were subsequently offered up to the court as reasons from departing, under s44 CPR from the default rule that costs follow the event.

Gradually guiding principles have emerged establishing that the court will only take account of serious offers to mediate that were made at a time when the process stood a chance of producing beneficial results. The circumstances when mediation is not a suitable process are also becoming increasingly clear. On the other hand, the range of cases for which mediation is now deemed by the courts to be appropriate is widening on an almost weekly basis. As the category widens, so the range of circumstances where cost penalties may be imposed also widens, so practitioners need to keep abreast of these developments.

MEDIATION AND THE PROFESSION

The key to the use of mediation by the legal community is to realise that mediation is not an alien concept, or a distinct take it or leave it process, but rather it is an additional tool for settling disputes. It is a valuable service that the profession can offer to its clients. The mistake is to assume that it is easy. The profession needs to learn how to engage in and how to maximise the benefits of mediation, both as client representative and / or as mediator. Mediation remuneration rates on larger disputes are attractive.

Best practice in mediation has not yet been established. There are many models of mediation. The final shape of court based mediation is yet to be determined. Lawyers can play a part in shaping its providing they are proactive. They cannot do so by boycotting the process. Mediation is here to stay so the profession needs to get on board.

[5] See ***Halsey v Milton Keynes General NHS Trust : Steel v Joy & Halliday*** *[2004] EWCA Civ 576.* for Civil Practice and ***Cowl v Plymouth City Council*** 2001/2067 [2001] EWCA Civ 1935, ***; Royal Bank of Canada Trust Corporation Ltd v S.S. for Defence*** [2003] EWHC 1479in respect of Public Practice.

CHAPTER FOUR

The Development of Court Annexed Mediation in the UK.

The aim here is to examine the ways that court annexed mediation has developed to date in the U.K. and to speculate on how court based mediation might develop over the next few years as Her Majesties Court Service (HMCS), which is tasked with rationalising the court service, takes an ever more active interest / role in court based mediation provision.

From the early beginnings of court annexed mediation in the Central London Court, successive courts have established their own distinct mediation services, drawing on broad principles from what had gone before but without emulating prior practice, tailoring services to perceived local needs, shaped by the knowledge and experiences of local enthusiasts in the vanguard of the movement. Whilst the movement was very slow to spread out from London at the outset, gradually as more and more courts developed their own in house services, momentum started to gather pace.

When HMCS decided to take an active role in promoting and developing court based mediation its initial response was to gather together as many of those actively engaged in court based mediation, both practitioners and court officials alike, together with likeminded persons interested in establishing new court schemes, for a brain storming session in Birmingham in June 2005, to mount a mediation promotion campaign in the courts, entitled ***"Mediation Awareness Week".***

At that time HMCS expressed no preference for the model that should be operated through the courts, though they let it be known that HMCS would be providing central support from London via an online Mediation Help Desk that they were in the process of developing. Whilst HMCS needed to determine the shape of its own provision through the Help Line, it made sense for HMCS to build upon pre-existing services in the regions, particularly since the HMCS budget was very limited. It was not part of HMCS's stated agenda to displace and replace what was in existence, but rather, the objective was proclaimed to be to promote ADR as a mutually beneficial new service for court users. It was far from clear at that time how the Help Line would dovetail into local provision and to what extent it would be compatible with regional services.

The diversity of services in operation at that time became apparent at the Birmingham session as representatives from around the country extolled the virtues of their home grown schemes. The inevitable question is whether this flexible approach is desirable, or whether or not it would be better to adopt a universal model throughout the UK. It is a question that needs to be addressed since whilst it is not yet clear whether or not HMCS will ultimately seek to impose a uniform model, given its rationalisation role in court service provision, it would be logical if they were to do so. Whether or not such a development would be welcomed by the various providers is, of course, quite another matter. If HMCS were to go down that route, the next question is what form should that model take?

First, is such a development likely? HMCS set a target in 2005 to establish a mediation officer in each of the 220 courts that fall within its remit. Mediation Awareness Week went a long way towards achieving that target with court based mediation promotion programs taking place in over 86 courts around the UK last October. During Mediation Awareness Week 2006 these courts were represented on a regional, not an individual, basis. This was another small step towards rationalisation and centralisation by HMCS. The Civil Mediation Council (CMC), closely supported by HMCS held a conference at the National Motorcycle Museum in Birmingham on the 3rd October 2006 where the central theme was the direction of mediation, standardisation of training, accreditation and service provision. The Academic Committee of the CMC has also devoted much attention to these matters. Whilst some committee members have expressed the view that CMC should become the standards gatekeeper for mediation in the UK, this does not appear to be something that CMC aspires to. HMCS might well decide to step into the breach, at least in respect of court based mediation services.

An indication of this came when Jeremy Tagg of HMCS stated that he envisages nine new court mediation centres along the lines of the Manchester Court Mediation Service.[6] This was closely followed and confirmed by the following announcement entitled ***"Small Claims Mediators – coming to a court near you!"***

> *"As a result of the success of the Small Claims mediation service piloted in Manchester, the service is now being extended to another 9 areas across HMCS. With three in the North East, one in the Midlands, two in the South*

[6] The Law Gazette. November 2006.

West, three in London and the South East, and the one already in the North West, we will be covering almost half of the new HMCS Areas. The recruitment process is currently underway and we have been inundated with requests for more information about the posts from hopeful applicants. The new mediators are expected to be in post and training for their new roles in February 2007." [7]

VARIABLE FACTORS IN COURT BASED MEDIATION SERVICES.

There are no set mediation procedures, practice standards or pricing scale. There are no uniform qualifications or training for the accreditation of mediators. There is no uniform guide to the appointment of mediators, with diverse mechanisms for appointment, ranging from court lists of mediators, to approved nominating bodies. HMCS also provides a central service. There is no set time scale for mediation. Sometimes court facilities will be provided for the mediation, at other times not.

Mediation procedures*: Is** there a right or a wrong way to mediate or is it a matter of "different strokes for different folks***"? If the latter, how will clients know what they are getting themselves into?

***Joint sessions or caucus* : S**omewhat like the traditional model of conciliation, some mediators conduct all the proceedings in a single joint session. There are advantages to doing so. There are no issues about exchanges of information. Everything that occurs is open and perforce above board. The mediator is somewhat like the chairman of a meeting. Only one room is needed, so accommodation issues are minimised. The drawback is that it can be difficult to overcome an impasse / gridlock in a joint session. By contrast, other mediators will use a mixture of joint and private sessions. The advantage is that a mediator can brainstorm avenues and grounds for settlement in a free exchange with a party that could prejudice the proceedings if carried out in an open forum. The danger is first a risk of collusion. Since the mediator assumes the role of information corridor there is the potential for both misinformation and disinformation as the mediator priorities that which appears conducive to settlement

***Evaluation or interests based mediation* :** The question here is the extent to which a mediator could and should take the initiative in developing/imposing avenues for the resolution of a dispute, of providing advice and even evaluating the case. For some mediators some or all of the above are absolutely no go areas, but for others they are standard procedure. Some users would welcome a mediator's evaluation, others would resent it as a threat to party autonomy.

Duration of mediation : The half hour, quick fire mediation is a feature of some low cost / low value mediations. Whilst this is seen as perfectly standard and appropriate to some, other mediators would not even start to know how to mediate under such tight time constraints, which would not leave them sufficient time to go through their standard opening, development and closure routines. Two to three hours is pretty standard in court mediation. Some court schemes have the facility to extend time, some do not, whilst others have a completely open attitude to time, according the process as much time as is needed or desired by the parties. Deadlines are very useful to concentrate the mind but can equally act as artificial constraints on the ability to give complex matters sufficient consideration.

***Costs in mediation – fees and appointments* :** Mediator fees are highly variable. At the lowest possible end of the scale is the pro-bono / free mediation. There are a number of fixed price mediation services. A number of schemes operate a graduated fee structure linked to the value of the dispute, with little regard to the complexity of the dispute, legal or factual or the personalities involved. At the top of the range, the sky is the limit. The appointment process is free in some schemes but involves appointment fees to the court or to a nominating body in others.

***Training, accreditation & quality assurance :* T**raining ranges in the private sector from a couple of days of presentations, to extended hands on role play training, with or without written examinations and skills testing. Completion of the course is sufficient for accreditation by some nomination bodies, whilst others mandate and provide apprenticeship, sometimes followed by a panel interview. Clients on the other hand will sometimes self select a mediator on the basis of reputation, which might not include any mediation training or experience whatsoever. Quality assurance is closely linked to the next item.

[7] **Out of Court. November 2006**. issued by HMCS.

Appointment processes and administration : **S**ome courts operate an appointment process. The court may maintain a list of mediators (and is thus able to set down criteria to be on the list and perhaps even to monitor performance and remove mediators from the list) or alternatively avails itself of the services of one or more nominating bodies, relying on the nominating bodies to establish their own listing criteria, and quality assurance mechanisms. The court maintains control over the nominating body and can stipulate some minimum requirements such as professional insurance cover. Some courts leave it to the parties to find their own mediator.

Mediation venue : Whilst much court annexed mediation takes place on court premises, not all courts have the spare rooming capacity to make such provision. A major drawback to using court facilities is that often there is limited space, unsuited to mediation and the buildings often close early.

Conclusion:

How much, if any of the above it would be possible, financially or professionally, for anyone to regulate is hard to say. Any changes to mediation practice are likely to be stoutly resisted by those holding grandfather rights as current practicing mediators. Nonetheless, it seems that change is in the air!

HUMAN RIGHTS & COURT ANNEXED ADR

Whilst certain jurisdiction within the US, Canada and Australia have provided statutory powers to mandate mediation, the extent if at all to which the UK courts could do likewise was at first unclear, though it has since become clear that this is not at present the case. To the extent that a court can mandate mediation, the question arises as to whether or not such a power is compatible with Article 6 of the European Convention on Human Rights which is incorporated into English Law by virtue of the Human Rights Act 1998.[8]

"ARTICLE 6 : RIGHT TO A FAIR TRIAL

> 1. In the determination of his civil rights and obligations ……., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. (*ss 2&3 omitted*)

The question as to whether or not the courts can mandate mediation was addressed in ***Halsey v. Milton Keynes General NHS Trust***[9] **i**n particular by Dyson L J in the following terms:-

> *"We heard argument on the question whether the court has power to order parties to submit their disputes to mediation against their will. It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court. The court in Strasbourg has said in relation to article 6 of the European Convention on Human Rights that the right of access to a court may be waived, for example by means of an arbitration agreement, but such waiver should be subjected to particularly careful review to ensure that the claimant is not subject to constraint: see* ***Deweer v Belgium*** *(1980) 2 EHRR 439, para 49. If that is the approach of the ECtHR to an agreement to arbitrate, it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6. Even if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it. We would adopt what the editors of Volume 1 of the White Book (2003) say at para 1.4.11:*

[8] The general implications regarding the inter-relationship between voluntary ADR processes and the Human Rights Act are considered in Chapter 2 above.

[9] ***Halsey v Milton Keynes General NHS Trust : Steel v Joy & Halliday [2004] EWCA (Civ) 576***

> *The hallmark of ADR procedures, and perhaps the key to their effectiveness in individual cases, is that they are processes voluntarily entered into by the parties in dispute with outcomes, if the parties so wish, which are non-binding. Consequently the court cannot direct that such methods be used but may merely encourage and facilitate.*
>
> *If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process. If a judge takes the view that the case is suitable for ADR, then he or she is not, of course, obliged to take at face value the expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR. But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it."*

In the light of the above "To what extent, if at all, in the light of the ECHR and the HRA 1998, can the UK courts mandate mediation?"

Since the early 1990'ies the UK courts have gradually embraced the concept of mediation, recognising it as an additional method for the parties to disputes to broker settlements that would otherwise require the good offices of the court. The win-win concept has received judicial approval, recognising that the adversarial nature of litigation is not conducive to continuing relationships. Furthermore, an over-loaded judicial system welcomed the opportunity to reduce the court lists.[10] The courts soon distinguished between unenforceable agreements to agree or good faith negotiation agreements and agreements to mediate. A mediation agreement, they found, is an enforceable agreement to engage in the mediation process, albeit that it may not be successful, which can be supported by a stay of action pending engagement in the process. However, since a stay pending a refusing defendant's engagement in mediation would deprive a consenting claimant of a forum, it is pointless issuing a stay in such circumstances.

The Civil Procedure Rules 1998 explicitly endorse the concept of ADR / mediation firstly in Rule 1(4) on case management, as a means of achieving the over-riding objective of enabling the court to deal with cases justly in a speedy, cost effective manner, proportionate to the issues at stake. The ability to stay an action to afford the parties a window of opportunity to attempt to negotiate a settlement is set out in Rule 26(4) and finally, by virtue of s44(3) the unreasonable refusal of a party to engage in negotiations can lead to cost penalties, displacing the traditional rule that costs follow the event. There is a duty of legal advisors to inform clients of the benefits of mediation and to ensure that the client had given the concept due consideration. The list of cases encouraging mediation and extolling its virtues grows ever longer.

However, all of this, whilst providing support for the mediation process, even in the absence of a contractual mediation agreement, falls short of mandating mediation. Indeed, it is clear from Lord Justice Dyson's judgement in ***Halsey v. Milton Keynes General NHS Trust*** that his Lordship considers that it is unlikely that the UK courts would go so far as to mandate an "ad hoc" reference to mediation against the will of the parties to a dispute.[11] Whether or not the ability to be able to do so exists is yet another matter. It would appear that some members of the judiciary would favour such as power, as demonstrated by the judgement of Hobhouse J in ***Automotive Patterns (Precision Equipment) Ltd v. A.W. Plume Ltd***[12] where he expressed the view that this case would have been an appropriate case for court ordered mediation if such a facility existed in the UK.. That "**IF**" demonstrates that he did not think at that time that such a power existed. Compare however s4.7 of the General Practice Direction Pre-Action Protocol which clearly does not envisage compulsory mediation.

GENERAL PRACTICE DIRECTION – PRE-ACTION PROTOCOLS

> *4.7 It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR.**

* The Legal Services Commission booklet 'Alternatives to Court', CLS Direct Information Leaflet 23 lists a number of organisations that provide alternative dispute resolution services. (www.clsdirect.org.uk/legalhelp/leaflet23.jsp),

[10] See inter alia ***Dunnett v Railtrack plc*** [2002] EWCA Civ 303 and ***Hurst v Leeming*** [2001] EWHC 1051 (Ch).

[11] By contrast Court ordered / mandated mediation is the norm in 13 US States, Canada and Singapore - so the concept has, for better or worse been tried and tested (and arguably proved) elsewhere by democratic societies.

[12] ***Automotive Patterns (Precision Equipment) Ltd v. A.W. Plume Ltd*** [1996] EWCA Civ 825

However, it was not beyond question that this was something the courts could not do. Consider the order given by the court in ***Rickards v Jones***.[13] The court order stated *"3 The parties shall take such serious steps as they may be advised, both between themselves and with the NHBC, to resolve any disputes by ADR procedures by the end of November 2000. "* The ***Rickards v Jones*** formula was adopted in the High Court Chancery Division decision of Blackburne J in ***Shokusan Co Ltd v Danovo Ltd.***[14] This concerned a rent dispute between the long leasehold owners of London County Hall and the owner and operator of the Saatchi Gallery, housed on the first floor of that building. Danovo requested Shokusan to mediate the matter and on being rebuffed applied for an Order substantially following Appendix 7 to the Admiralty and Commercial Costs Guide that the parties mediate their various disputes, the order to include a mechanism for the mediator's appointment, to require the parties to participate and if the mediation fails, to account to the court whey it failed. Picking up at para 12 the transcript reads :-

"12. The first question which arises is whether the court has jurisdiction to order a party, who is unwilling, to have a dispute mediated in the terms applied for. Mr Andrew Hochhauser QC who appears with Mr Andrew Walker on behalf of Danovo, making the application, says that I have such jurisdiction. Mr Nicholas Taggart appearing for the defendants says that I do not.

13. There is no doubt that courts have assumed such a jurisdiction. That is apparent from an unreported decision of Mrs Justice Arden, as she then was, in the case called ***Guinle v Kirreh, Kinstreet Limited v Balmargo Corporation Ltd,***[15] *judgment in which was given on 3rd August, 1999. A submission had been made that the court did not have such a jurisdiction. One party at any rate was not willing to undergo ADR. The court nevertheless directed ADR and did so in a form which has been largely followed in the draft Order attached to the application before me. Mrs Justice Arden took the view that Rule 1.1 of the Civil Procedure Rules, setting out the overriding objective, opened the way and that Appendix 7 to the Admiralty and Commercial Courts Guide provided the structure for such an Order.*

14. Then there is the case of ***Muman v Nagasena*** *in the Court of Appeal reported in [2000] WLR 299. That was a dispute over the administration of a charity. The court took the view that mediation would help. Towards the end of his judgment, Lord Justice Mummery, at page 305, said this:*

> ***"In this case very substantial sums of money have been spent on litigation without achieving a resolution. The spending of money on this kind of litigation does not promote the religious purposes of this charity. It is time for mediation. No more money should be spent from the assets of this charity until (i) the Charity Commissioners have authorised the proceedings and counterclaim and (ii) all efforts have been made to secure a mediation of this dispute in the manner suggested."***

15. He had earlier said that there existed a mediation service for charities which had been established by the Centre for Dispute Resolution, jointly with the National Council for Voluntary Organisations, under the umbrella of the Home Office and that the purpose of the scheme was to achieve by voluntary action confidentially conducted, a healing process in which disputes within a charity can be resolved at a modest fee and without the use of funds which have been raised for charitable purposes. In suggesting the Order which he refers to in his judgment, he made it clear that a stay of proceedings until after an attempt had been made by both parties to resolve the dispute by mediation was quite separate from the requirement of authorisation under Section 33 of the Charities Act, 1993.

16. Those two cases plainly proceeded upon the basis that there is jurisdiction to make an ADR order even when one side is opposed to such relief." ……17 …… 18 ……

19. I take the view that the exercise of those powers is not confined simply to the case where the parties jointly wish to settle the whole or part of the case or to use alternative dispute resolution procedures. There is nothing binding on this court to the effect that there is no jurisdiction, to have recourse to those powers unless both parties are willing. I do not accept that the remarks of Mr Justice Lightman in ***Hurst v Leeming*** *to which my attention was drawn (in particular in paragraph 12) are to be taken as a statement that mediation can only be ordered where both parties are willing. Nor do I take the view that the remarks in paragraph 11 of the judgment of Lord Justice Tuckey in* ***Tarajan***

[13] ***Rickards v Jones*** [2002] EWCA Civ 260.
[14] ***Shokusan Co Ltd v Danovo Ltd*** [2003] EWHC 3006.
[15] ***Kinstreet Ltd v Balmargo Corporation Ltd [1994] Ch 1994 G2999***

> ***Overseas Limited v. Donald Lee Kaye***[16] *are to similar effect. I notice, moreover, that in* ***Cable & Wireless Plc v IBM United Kingdom Ltd*** *[2002] EWHC 2059 (11 October 2002) Colman J observed that the making of ADR orders was commonplace, (at any rate in the Commercial Court), even when one party objects to such an order and that, occasionally, such an order has been made even in the face of objections from both sides.*
>
> *20. I, therefore, accept Mr Hochhauser's submission that there is jurisdiction to order ADR, notwithstanding that one side opposes the making of such an order.*

Having concluded that he had jurisdiction to make such an order, Blackburne J considered why he should do so, noting that the applicant stated in favour of such an order that a) the parties were in long-term relationships and will need to talk to each other and work together in future, possibly for many years b) the claimant and defendant had a shared interest in the success of the gallery, in particular, in the profit rent arrangements c) wider issues than those covered by the claim needed to be addressed between the parties d) there was nothing to lose and everything to gain from mediation e) there was a need to take the heat out of the dispute f) mediation could potentially save both parties money. Blackburne J saw particular merit in points a) and b). Denying an assertion that mediation threatened confidentiality and privilege, Blackburne J made an order mandating mediation, on terms similar to those requested.

There are a number of judicial statements that express the view that the presiding judge did not have the power to mandate mediation and even opposing the notion of mandated mediation. Thus in ***H (A Minor)***[17] Wall LJ stated that *"There needs to be a mechanism to reduce the mother's anxiety, assuming for this purpose that the father's bona fides are established. But that is a matter for the parties. I cannot compel them to mediation and indeed compulsory mediation is a contradiction in terms."* Since these judicial statements are made by the way, in relation to proposals and recommendation by the court, rather than as matters that the court had to decide, they do not amount to authority for the proposition that the courts cannot mandate mediation. Whether compulsory engagement in the mediation process, as opposed to a requirement to settle, is in fact a contradiction terms is less than certain. It is true that whilst one can lead a horse to water, one cannot make him drink. That however does not mean one should not, even in the face of stubborn resistance, take the strongest reasonable measures available to present the horse with the opportunity to drink.

Both ***Halsey*** and ***Rickards*** are Court of Appeal decisions, as indeed was ***Muman,*** and are thus of equal standing. If anything, ***Rickards*** has the stronger pedigree. Inevitably therefore, ***Halsey*** had to leave the question open as to whether or not the courts can lawfully mandate mediation. Only a decision of the House of Lords or fresh legislation can provide a final answer to this question. Arguably a mere Practice Direction is not sufficient for such purposes.

The 2004 London Court Scheme steered a mid-way course between ***Halsey*** and ***Rickards***. Rather than merely require the parties as per the Civil Procedure Rules to be advised on, consider and chose whether or not to opt in to mediation (including explaining to the court how they reached a decision not to opt in) the Trial Scheme required the parties, selected on a random basis, to mediate their dispute, subject to a right to opt out (also requiring reasons). Therefore the court shifted its mediation service from "*opt in*" to "*opt out*", each time with reasons and potential cost consequences. The Scheme provided as follows :-

PRACTICE DIRECTION TO SUPPLEMENT CPR PART 26 (2005)
PILOT SCHEME FOR MEDIATION IN CENTRAL LONDON COUNTY COURT

General

1.1 This practice direction provides for a pilot scheme to operate from 1st April 2004 to 31st March 2005 in relation to claims in the Central London County Court.

1.2 This practice direction enables the Central London County Court to

(1) require the parties to certain types of claims either to attend a mediation appointment or to give reasons for objecting to doing so; and

[16] ***Tarajan Overseas Limited v. Donald Lee Kaye [2001] EWCA Civ 1859***

[17] ***H (A Minor) [1998] EWCA Civ 98 (29 January 1998)***

1.3 Cases in which a notice of referral to mediation has been served under paragraph 3.1 prior to 31st March 2005 shall remain subject to this practice direction until either

(1) a mediation appointment has taken place; or

(2) any stay of execution imposed under paragraph 5 has expired or been lifted by the court,

whichever shall be the sooner.

Types of claims to which this practice direction applies

2. This practice direction applies to a claim if it meets all the following conditions

(1) the small claims track is not the normal track for the claim;

(2) no party to the claim is

(a) a child or patient; or

(b) exempt from payment of court fees; and

(3) the court has not granted an interim injunction in the proceedings.

Service of mediation notice

3.1 The court may, when it serves the allocation questionnaire under rule 26.3, serve a notice of referral to mediation on each party

(1) notifying them that the claim is to be referred to mediation; and

(2) requiring them, within 14 days after service of the notice on them, to file and serve a reply to the notice in which they must

(a) state whether they agree or object to mediation;

(b) specify any dates within three months of the date of filing the response on which they would not be able to attend a mediation appointment; and

(c) if they object to mediation, set out their reasons for doing so.

3.2 The cases where a notice of referral to mediation is served on the parties will be chosen at random from those that meet the criteria set out in paragraph 2.

3.3 A party who receives a notice of referral to mediation need not complete and file an allocation questionnaire unless or until directed to do so by the court.

Objection to mediation

4.1 If one or more of the parties states in his reply that he objects to mediation, the case will be referred to a district judge who may -

(1) direct the case to be listed for a hearing of the objections to mediation;

(2) direct that a mediation appointment should proceed;

(3) order the parties to file and serve completed allocation questionnaires; or

(4) give such directions as to the management of the case as he considers appropriate.

4.2 If a party does not file a reply within the time specified in the notice of referral to mediation, the court and all other parties may proceed as if that party has no objection to the use of mediation in the case.

Mediation appointment

5.1 If no party objects to mediation, or the court directs that mediation should proceed, the court will direct that the proceedings be stayed for an initial period of two months.

5.2 In accordance with the existing Central London County Court Mediation Scheme, the court will fix a date, time and place for the mediation appointment and notify the parties accordingly once all the parties have paid the mediator's charges.

5.3 When the court fixes a mediation appointment it will if necessary extend the stay of proceedings until the date of the appointment.

Mediator's charges

6.1 A mediator's charge is payable by each party who is to attend a mediation appointment. The court will notify each party of the amount of the charge and request payment of that amount in the notice of referral to mediation.

6.2 A party must pay the mediator's charge to the court within 14 days of being requested to do so or such other period as the court may direct. Any request for further time in which to pay the mediator's charge may be made by letter.

6.3 If any party fails to pay the mediator's charge the court will refer the case to a district judge for directions.

Unsuccessful mediation

7. If the mediation does not proceed or does not fully resolve the dispute, the mediator will notify the court and the court will

(1) either

(a) allocate the claim to a track; or

(b) order the parties to file and serve completed allocation questionnaires (if not already filed); and

(2) give such directions for the further management of the case as it considers appropriate.

Whether the opt in or opt out version is adopted, critics of mediation complain that the ***"coercive",*** some would say "***blackmail,***" penalty of costs for unreasonably failing to mediate is unconstitutional and amounts in practice to an economically enforceable requirement to participate in mediation, which undermines the law on consent. The courts however have not accepted that cost penalties are a constraint contrary to the ECHR and the HRA.

The clear exception to the above however concerns Public Law disputes. Following on from ***Cowl v Plymouth CC***[18] and ***Royal Bank of Canada***[19], it is clear that the courts are able to refuse an application for Judicial Review (available as a discretion - not a legal right) for a failure to exhaust all other avenues of resolution, including a wide variety of forms of ADR, including negotiation. In ***Anufrijeva***[20] this was held to conform with Human Rights, which were the central issue under consideration by the court.[21] Without expressly mandating mediation, the equivalent effect is achieved, in that, in the absence of an unsuccessful attempt to mediate, the courts are able and willing to refuse an application for Judicial Review. Clearly, such a refusal can only operate against the applicant, though the ***Royal Bank*** case demonstrates that a refusing public authority can have cost penalties imposed upon it.

It is important to distinguish between "ad hoc" references and contracted references. Contracted ADR must be further divided into consumer and commercial.

Where the parties to a commercial dispute are subject to a mediation provision, participation in the mediation process is a pre-requisite to litigation (or even arbitration in the case of a med/arb clause). The courts can, will and indeed must order a stay pending mediation, exactly the same as in arbitration and in construction adjudication.[22] Contrary to the reference to ***Deweer v Belgium*** made by Dyson LJ in ***Halsey,*** the courts have not hesitated to stay action to Arbitration under s9 Arbitration Act 1996 (because there is a consent to waive the right to arbitration) and similarly on five occasions the courts have confirmed that construction adjudication is not contrary to the ECHR. A mere delay in getting to the courts has not been accepted as a constraint.[23] The underlying rationale is that enforcement of both mediation agreements and adjudication decisions provide the parties with their day in court - so Article 6 is not breached.

Consumer arbitration is different in that there is a requirement for the UK to comply with the Unfair Contractual Terms Regulations. Hence s89-91 Arbitration Act 1996 provides that s9 does not apply to consumer

[18] ***Cowl (Frank) v. Plymouth City Council [2001] EWHC Admin 734 : [2001] EWCA Civ 1935***

[19] ***Royal Bank of Canada Trust Corporation Ltd v Secretary of State for Defence [2003] EWHC 1479 (Ch)***

[20] ***Anufrijeva v L.B. Southwark; R v SS for H.D. ex parte N & M [2003] EWCA Civ 1406***

[21] See also ***Rye v Sheffield City Council*** [1997] EWCA Civ 2257

[22] See ***Torith Ltd v Stewart Duncan Robertson*** [1999] LTL C8200316 : ***Cable & Wireless v IBM*** [2002] EWHC 2059 : ***Haines v Carter*** [2002] UKPC 49 **:** ***Donwins Production Ltd v EMI Films Ltd*** [1984] Times 9th March 1984 : ***Courtney & Fairbairn v Tolaini Bros.(Hotels) Ltd*** (1975) 1 WLR 397.

[23] see ***Fab-Tek Engineering Ltd v Carillion Construction Ltd*** **[2002]** ***Dunfermline Sheriff Court : Karl Construction (Scotland) Ltd v Palisade Properties plc*** [2002] GWD 7-212; 2002 SLT 312 : ***Austin Hall v Buckland Securities Ltd*** [2001] BLR 272 :

arbitration - at least from the consumer's point of view. On the other-hand an "ad hoc" reference as a post dispute agreement is not an unfair waiver and is enforceable. Even this is questionable and may have been too cautious. Consumer home owners who contracted in to adjudication have been held to be bound to the process and that it does not amount to an unfair constraint on the right to litigation.[24] It would appear that mediation / adjudication clauses in standard form consumer purchase contracts may still be a problem - but where the parties actually negotiate the terms of the contract they are not. Consumer adjudication / arbitration schemes dealing with the travel industry and the like are now common.

Apart from the Courts, which are governed by the CPR, there are a diverse range of publicly funded adjudicators, arbitrators, ombudsmen and tribunals in the UK that have statutory authority to settle disputes and challenges to the decisions of public bodies and bodies that exercise authority over matters that are in the public interest, such as the disciplinary committees of many of the professional bodies.

The first thing to note is that, in common with the courts, all quasi-judicial decision makers fall within the judicial review jurisdiction of the Queens Bench Division, High Court, under Part 54 CPR. Thus such decision makers may be held to account for failure to adhere to the rules of due process and natural justice. This facility goes a long way towards fulfilling the requirements of Article 6 ECHR.

The second point however, is that apart from the general rules and procedures set out in the Tribunals and Inquiries Act 1992 and the guidance provided by the Council on Tribunals, the powers and procedures of each tribunal are set out by Act of Parliament. There is a distinct lack on uniformity in this regard. It is not possible therefore to make generalisations as to whether or not such statutory decision makers have the power to mandate mediation. In each case careful consideration should be paid to the relevant statute before forming a view as to whether nor not that might be the case. A number of these statutes specifically provide for mediation and thus sets out the mediation powers and duties of the decision maker.[25]

There is no general bar to a decision maker recommending pre-emptive mediation. Thus whilst the Housing Grants Construction and Regeneration Act 1996 provides a process whereby either party to a relevant construction dispute has the statutory right to refer a dispute to adjudication, there are a number of instances where the adjudication process has been terminated as a consequence of a settlement, on times brokered with the assistance of a mediator. Indeed, whilst ***Glencot v Barret***[26] outlines the dangers inherent in an adjudicator performing the function of a mediation and reassuming his role as an adjudicator in the event of a failure to mediate, with appropriate cautions issued, there is nothing to prevent an adjudicator so doing. However, it has now been established that a mediation provision cannot inhibit the right to a party to refer a dispute to adjudication and having accepted the appointment the adjudicator must, in the absence of consent and an extension of time by the appointing party or by joint consent, render a decision within 28 days.[27]

Where statute does not proscribe the period of time for producing a decision, there is scope for an intervening mediation process. This is the model adopted by Nominet, the expert determination process for the settlement of domain name disputes. Under this scheme the parties have the option to fast track direct to determination but attempts at mediation are the norm. Thus mediation is not mandated. It would appear that it is highly unlikely that the courts would support satellite judicial and quasi-judicial decision makers adopting mandatory mediation procedures in the absence of express statutory authority to do so.[28]

Conclusions

It is difficult to predict the final form that court annexed mediation will assume in the United Kingdom. Much will depend upon the initiatives of governments over the next few years. It is not possible to rule out radical reformulations, particularly if the government of the day perceives that they can deliver economies and improve access to justice. The literature at the end of this chapter demonstrates that there are both ardent proponents and opponents of court annexed mediation.

[24] See ***Westminster Building Company Ltd. v Beckingham*** [2004] EWHC 138 : **Lovell Projects Limited v Legg and Carver** [2003]BLR 452 : ***Bryen & Langley Ltd v Boston*** [2005] EWCA Civ 973.

[25] **Employment Rights (Dispute Resolution) Act 1998**

[26] ***Glencot Development & Design Ltd v. Ben Barrett & Son Ltd [2001] EWHC TCC 15***

[27] ***R G Carter Ltd v Edmund Nuttall Ltd (2002) BLR 359***

[28] ***Secretary of State for Defence v Farrow System Ltd [2005] BL O/008/05***

Working party on ADR. Second Report of Commercial Court Committee.

1. Introduction

The first Report of the Working Party dated 12 June 1996 made recommendations as to the making of ADR orders in Commercial Court proceedings and as to other related matters. The object of these recommendations was to encourage the settlement of commercial litigation with the minimum cost to the parties and also to reduce the incidence of commercial litigation and so help limit the requirement for judicial resources. The Report included a draft practice direction which was intended to give effect to the recommendations. This practice direction was circulated to the Commercial Court Committee, approved by the Commercial Judges and formally promulgated by Mr Justice Waller on 7 June 1996. A copy is attached.

In view of the substantial changes of procedure recommended and the untried nature of its proposals, the Working Party recommended that the working of the ADR jurisdiction should be monitored and reviewed after two years. The Working Party has therefore been reconvened in order to review the effect of the new jurisdiction and to consider whether it ought to be continued and, if so, whether any changes ought to be made in the light of the experience of the last two years.

At the time of consideration of the contents of this report the final procedural proposals for the Commercial Court arising out of the Woolf recommendations were not to hand. This report is therefore prepared against the background of existing procedure. However, it is believed that its recommendations are likely to be compatible with any changes in Commercial Court procedures so far put forward by the Lord Chancellor's Department.

2. The Nature of Orders made under the Practice Direction

Fundamental to the recommendations of the first Report was the principle that the ADR jurisdiction should not impose on the parties a mandatory regime. If both the parties formed the view that it was inappropriate to submit their disputes to ADR or, having done so, to proceed to a settlement, they should be entitled to continue with their Commercial Court action in the ordinary way. To give effect to this principle but also to encourage the parties and their advisers to concentrate their minds on the real benefits of ADR, the form of the ADR orders made has been along the following lines: (see Guide to Commercial Court Practice, 4th Edn, pages 71-72). *"(Within the next 28-42 days) or (following exchange of lists of documents) or (following exchange of factual witness statements) or (following exchange of expert reports) or (before setting down for trial) the parties shall take such serious steps as they may be advised to resolve their disputes by ADR and, should they fail to do so, they shall inform the court by letter what steps they have taken and, without prejudice to matters of privilege, why such steps have failed. Costs of the ADR to be costs in the cause."*

In some cases the order has also suspended the periods of time within which certain interlocutory steps in the proceedings were required to be taken so that the parties should be given the chance to allow ADR procedures to take their course without having to conduct them simultaneously with preparations for trial. However, it has been found that a complete suspension of the pre-trial timetable often has substantial disadvantages. Very often the parties have taken an inordinate time to agree whether to attempt mediation and if so, the identity of the mediator and how proceedings ought to be pursued. Some actions have been delayed for many months while minimal progress has been made towards ADR proceedings. In order to minimise delay, orders for ADR have in general required the timetable towards trial to be maintained, but have required steps towards settlement by ADR to be taken before a particular stage in the pre-trail timetable, such as exchange of factual witness statements or setting down for trial. Such orders have not always avoided significant delay due to the parties agreeing to extend time for the next stage in the pre-trial timetable.

In certain special cases the judges have made ADR orders pending delivery of a reserved judgment on an interlocutory application, allowing the parties, having fully argued the issues, to attempt to resolve the whole litigation by ADR within perhaps 28 days, after which judgment would be given on the interlocutory application.

Consistently with the persuasive rather than the mandatory philosophy of the Practice Direction, orders ancillary to the making of conventional ADR orders have included a requirement that within a period of a

few days the parties should exchange lists of three neutrals each who are available to provide ADR mediation within a given period of time and should select one such person from such lists, failing agreement on such neutral, the matter to be restored to enable the court to facilitate agreement on a neutral.

The Court has not been deterred from making ADR orders in cases where one, or even both, of the parties have objected, provided that the nature of the issues or the relationship between the parties lend themselves to ADR procedures. Experience suggests that, even where the parties are at first ill-disposed to or highly sceptical as to mediation, the intervention of a neutral may so strongly influence them that initial hostility may change to reluctant enthusiasm. As the experience of the judges of the results of ADR orders increases, they are able to derive a more accurate "feel" for cases particularly likely to respond to ADR orders.

3. The Effect of ADR Orders on the Settlement of Commercial Litigation

Between June 1996 and July 1998 a total of at least 67 ADR orders were made. "At least" has to be inserted because, it is believed that a relatively small number of orders may have been made without having been notified to the Commercial Court Listing Office.

The total number of letters received by the Listing Office in consequence of those orders indicating either that ADR had not been proceeded with or that, having been attempted, it had failed to produce a settlement, amounted by the date of this Report to 7. One of these cases has subsequently settled, but six have either gone to trial or are awaiting trial.

The nature of the monitoring system introduced by the Court does not enable it to conduct an analysis of the response of the parties to ADR orders in those cases where an ultimate settlement was achieved. It is not therefore possible to say in how many of these cases ADR procedures were used and in how many of them direct bilateral negotiation achieved settlement. This Working Party does not believe that to be a matter of great importance. If the parties respond to an ADR order by achieving within the time designated by the order a settlement by direct negotiation, they will have achieved by a cheaper and less complicated mechanism the objective which such an order was intended to help them reach.

The achievement of settlement by direct negotiation, as well as by ADR procedures, is no doubt a consequence of the matters taken into account by the judges in deciding which cases are appropriate for ADR orders. A major consideration in that regard is the claim/costs ratio. Thus, if, for example, the claim is for, perhaps US$ 500,000, but the documentation is considerable, there are anticipated to be several factual witnesses whose evidence will not be short as well as expert witnesses on complex technical areas and the length of trial estimated as 5-7 days, it can at once be seen that the costs ratio will be so high that the sooner the litigation is settled the better.

The letters received by the court indicating failure to settle in response to ADR orders all describe decisions by one or both of the parties that ADR was inappropriate or unlikely to be productive of settlement. In none of those cases was a mediator appointed. A number of other letters indicate that, although the parties decided against ADR, they achieved settlement by means of direct negotiations.

The up-take of early neutral evaluation provided by the Commercial Judges has been low -

in only 4 cases. This can probably best be explained by lack of familiarity of the parties or their advisers with that facility and by the fact that the cases in which ADR orders have been made have not often leant themselves to such procedures. The facility is only likely to assist the parties in cases where there are one or few distinct issues on which preliminary views can be readily expressed without substantial presentation of the merits from either party. In such cases the Court will often be more inclined to conclude that a final determination of the separable issues under Order 33 rule 3 or Order 14A will more effectively and economically dispose of the whole action than a non - binding early neutral evaluation.

Nevertheless, we believe that in some cases the facility of an early neutral evaluation by the Commercial Judges can be a useful tool in persuading or encouraging settlement.

4. Does the Experience of the Last Two Years justify Continuance of the Practice Direction?

The Working Party has no doubt that in appropriate cases ADR orders have an important contribution to make to the early settlement of Commercial litigation. Even if the parties do not respond to such orders by

attempting ADR procedures, the impetus towards settlement by direct negotiation is undeniable. Furthermore, the fact that by such orders, the court takes an active part in directing the parties' minds towards settlement at a particular stage, often at an early stage in their pre-trial activities probably leads to an acceleration of settlement, even without mediation. The saving of costs to the parties and judicial time for the Court amply justifies continuation of the jurisdiction, at least as currently exercised. In the vast majority of cases where ADR orders have been made, successful mediation or settlement has followed.

Consideration has been given to whether one effect of ADR orders might be that litigants, particularly those from overseas, will be deterred from referring their disputes to the Commercial Court.

Although this would be a matter of great concern, there is so far no evidence to suggest this consequence is a reality. This Working Party is more concerned about the legal costs of heavy commercial litigation in London operating as a deterrent to the selection of English jurisdiction. In as much as successful ADR orders operating well before trial will tend to reduce those costs, it can be strongly argued that such orders are more likely to encourage than to deter the use of the English courts.

5. Should ADR Orders be made in all cases?

The Working Party believes that there are many cases within the range of Commercial Court work which do not lend themselves to ADR procedures. The most obvious kind is where the parties wish the court to determine issues of law or construction which may be essential to the future trading relations of the parties, as under an on-going long term contract, or where the issues are generally important for those participating in a particular trade or market. There may also be issues which involve allegations of fraud or other commercially disreputable conduct against an individual or group which most probably could not be successfully mediated. In such cases where ADR is unlikely to be given a chance by the parties, there is no justification for delaying the course of the proceedings or putting the parties to further unnecessary expense by introducing a regime of ADR orders in all cases. As the regime remains non - mandatory, such a practice would materially diminish the success - rate achieved by the present regime. It would also fail to convey to the parties that the judge making the order had formed the view that their case was particularly appropriate for ADR procedures, thereby encouraging them to try harder to achieve a settlement by that means. The process of judicial selection of the "right" cases for ADR produces the maximum flexibility and the most user - friendly and therefore potentially effective case management.

6. Should ADR Orders incorporate Costs Sanctions or other Inducements to Mediation?

In view of the fact that the letters received by the Court which reported a failure to settle following ADR orders indicated that the parties had decided not even to attempt mediation, the Working Party considered whether it might be appropriate for the court to impose costs sanctions in some such cases. The concept would be that if the court took the view that, instead of giving mediation a fair chance, the parties had simply decided to litigate for no specific reason, it might be appropriate, following trial of the action, to deprive the successful party of some or all of its costs. The purpose of such an order would be to deter parties from excluding ADR procedures without any serious grounds or out of prejudice against ADR on the part of them or their solicitors.

Such investigations as have been made do not suggest that a similar residual costs sanction is operated in any other jurisdiction. In Singapore, however, an inducement is granted to successful ADR participants in the form of a rebate of Court fees already paid by the parties.

After careful consideration the Working Party concluded that neither a costs sanction nor a Court fees rebate scheme should be introduced. The following considerations caused us to take this view.

(i) Given the Working Party's view that the ADR jurisdiction should remain non - mandatory, it was undesirable that the court should become involved in investigating the circumstances in which the parties had failed to agree to initiate ADR.

(ii) Investigation by the Court of such circumstances might well impinge on areas of privilege which in a consensual system ought to remain invisible.

(iii) Parties who wished to avoid ADR might well seek to avoid adverse costs orders by advancing bogus or at least contrived reasons for their decision which, if superficially plausible, the court would have to accept as sufficient.

(iv) If the parties were so adamantly opposed to mediation it was improbable that the threat of an adverse costs order of the kind proposed would deter them from dismissing ADR out of hand.

(v) Court fees are currently set at such a low level in this country that it was hard to believe that any rebate scheme would be likely to operate as an inducement to give mediation a try where parties were so strongly opposed to it that they would not agree even to attempt it.

The Working Party considers that in order to discourage the parties simply ignoring the Court's order or rejecting ADR out of hand without giving it a serious chance, it is desirable that if the parties wish to continue their action without even having tried ADR; they ought to come back before the court and discuss with the judge why they have not responded more constructively to an ADR order previously made. This need not involve any invasion of matters of privilege, but it would enable the court to take a more persuasive course if it appeared that the parties had not really applied their minds in a properly informed manner to the prospects of achieving settlement by ADR. While the present system of letters to the court reporting and explaining failure to achieve settlement by ADR should continue in those cases where ADR has been commenced, ADR orders should in future require that, before continuing towards trial, the summons for directions be restored in those cases where ADR has not even been attempted.

In a recent lecture to the Chancery Bar Association Mr Justice Lightman put forward a number of suggestions for driving the parties to use their best endeavours to make ADR succeed. He has recommended that the party responsible for the failure of the ADR order to achieve settlement should be made to bear the whole or part of the ultimate costs of the action. ADR orders should therefore incorporate words which reflected that sanction.

This Working Party does not agree with that suggestion. It involves a fundamental departure from the confidentiality of negotiations for settlement and the insulation from them of the judicial process. The success rate of ADR orders is so high that this course would hardly seem justified in order to achieve success in those few cases where there is no genuine bilateral commitment to a successful ADR. Further, in those cases where ADR failed or was not commenced such orders would involve an investigation by the court into responsibility for what had occurred which in a complex series of negotiations might be very time-consuming and would itself increase the costs for both sides. These unattractive consequences far outweigh the value of the marginally increased success rate of ADR orders which might thereby be achieved.

7. Preventing ADR causing delay to the Preparations for Trial

The Working Party recognises the need to avoid substantial disruption of pre-trial preparations by the parties' attention being diverted to attempting to initiate and pursue mediation procedures. It is also of the view that it is imperative that plaintiffs should not come to view ADR orders as providing defendants with a means of delaying justifiable claims. This effect can be prevented by a number of different methods, namely:

(i) inserting in ADR orders a date by which ADR must be completed;

(ii) inserting in ADR orders dates by which the parties should exchange lists of available neutrals and by which, if they are unable to agree on a name from those lists, the matter should return to court and;

(iii) by the early fixing of the date for trial.

As to the imposition of (i) a completion date, this may only be appropriate in matters of some urgency, where the pre-trial timetable is very short and it is essential that the parties know where they stand as early as possible. Its disadvantage is that it introduces an element of inflexibility into the settlement process which may prove counter-productive in some cases. Where an ADR order is made with reference to other stages of the pre-trial timetable to which fixed dates have been given it would seem unnecessary to super-add a further fixed date applicable to ADR. If the next stage in the timetable cannot be proceeded with until the parties have reported to the court, a further fixed date may be superfluous.

As to (ii) the requirement to exchange lists of neutrals by a fixed date, it is believed that this should be much more widely used. It concentrates the parties' minds on the need to give urgent and very serious consideration to ADR as a settlement process and to initiate that process at a very early stage.

As to (iii) the early fixing of a date for trial, if at the time when the parties commence their endeavours to comply with the ADR order a trial date were already fixed, there would clearly be a strong incentive to make progress with ADR simultaneously with trial preparations. Accordingly, there would be less risk of delay due to ADR orders if at the time when the order were made a time limit were imposed on the fixing of the trial date. Normally, a summons for directions is heard when the pleadings have closed and discovery is largely completed. If on that occasion an order were made requiring the fixing of the trial date by no later than a given date, the entire pre-trial timetable would be driven by the need to maintain sufficient momentum to be ready for trial on the date so fixed.

Suggestions have been made in some quarters that there should be a court official whose responsibility it is to follow up ADR orders in order to monitor the response of the parties and with responsibility for seeing that progress is made. This Working Party is not persuaded that this course is necessary or desirable. If the ADR orders are initially made on a non-mandatory basis, it is undesirable that, until the parties have finally abandoned the process, the court should intrude in the progress of their efforts towards settlement. The plaintiff will almost always have an interest in pursuing its claim with as little delay as possible and it can therefore be assumed that in most cases the plaintiff will return to court if ADR is not being genuinely progressed by the defendants.

Furthermore, since the success of the Commercial Court depends indisputably on the direct involvement of the Commercial Judges at all interlocutory stages and since it is they alone who make ADR orders in the first place, it would be unsatisfactory to vest any other court official with power to interfere with the running of ADR or its impact on the pre-trial timetable.

8. The Need for the Court to Explain ADR to the Parties

Experience suggests that when an ADR order is made those representing the parties may have little knowledge or experience of ADR in practice. The judges should in that event explain with some care the effect of the order made and in particular, if necessary, what ADR entails.

In this connection, in appropriate cases an explanation should be given of judicial early neutral evaluation (ENE). The Working Party is strongly of the view that this facility has been so little used because the legal profession is not generally aware that it is available or how it can be arranged. It should accordingly, be explained that, if an order for ENE by a commercial judge is made, arrangements for the appointment of the judge must be made with the Listing Office in the same way as for the fixing of a summons. The arrangements for the ENE should be treated by the Listing Office as a matter deserving of a degree of priority.

Attached to this Report are some Guidance Notes which, it is recommended, should be provided to the parties to ADR orders at the time of making the order.

9. Court - accredited Neutrals

The Working Party is not in favour of the court taking any part in the approval or accreditation of those who hold themselves out as neutrals. This course would be consistent with the practice adopted in many other jurisdictions where the court does not appoint its own neutrals. Although there are many who have received some form of ADR training, and who wish to be appointed as neutrals there are others who have not but who wish nonetheless to be appointed. Amongst the latter are several retired judges. At present the Listing Office provides parties with a list of umbrella institutions providing trained neutrals, such as CEDR, as well as a list of retired judges who may or may not have received any formal ADR training.

It is not considered that the court should be involved in any way in the accreditation of ADR neutrals. It is, however, certainly true that more and more people are purporting to offer their services as neutrals to the public at large. It is normally not difficult to ascertain whether they have obtained experience from one of the practical training bodies.

This Working Party believes that ADR techniques require intensive and specialist training and that a trained mediator is more likely to achieve results than one who is not trained at all. However, experience shows that sometimes those without such training but with long experience of commercial litigation can achieve significant access as neutrals.

For these reasons it is recommended that the existing practice of the Listing Office should be altered to the extent of listing those institutions offering ADR-accredited members who have been trained in the relevant techniques and also those retired members of the judiciary who wish to be appointed, but indicating that some of those included may not have received ADR training.

Litigants will then be able to obtain the names of individuals offering ADR services from one or other of the institutions concerned.

10. The Form of ADR Orders

Attached to this Report is a form of ADR order which reflects many of the recommendations set out above. The Working Party is, however, strongly of thie view that such form of order should not be regarded as an inflexible formula. On the contrary, flexibility is an essential feature of such orders. They must be fashioned to suit the best interests of the parties in accordance with the judge's perception in each case.

Dated: 14 July 1998

Mr Justice Colman – Chairman
Mr Justice Tuckey
Mr Justice Cresswell
Anthony Pugh Thomas (Lovell White Durrant)
Charles Williams (Thomas Cooper & Stibbard)
Anthony Willis (Clifford Chance)
Diana Good (Linklaters & Paines)
Elizabeth Birch (COMBAR)

Appendix 1

Practice Direction of Mr Justice Waller dated 7th June 1996

On 10th December 1993 Mr Justice Cresswell issued a Practice Statement on the subject of ADR indicating that the judges of the Commercial Court wished to encourage parties to consider the use of ADR. In consequence of that Practice Statement, amendments were made to the standard questions to be answered by the parties in preparation for the Summons for Directions and to the standard questions to be answered as part of the Pre-Trial Check List. Additional questions were inserted in order to direct the attention of the parties and their legal advisers to ADR as a means of settling their disputes. By that practice Direction, legal advisers were urged to ensure that parties were fully informed as to the most cost effective means of resolving the particular dispute.

The Judges of the Commercial Court in conjunction with the Commercial Court Committee have recently considered whether it is now desirable that any further steps should be taken to encourage the wider use of ADR as a means of settling disputes pending before the Court. In the belief that, whereas the Commercial Court will remain an entirely appropriate forum for resolving most of the disputes which are commenced before it, the settlement of actions by means of settling disputes pending before the Court. In the belief that, whereas the Commercial Court will remain an entirely appropriate forum for resolving most of the disputes which are commenced before it, the settlement of actions by means of ADR (i) significantly helps to save litigants the ever-mounting cost of bringing their cases to trial; (ii) saves them the delay of litigation in reaching finality in their disputes, (iii) enables them to achieve settlement of their disputes while preserving their existing commercial relationships and market reputation; (iv) provides them with a wider range of settlement solutions than those offered by litigation; and (v) is likely make a substantial contribution to the more efficient use of judicial resources, the Judges will henceforth adopt the following practice on the hearing of the first inter partes Summons at which directions for the interlocutory progress of the action are given or at subsequent inter partes hearings at which such directions are sought

If it should appear to the judge that the action before him or any of the issues arising in it are particularly appropriate for an attempt at settlement by ADR techniques but that the parties have not previously attempted settlement by such means, he may invite the parties to take positive steps to set in motion ADR procedures. The judge may, if he considers it appropriate, adjourn the proceedings then before him for a specified period of time to encourage and enable the parties to take such steps. He may for this purpose extend the time for compliance by the parties or either of them with any requirement under the Rules or previous interlocutory orders in the proceedings.

If, after discussion with those representing the parties, it appears to the judge that an early neutral evaluation is likely to assist in the resolution of the matters in dispute, he may offer to provide that evaluation himself or to arrange for another judge to do so. If that course is accepted by the parties, the judge may thereupon give directions as to such preparatory steps for that evaluation and the form which it is to take as he considers appropriate. The parties will in that event be required to arrange with the Commercial Court Listing Office the time for the evaluation hearing having regard to the availability of the judge concerned.

Where early neutral evaluation is provided by a judge, that judge will, unless the parties otherwise agree, take no further part in the proceedings either for the purpose of the hearing of summonses or as trial judge.

Except where an early neutral evaluation is to be provided by a judge, the parties will be responsible for agreeing upon a neutral for the purposes of ADR and will be responsible for his fees and expenses. As indicated in the Practice Statement on ADR made by Cresswell J. on 10th December 1993, the Clerk to the Commercial Court keeps a list of individuals and bodies that offer mediation, conciliation and other ADR services. If, after ADR has been recommended to them by the judge, the parties are unable to agree upon a neutral for ADR they may be consent refer to the judge for assistance in reaching such agreement.

On the hearing of any summons in the course of which the judge invites the parties to take steps to resolve their differences by ADR he may on that occasion make such order as to the costs that the parties may incur by reason of their using or attempting to use ADR as may in all the circumstances seem appropriate.

Should the parties be unable to resolve their differences by ADR or otherwise within the period of any such adjournment as may be ordered, they may restore the Summons for Direction or other summons for the purposes of reporting back to the judge what progress has been made by way of ADR (such report to cover only the process adopted and its outcome, not the substantive contact between the parties and their advisors) and whether further time is required for the purposes of ADR and, where efforts towards settlement by means of ADR have proved fruitless, for the purpose of obtaining further interlocutory directions in the proceedings.

Parties to pending proceedings who consider that ADR might be an appropriate form of dispute resolution for those proceedings or who wish to discuss the applicability of ADR with a commercial judge will be strongly encouraged to bring on the summons for directions at an earlier stage in the proceedings than would otherwise be justifiable. The fact that in such a case pleadings have not yet closed or that discovery has not yet been completed will not be regarded by the court as a reason for declining to consider the applicability of ADR in that case.

Appendix 2

ADR Orders in the Commercial Court

Guidance Notes for Litigants and their Lawyers

Introduction

1. This guidance refers only to mediation (the most common method of ADR) and to Early Neutral Evaluation, but not to Adjudication or Arbitration).
2. This guidance is intended as an outline only. Parties or their lawyers should take expert ADR advice if they are unclear about the process in any way.

CHAPTER FOUR

Mediation Essentials

3. Mediation is a well-tried, robust and powerful process. It is safe because no ultimate outcome can be imposed on any party except by agreement and because what is said or done during a mediation should be confidential and covered by 'without prejudice' privilege up to the point when agreement is reached.

   The neutral Mediator, chosen by the parties direct or through one of the ADR institutions, will direct procedure but it is for the parties to choose their own outcomes in negotiation with the other parties assisted by the neutral Mediator.

   The power of the process comes from the mixture of direct negotiation and private meetings helped by the experience of the Mediator, and the skill and experience of the parties and their lawyers. It can provide considerably more than direct negotiation. For that reason, even where direct negotiations have failed and where the parties are instinctively hostile to further attempts to settle, mediation often achieves a settlement. The range of possible solutions can be much wider than is possible in Court.

   The ultimate aim of a mediation is a binding agreement.

Time

4. Normally, the Court will wish the parties to proceed to mediation swiftly, so that Court time is not wasted with procedural or other steps which become unnecessary - and so that trial dates are not affected.

   The most effective and speedy mediations are usually those in which the parties appoint a Mediator very quickly and then make use of the Mediator's experience and skills to help construct the procedure.

   A mediation could take place in a matter of days. Even the most complex mediation should be capable of being arranged and dealt with in a few weeks at most.

Appointment of Mediators

5. This is usually done by the parties, sometimes direct or perhaps after consulting one of the mediation institutions, who will put forward names on request. In choosing a Mediator, parties should look for experience of mediation, after formal ADR training if possible. If subject matter expertise is thought necessary (but it is usually unnecessary, the parties and their advisers know much more about the technicalities than anyone) an expert in the field can be appointed. However, experience as a Mediator is much more important and a suitably qualified co-Mediator or Pupil Mediator can supply any specialist knowledge which might be thought necessary. Fees may be prescribed by the mediation institution or negotiated on a daily rate with the Mediator.

Mediation Agreements

6. These are usually short and uncomplicated. Some mediation institutions supply standard model agreements. A Mediator chosen in principle can help in framing the agreement. It will usually be a mistake to negotiate a complex mediation agreement without first choosing a Mediator or consulting a mediation institution for help.

Steps in a typical Mediation

Day 1 - Commercial Court ADR Order

Days 1-5 - Discussion between the parties and their lawyers and consultation with a mediation institute produces a short-list of three suitable Mediators

Day 6 - Parties agree on one of the three.

Day 10 - Preliminary meeting of the parties, their lawyers and the Mediator when the Mediator suggests a timetable for subsequent meetings, a form of mediation agreement, an exchange of background information and a short summary of each side's case. The procedure is agreed.

Day 15 - Parties exchange a 10 page summary of each other's position with copies of a core bundle including pleadings in the action.

Day 20 - Mediation, Day 1. Mediation commences, lasts all day and part of the evening. Parties attend with their lawyers.

Day 21 - Mediation, Day 2. Settlement reached, documented by the parties and their lawyers.

Day 22 - The Court is informed of the settlement with a draft Tomlin Order putting the settlement into place and a request to vacate the trial date.

Early Neutral Evaluation

The function of this procedure is to provide the parties to a dispute with a non-binding assessment by a neutral of their respective chances of success were the litigation to be pursued.

The procedure normally involves the selection of a neutral, who may be a Commercial Judge, and the concise presentation to the neutral of the nature of the dispute and the parties' respective contentions. The neutral will then give the parties his evaluation of the issues, indicating the strength and weaknesses of the claim and defences.

There will usually first be a preliminary meeting at which the neutral meets the parties and their representatives and agrees the future procedure.

Normally, the neutral will initially be provided with a limited amount of pre-reading, such as skeleton arguments, pleadings, witness statements and the key documents. There may then be a short hearing, not normally exceeding one or two days, in the course of which each party orally presents its case. That may in appropriate cases involve key witnesses and/or experts giving evidence. Such a hearing should always be attended by a board member or other representative of the parties with authority to settle the case.

In simpler cases or where the parties wish to save costs there is no reason why the entire procedure should not be in writing without the need for an oral hearing.

The neutral will not normally act as a mediator and when the evaluation is to hand it will be up to the parties to take whatever further course they consider best towards settlement. Or they may prefer to let some or all of the issues go to trial. If they do so, what passed in the course of the early neutral evaluation is entirely privileged.

Where a Commercial Judge is appointed as early neutral evaluator, he will taken no further part in the litigation unless the parties wish that he should do so. Application for the appointment of a Commercial Judge should normally be made to the Listing Office.

Appendix 3

Form of ADR Order

1. The parties shall within 5 days exchange lists of 3 neutrals each who are available to conduct ADR procedures in this matter prior to (date).
2. Within 2 days thereafter the parties shall in good faith endeavour to agree a neutral from the lists so exchanged.
3. Failing such agreement by (date) this summons will be restored to enable the court to facilitate agreement on a neutral.
4. The parties shall take such serious steps as they may be advised to resolve their disputes by ADR before the neutral so chosen by no later than (date).
5. If the matters in issue are not finally settled, the parties shall inform the court by letter prior to (exchange of list of documents or of witness statements or exchange of experts' reports or setting down for trial) what steps towards ADR have been taken and (without prejudice to matters of privilege) why such steps have failed. If the parties have failed to initiate ADR procedures they are to appear before Mr Justice ..... for further consideration of the Order.
6. Costs in the ultimate cause.

CHAPTER FOUR

A New TCC Court Settlement Process for Technology Disputes [29]

Introduction

The specialist judges of the Technology and Construction Court have particular expertise in the evaluation of the disputes which are dealt with in that Court. It has been suggested that the judges might use this expertise to assist the parties to proceedings to achieve settlements as part of their role of case management under the Civil Procedure Rules. As a result, the following process has been produced for those situations where a case managing judge feels, either of his own volition or following a request from the parties, that the parties should be able to achieve an amicable settlement and that the judge is particularly able to assist in achieving that settlement.

In those circumstances, the judge would be at liberty, as part of the Court procedure, to offer a Court Settlement Process to the parties and, if accepted by all relevant parties to the case, the Judge would make a Court Settlement Order embodying the parties' agreement and fixing a date for a Court Settlement Conference proportionate in time to the issues in the case but not normally lasting more than one day. The judge, who would normally have been the case management judge, would then conduct the Court Settlement Process in accordance with that Court Settlement Order. If a settlement were not reached then the case would be taken over by another case management judge.

Implementation Scheme

If this proposed procedure is approved in principle, it is suggested that there should be consultation with Tecbar, TeCSA and Court Users followed by a pilot scheme by London TCC judges.[30] Subject to that consultation process and pilot scheme, the procedure would then be formally incorporated into the TCC Guide.

Court Settlement Order

Court Settlement

1. The Court Settlement Process under this Order is a confidential, voluntary and non-binding dispute resolution process in which the Settlement Judge assists the Parties in cases before the Court to reach an amicable settlement at a Court Settlement Conference.

2. This Order provides for the process by which the Court assists in the resolution of the disputes in the Proceedings. This Order is made by consent of the Parties with a view to achieving the amicable settlement of such disputes. It is agreed that the Settlement Judge may vary this Order at any time.

3. The following definitions shall apply:
(1) The Parties shall be [names]
(2) The Proceedings are [identify]
(3) The Settlement Judge is [name]

The Court Settlement Process

4. The Settlement Judge may conduct the Court Settlement Process in such manner, as the Judge considers appropriate, taking into account the circumstances of the case, the wishes of the Parties and the overriding objective in Part 1 of the Civil Procedure Rules.

5. Unless the Parties otherwise agree, during the Court Settlement Conference the Settlement Judge may communicate with the Parties together or with any Party separately, including private meetings at which the Settlement Judge may express views on the disputes. Each Party shall cooperate with the Settlement Judge. A Party may request a private meeting with the Settlement Judge at any time during the Court Settlement Conference. The Parties shall give full assistance to enable the Court Settlement Conference to proceed and be concluded within the time stipulated by the Settlement Judge.

6. In advance of the Court Settlement Conference, each Party shall notify the Settlement Judge and the other Party or Parties of the names and the role of all persons involved in the Court Settlement Conference. Each Party shall nominate a person having full authority to settle the disputes.

[29] This is a reprint of the HMCS announcement at www.hmcourts-service.gov.uk/docs/tcc_court_settlement_process.pdf

[30] See A.Thornton, **You be the judge**. Building, 9th June 2006. p48. The pilot Scheme will run till 31st July 2007.

7. No offers or promises or agreements shall have any legal effect unless and until they are included in a written agreement signed by representatives of all Parties (the "Settlement Agreement").

8. If the Court Settlement Conference does not lead to a Settlement Agreement, the Settlement Judge may send the Parties an Assessment setting out his views on the disputes, including, without limitation, his views on prospects of success on individual issues, the likely outcome of the case and what would be an appropriate settlement. Such Assessment shall be confidential to the parties and may not be used or referred to in any subsequent proceedings.

Termination of the Settlement Process

9. The Court Settlement Process shall come to end upon the signing of a Settlement Agreement by the Parties in respect of the disputes or when the Settlement Judge so directs or upon written notification by any Party at any time to the Settlement Judge and the other Party or Parties that the Court Settlement Process is terminated.

Confidentiality

10. The Court Settlement Process is private and confidential. Every document, communication or other form of information disclosed, made or produced by any Party specifically for the purpose of the Court Settlement Process shall be treated as being disclosed on a privileged and without prejudice basis and no privilege or confidentiality shall be waived by such disclosure.

11. Nothing said or done during the course of the Court Settlement Process is intended to or shall in any way affect the rights or prejudice the position of the Parties to the dispute in the Proceedings or any subsequent arbitration, adjudication or litigation. If the Settlement Judge is told by a Party that information is being provided to the Settlement Judge in confidence, the Settlement Judge will not disclose that information to any other Party.

Costs

12. Unless otherwise agreed, each Party shall bear its own costs and shall share equally the Court costs of the Court Settlement Process.

Settlement Judge's Role in Subsequent Proceedings

13. The Settlement Judge shall from the date of this Order not take any further part in the Proceedings nor in any subsequent proceedings arising out of the Court Settlement Process and no party shall be entitled to call the Settlement Judge as a witness in any subsequent adjudication, arbitration or judicial proceedings arising out of or connected with the Court Settlement Process.

Exclusion of Liability

14. For the avoidance of doubt, the Parties agree that the Settlement Judge shall have the same immunity from suit in relation to a Court Settlement Process as the Settlement Judge would have if acting otherwise as a Judge in the Proceedings.

Particular Directions

15. A Court Settlement Conference shall take place on [date] at [place] commencing at [time].

16. If by [date] the Parties have not concluded a settlement agreement, the matter shall be listed on the first available date before an appropriate judge who shall be allocated for the future management and trial of the Proceedings.

17. The Court Settlement Process shall proceed on the basis of the documents filed in the Proceedings, without further documents; provided that the Settlement Judge may direct that any Party should provide further documents.

Self Assessment Exercise No 4

1. To what extent, if at all, is court mandated mediation a contradiction in terms?
2. To what extent, if at all, is the concept of court mandated mediation contrary to Article 6 Human Rights Act 1998?

CHAPTER FOUR

The Technology and Construction Court Guide[31]

Section 7 Alternative Dispute Resolution (ADR)

7.1 **General**

7.1.1 The court will provide encouragement to the parties to use alternative dispute resolution ("ADR") and will, whenever appropriate, facilitate the use of such a procedure. In this Guide, ADR is taken to mean any process through which the parties attempt to resolve their dispute, which is voluntary. In most cases, ADR takes the form of mediation conducted by a neutral mediator. Alternative forms of ADR include formal inter-party negotiations or (occasionally) early neutral evaluations. In an early neutral evaluation either a judge or some other neutral person receives a concise presentation from each party and then states his own evaluation of the case.

7.1.2 Although the TCC is an appropriate forum for the resolution of all IT and construction/engineering disputes, the use of ADR can lead to a significant saving of costs and may result in a settlement which is satisfactory to all parties.

7.1.3 Legal representatives in all TCC cases should ensure that their clients are fully aware of the benefits of ADR and that the use of ADR has been carefully considered prior to the first CMC.

7.2 **Timing**

7.2.1 ADR may be appropriate before the proceedings have begun or at any subsequent stage.

7.2.2 The TCC Pre-Action Protocol (**Section 2** above) itself provides for a type of ADR, because it requires there to be at least one face-to-face meeting between the parties before the commencement of proceedings. At this meeting, there should be sufficient time to discuss and resolve the dispute. As a result of this procedure having taken place, the court will not necessarily grant a stay of proceedings upon demand and it will always need to be satisfied that an adjournment is actually necessary to enable ADR to take place.

7.2.3 However, at the first CMC, the court will want to be addressed on the parties' views as to the likely efficacy of ADR, the appropriate timing of ADR, and the advantages and disadvantages of a short stay of proceedings to allow ADR to take place. Having considered the representations of the parties, the court may order a short stay to facilitate ADR at that stage. Alternatively, the court may simply encourage the parties to seek ADR and allow for it to occur within the timetable for the resolution of the proceedings set down by the court.

7.2.4 At any stage after the first CMC and prior to the commencement of the trial, the court, will, either on its own initiative or if requested to do so by one or both of the parties, consider afresh the likely efficacy of ADR and whether or not a short stay of the proceedings should be granted, in order to facilitate ADR.

7.3 **Procedure**

7.3.1 In an appropriate case, the court may indicate the type of ADR that it considers suitable, but the decision in this regard must be made by the parties. In most cases, the appropriate ADR procedure will be mediation.

7.3.2 If at any stage in the proceedings the court considers it appropriate, an ADR order in the terms of **Appendix E** may be made. If such an order is made at the first CMC, the court may go on to give directions for the conduct of the action up to trial (in the event that the ADR fails). Such directions may include provision for a review CMC.

7.3.3 The court will not ordinarily recommend any individual or body to act as mediator or to perform any other ADR procedure. In the event that the parties fail to agree the identity of a mediator or other neutral person pursuant to an order in the terms of **Appendix E**, the court may select such a person from the lists provided by the parties. To facilitate this process, the court would also need to be furnished with the C.V's of each of the individuals on the lists.

[31] **Second Edition. (**with effect 3 October 2005)

7.3.4 Information as to the types of ADR procedures available and the individuals able to undertake such procedures is available from TeCSA, TECBAR, the Civil Mediation Council, and from some TCC court centres outside London.

7.4 **Non-Cooperation**

7.4.1 **Generally.** At the end of the trial, there may be costs arguments on the basis that one or more parties unreasonably refused to take part in ADR. The court will determine such issues having regard to all the circumstances of the particular case. In ***Halsey v Milton Keynes General NHS Trust*** **[2004] EWCA Civ 576; [2004] 1 WLR 3002,** the Court of Appeal identified six factors that may be relevant to any such consideration:

a. the nature of the dispute;
b. the merits of the case;
c. the extent to which other settlement methods have been attempted;
d. whether the costs of the ADR would be disproportionately high;
e. whether any delay in setting up and attending the ADR would have been prejudicial;
f. whether the ADR had a reasonable prospect of success.

7.4.2 **If an ADR Order Has Been Made.** The court will expect each party to co-operate fully with any ADR which takes place following an order of the court. If any other party considers that there has not been proper co-operation in relation to arrangements for the mediation, the complaint will be considered by the court and cost orders and/or other sanctions may be ordered against the defaulting party in consequence. However, nothing in this paragraph should be understood as modifying the rights of all parties to a mediation to keep confidential all that is said or done in the course of that mediation.

7.5 **Early Neutral Evaluation**

7.5.1 An early neutral evaluation ("ENE") may be carried out by any appropriately qualified person, whose opinion is likely to be respected by the parties. In an appropriate case, and with the consent of all parties, a TCC judge may provide an early neutral evaluation either in respect of the full case or of particular issues arising within it. Such an ENE will not, save with the agreement of the parties, be binding on the parties.

7.5.2 If the parties would like an ENE to be carried out by the court, then they can seek an appropriate order from the assigned judge either at the first CMC or at any time prior to the commencement of the trial.

7.5.3 The assigned judge may choose to do the ENE himself. In such instance, the judge will take no further part in the proceedings once he has produced the ENE, unless the parties expressly agree otherwise. Alternatively, the assigned judge will select another available TCC judge to undertake the ENE.

7.5.4 The judge undertaking the ENE will give appropriate directions for the preparation and conduct of the ENE. This may include a stay of the substantive proceedings whilst the ENE is carried out. The ENE may be carried out entirely on paper. Alternatively, there may be an oral hearing (either with or without evidence). The parties should agree whether the entire ENE procedure is to be without prejudice, or whether it can be referred to at any subsequent trial or hearing.

THE COURT OF APPEAL MEDIATION SCHEME

Court of Appeal mediation.

At the instigation of Lord Woolf (then Master of the Rolls), an Alternative Dispute Resolution (ADR) scheme was established for the Court of Appeal. The Court of Appeal's mediation scheme, for non-Family work, is administered by CEDR Solve (Centre for Effective Dispute Resolution). The parties are not obliged to take part in the scheme and are free to terminate the mediation by informing the Civil Appeals Office or CEDR at any time without giving any reason. CEDR is responsible for nominating mediators, preparing a mediation agreement and liaising with the parties over mediation arrangements. The Court remains responsible for the composition of the Panel and for any adjustment to the fees payable. The Panel includes mediators from a varied range of disciplines including Commercial, Personal Injury, Insurance, Shipping, Employment, Intellectual Property, etc. During the first year of its operation from May 2003, the scheme achieved a settlement rate at mediation of 68%.

CHAPTER FOUR

Family mediations are administered and monitored by the Civil Appeals Office which will appoint a suitable mediator from mediation panels provided by the Law Society, the UK College of Mediators or the Solicitors' Family Law Association.

Following the recommendations in Professor Genn's recommendations in her paper, "Court based initiatives for non family civil disputes", a Lord/Lady Justice considering an application for permission to appeal is expressly required to consider whether the matter is suitable for mediation. If so, the Head of the Civil Appeals Office, Master Gladwell, will send details of the case to CEDR, who will write directly to the parties seeking agreement to arrange a mediation hearing. The full Court may also propose mediation where there are outstanding issues and a possibility of further litigation.

The current fee for a mediation under the scheme, covering CEDR Solve's administrative work and 4 hours preparation and up to 5 hours attendance by the mediator is £850 plus VAT per party, unless waived by the Court. LSC funding is available where cases are within its scope. Mediations can take place anywhere in England and Wales to suit the parties, and are almost always completed within 3 months of referral to CEDR, avoiding any need to stay the appeal.

The mediation

The purpose of mediation is to help parties in dispute to resolve their differences, in whole or in part, outside the Court process. It is a speedy and informal process, in which an independent person (the mediator) assists the parties.

Voluntary nature of the Court of Appeal Mediation Scheme

The mediation will only proceed if all parties agree. The parties are not obliged to take part in the scheme, and they and the mediator are free to terminate the mediation by informing the Civil Appeals Office or the administrators of the scheme – Centre for Effective Dispute Resolution (through its service arm CEDR Solve) at any time and without giving a reason.

The mediator has no power to make orders in relation to a case. The mediator's role is to assist the parties to reach a mutually acceptable solution which will bring the proceedings to an end – ideally as a whole, but if not, at least in part.

However, it is a condition of the parties entering into the mediation under the Court of Appeal Scheme that they will earnestly try to reach a solution.

The powers, role and independence of the mediator

The mediator's job is to help the parties see if the matter is capable of amicable resolution, helping them look at issues in dispute in a number of different ways which may extend beyond a merely legal view of the problems.

The mediator is an experienced and independent neutral person who has been approved for membership of the panel by the Court and who will help the parties come to their own agreement on how to settle the dispute.

The mediator is not a judge, and furthermore is not employed by or acting as a representative of Her Majesty's Courts Service or the Judiciary, and is entirely independent from them.

The mediator is and must be wholly independent of the parties in dispute and before the mediation will have undertaken a preliminary check to ensure that there is no conflict of interest in acting.

Once the parties have received the names of possible mediators, they are asked to bring to the attention of the Scheme administrator any matter which leads them to believe that a conflict of interest which prevents him from acting as mediator, so that if there is indeed some conflict, another mediator may be found.

The mediator is not an adviser to any of the parties. It is not the mediator's role to tell the parties what their rights are. However, the parties may if they all wish ask the mediator to offer an opinion on matters which arise if it might help the parties to resolve their disagreement. Not every mediator is willing even to do this, as it might be seen as compromising neutrality if the view is perceived as unfavourable to one party.

The parties must agree, as a condition of entering the mediation, not to make any claim against the mediator and/or the Court or its officials or CEDR Solve, the administrators of the scheme, in connection with this mediation.

The confidentiality of the process and any settlement

It is a condition of entering the mediation process that the parties treat all discussions in and documents created for the mediation as "without prejudice" and confidential. This means that what is said or written in relation to the mediation may only be used for the purpose of the mediation. No party may raise, either later in the appeal (if the mediation does not settle the case) or in any other proceedings any statement either oral or written, made in the course of the mediation. The exceptions to this confidentiality rule are:

- A short report will be made to the Court by the mediator and/or CEDR Solve at the end of the mediation which simply records the date on which the mediation took place and its outcome. The Court will not otherwise have power to enquire about what happened within the confidentiality of the mediation.
- If a settlement was reached, the Court record would normally reveal the terms of the agreement, and a copy would be kept on the Court file. Steps can be taken to keep such a record confidential if required.

The parties must agree not to serve a witness summons on or otherwise require the mediator or any employee of the Civil Appeals Office or of CEDR Solve or any other person attending the mediation to testify or produce records, notes or any other information about what happened at the mediation in any future or continuing proceedings.

Private sessions

The mediator may speak to each of the parties separately at the mediation. This is to enable the mediator to understand and communicate each party's position better. The mediator will not divulge any matter discussed privately with one party to the other party unless expressly authorised to do so.

Administration of the Court of Appeal Scheme

This is now handled by CEDR Solve – the servicesarm of the Centre for Effective Dispute Resolution – of 70 Fleet Street, London EC4Y 1EU, telephone 020 7536 6060, who liaise closely with Civil Appeals Office staff in relation to the scheme. They are responsible for nominating mediators suitable for each case, preparing the mediation agreement and liaison with the parties over dates and exchange of information. They can also help over venues, though the responsibility for finding these rests with the parties. They will also report to the Court and obtain feedback about the mediation and the mediator at the end of the process.

The Court retains responsibility for the composition of the panel of mediators and for any adjustments to the fees payable by the parties.

Family cases are not administered by CEDR Solve. The Civil Appeals Office will appoint a suitable mediator from specialist family mediation panels provided by the Law Society, the UK College of Mediators or the Solicitors' Family Law Association, and will monitor progress of the mediation process.

Mediation fees for non-family cases

The fixed fee for each party for the mediations in all but family matters is £850 plus VAT, totalling £998.75, which allows for the administrative work setting up the mediation and for the mediator's time in preparing and reading documents for about up to 9 hours, divided between preparation and conduct of the mediation itself. Each party will bear their own costs of the mediation unless otherwise agreed between the parties, and this includes both the Scheme mediation fee and the legal costs of representation by their own legal team. If a party has Legal Services Commission funding to cover the appeal, this will cover that party's legal costs for preparing for and attending the mediation. Application should be made to the LSC (or to any other funder, such as an insurer) for authority for the mediation fee as well before seeking a waiver of fee.

Mediation fees for family cases

Mediation fees in family cases will be negotiated between the mediator and the parties. In appropriate cases the Court will appoint a mediator who is prepared to offer services at a reduced rate or on a pro bono basis.

Waiver of fees

If the mediation fee is more than any party can afford, they may apply for a fee waiver to the Court, either direct or through CEDR Solve, who will pass the application on to the Civil Appeals Office. The Court (and not CEDR Solve) will make the decision in every case.

Panel mediators have agreed to do some mediations without charge to any party given a fee waiver, though the other party may remain liable for their part of the fee.

Fees in Complex or large cases

In cases involving exceptional complexity or in which sums of more than £1 million pounds are at stake, CEDR Solve is authorised by the Court to suggest that a properly commercial mediation be arranged, or, if it is preferred by the parties that the mediation remains within Court of Appeal Mediation Scheme, to propose higher fees subject to Court approval. The details and terms of the fee structure are set out on the Fees Schedule, Form 56C.

Who attends the mediation?

Save in exceptional circumstances, the parties themselves must attend the mediation. At their choice they may be accompanied by a lawyer or a relative, friend or colleague. In complex matters it is always advisable for a party to be legally represented, and indeed in most mediations, parties will have their lawyer present to advise throughout, bearing in mind that the mediator cannot advise either party.

In the case of any party which is a firm, company or association, a representative (who may be that party's solicitor) should attend who is authorised to reach a binding settlement, and who is capable of receiving very promptly (*ie*. immediately by telephone) any further authority that is needed as a result of the discussions. The process will not work if adjournments are needed whilst representatives seek authority. Authority means the **power** to approve a settlement at any level, always accepting that each party has freedom to choose whether to settle and if so at what level.

No witnesses are formally called in the mediation process in appeal mediations, whether factual or expert, but their attendance may in any given case be helpful.

Stages in the mediation process

An appellant or respondent who wants to opt for mediation through the Court of Appeal Mediation Scheme should indicate this as soon as possible by completing the attached form and sending it to the Civil Appeals Office as soon as possible. This may be at the party's own initiative, or in response to a recommendation from a Lord or Lady Justice in giving permission to appeal that the case is one which the Court feels is appropriate for mediation. It should be borne in mind that the Court of Appeal, like every civil court, has power under CPR Part 44 to take into account the conduct of parties in relation to unreasonably refusing to take part in mediation when deciding what costs order to make at the conclusion of an appeal, even when the refusing party is otherwise successful in the appeal. Since the decision of the Court of Appeal in ***Dunnett v Railtrack*** [2002] 2 All ER 850, this must particularly be borne in mind where the Court has advised the parties that it considers that mediation or some other form of alternative dispute resolution should be attempted. See also ***Halsey v Milton Keynes*** [2004] EWCA Civ 576.

Once either party or legal representative on a party's behalf has indicated a desire to try mediation through the Court of Appeal Mediation Scheme, or the Court has recommended that it be tried, the Court will give details of the case on a confidential basis to CEDR Solve and ask CEDR Solve to contact the parties in order to see if a mediation can be agreed. If agreed, CEDR Solve's administrator will then put in motion the process of nominating three suitable mediators from whom the parties must choose one. In default of agreement, CEDR Solve will make the final nomination taking into account the representations of the parties.

CEDR Solve will also help with finding a convenient date, arranging for exchange of documents and bundles between parties and mediator and if asked over finding a venue, though this is normally the responsibility of the parties to find and fund. CEDR Solve will also require payment of the fees in advance of the mediation in accordance with the terms of the Fees Schedule. The mediation will be sent for signature when the mediation is set up. If it has to be amended later, the revised version will be signed at the mediation.

Parties should exchange and send the mediator a short summary of their position in writing, preferably no more than 5-10 pages long, but which may be accompanied by documents, though bearing in mind that the mediator is only normally expected to do 4 hours preparation.

On the mediation day itself, after brief private meetings, there will usually be a meeting chaired by the mediator at which the parties will be present at the same time in the same room. The mediator will explain the

nature of the process and then normally invite each party or their representative to speak briefly as to their position. The mediator may ask them questions in each other's presence.

It will then be for the mediator to decide what further meetings are warranted and whether they should be with the parties separately or together. It is usual for there to be some separate meetings. At these, the mediator will probably be looking not only at each party's rights and obligations but also at their needs and expectations, seeking to encourage the parties to propose and embrace solutions to their differences.

A time limit of 5 hours has been placed on Scheme mediations, with the fee including preparation time by the mediator. It is normally clear before then whether sufficient progress is being made to justify continuing with the process. Any extension of time is a matter before the mediator and the parties. No further fee is payable without specific agreement to that effect.

Agreement in whole or in part at the mediation

Upon reaching an agreement, the terms of settlement will be recorded in writing at the conclusion of the mediation and signed by the parties. They should then be lodged by the mediator either direct or through CEDR Solve with the Civil Appeals Office, and the parties should also lodge a consent order.

It may be possible to resolve some but not all the issues in dispute. In that case, any partial agreement should be recorded in writing and signed by the parties, and can be lodged with the Court so that proceedings can be treated as resolved to that extent.

No agreement at the mediation

If no agreement is reached, CEDR Solve will inform the Civil Appeals Office so that the appeal process can continue.

CIVIL APPEALS OFFICE, ROYAL COURTS OF JUSTICE, 1 April 2005

Feedback about mediation

CEDR Solve will normally contact the parties to a mediation shortly after it has taken place to obtain feedback as to how it went and the impression given by the mediator. This feedback will be shared with both the mediator concerned and the Court in an endeavour to maintain the highest standards. Your participation in this process will be welcomed.

If you have general queries regarding mediation please contact CEDR Solve at
70 Fleet Street, London. EC4Y 1EU. Telephone 020 7536 6060.

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SEE YOU OUTSIDE COURT: PIONEERING MANCHESTER MEDIATION SCHEME CELEBRATES SUCCESS

A small claims mediation scheme, piloted in Manchester, has been so successful it is to be the template for nine new schemes across England and Wales. The news comes on the heels of National Mediation Week (9-13 October) which saw a series of events around the country to promote mediation as a more flexible, speedy and cost effective dispute resolution process than court proceedings.

The first scheme of its kind in England and Wales, the Manchester pilot scheme was set up in June 2005 offering a free mediation service for small claims cases with a full time in-court mediator. Since its inception it has proved itself extremely successful with an 86 per cent settlement rate on the day of mediation. Up to May 2006 the in-court mediation service had dealt with a total of 121 mediations. Of those cases that were not resolved on the day, more than half settled before going to a court hearing. Mediations can be either in person or by telephone. Due to the success of the scheme it has already been rolled out from Manchester county court to include county court users at Oldham and Stockport.

Mediation provides a less hostile environment than a courtroom in which parties can discuss their issues and come to a mutual agreement. It also allows both parties to remain in control of the process, rather than have an outcome imposed by a judge and settlements can be more flexible than those available to a judge – for example donations to charity, an apology or a mutual agreement.

Mediation is also a speedier process than a full court hearing. Most small claims that went to mediation in Manchester took around five weeks from the claim being lodged, whereas to take a claim to a full court hearing

takes an average of 13 weeks. The mediation itself usually takes around one hour though this can be extended depending on the complexity and value of the claim.

James Rustidge, the in-court mediator at Manchester said: *'For some people taking a case to court can appear intimidating, time consuming and stressful – not to mention costly. Mediation provides an alternative that allows parties to discuss the issues in a less formal environment, to 'patch-up' differences and most importantly to agree a settlement, rather than to impose one. This can be particularly beneficial where a continuing relationship is necessary – for example in a business case. This pilot at Manchester proves that mediation can and does make a difference to people's lives. The success of the service is not only the high settlement rate, but also that 100% of those disputes that were resolved through mediation have abided by the agreed settlement: not one has required follow-up action. If parties have both had a hand in reaching a mutual agreement, they are more likely to uphold the agreement as neither feels badly done by or that a settlement was imposed.'* He added that great progress had been made in the last twelve months. He said: '*I have received terrific support from the judiciary and management from all the civil courts in Manchester and this has been a tremendous help in ensuring the success of the small claims mediation service. I am certain that the increased use of mediation in the area has had a very positive effect on people's lives and in increasing public awareness of alternative dispute resolution in general.'*

Mediation can be used to resolve a whole raft of disputes – not just small claims – including housing issues, business disputes, debt claims, boundary disputes, employment disputes, contractual disputes, personal injury and negligence claims as well as community disputes such as nuisance or harassment issues and family mediation to sort out finances, property issues and childcare arrangements in the event of family or relationship breakdown. HMCS aims to have ten schemes based on the Manchester model, including Manchester, by April 2007.

Case studies

Janet Dyet : Janet Dyet of Rochdale injured her hand when the council were cleaning the block of flats she lives in with a hydrochloric acid solution. The council hadn't secured the windows properly and some of the solution sprayed through into her flat and onto her ornaments. She burnt her hand when she picked up one of the ornaments. The cleaning company and council refused to accept liability. Initially Janet tried to pursue her claim through her own personal insurance and then consulted a solicitor. As she felt the costs would outweigh the value of the claim to pursue the claim with legal representation, she decided to take a small claim herself through Oldham county court. Her case was referred to the Manchester in-court free mediation service. Her case was settled through mediation in less than two months of her filing her claim with the court and she received £600 compensation. She said: 'Mediation was an excellent way to get justice – and it saved a lot of time and money. It's a good way to resolve a dispute if you don't have a solicitor or are put off by the thought of going to court.'

George Steele : George Steele from Rochdale used the in-court small claims mediation service in Manchester after he lodged a claim against a large electrical retailer. He had purchased a DVD player which started to perform badly after 18 months. As the DVD player was out of its 12 month guarantee the shop refused to refund the item or repair it for free. However a friend of his advised him that under his consumer rights he had a right for the player to be fit for purpose and that if something stopped working that had no lifetime predicted, then the cost should be refunded. The cost of the machine was £70.

After lodging his claim, the judge recommended the free mediation service which he accepted. The case was then settled within days with just a couple of phone calls. George received an apology from the retailer, the full purchase price of the DVD player and his original court costs to lodge the claim (£30). He describes the service as 'stress-free and a great time-saver' and is currently pursuing a repair company that carried out unauthorised repairs on the DVD player before his case was resolved with the original retailer. He intends to use mediation again rather than take the matter to a full hearing.

COURT REPORT - BIRMINGHAM 2003-2006

We have, at Birmingham, one of the most successful court operated mediation schemes in the country. We are holding at least one, and often two, mediations per evening, and the success rate, when last reported, was over 60% with other cases settling within a short time. My message on court operated ADR is that the scheme must provide for CHEAP mediation, if there is to be a worthwhile take-up. We are fortunate to have

a good reservoir of talent – local mediators who are happy to offer their services for relatively modest fees; we at Birmingham can be proud of this scheme, which, if it were possible to measure these things, would be at or close to the top of any league table, and which is being copied and adopted by other Court Centres. The details of the scheme are available for others who wish to set up court operated mediations, and we are more than happy to provide advice and other assistance. This has been achieved without any additional finance. The scheme was set up with the help of sponsorship from major ADR providers, and continues to flourish without any cost to the Treasury.

COURT REPORT – DEVON AND CORNWALL 2003/2004 [32]

ADR/mediation : Two schemes – Small and FT/MT- Appendix 3

Exeter's two mediation schemes have now been running for over a year, and Exeter represents the flagship mediation court for Devon and Cornwall, under the supervision of the Exeter mediation judge, District Judge Jill Wainwright and her deputy, District Judge Andrew Harvey. The Exeter small claims scheme has also been replicated in Torquay and Barnstaple during the last year.

The two schemes are however quite different in concept. The small claims scheme is free to the parties and the cases that are mediated are the subject of judicial selection; the FT/MT scheme is paid for (on a "standard" scale of £450 FT or £650 MT) by the parties, who first have to consent to use the scheme.

The format of the mediation is quite different, too. In the small claims scheme the mediators undertake 5 mediations in the morning. The FT/MT scheme lasts for three hours per mediation. The mediators for the small schemes are all members of Devon and Exeter Law Society (DELS). They are currently paid a flat rate by the DCA on a fixed period contract basis – although DELS funded their own participation for the initial year.

The larger Exeter scheme is supported by seven ADR providers, who – only after the parties have agreed to mediate - are allocated the cases by the court staff in rotation, and then nominate their own trained mediators. In the last year each provider has held between two and seven mediations. The most successful provider has succeeded in 5 out of 7 mediations; the least successful has two failed mediations out of two – see Appendix 4.

Considerable interest has been expressed in the Exeter schemes which are also the subject of research by Exeter University10. The small claims scheme has also been scrutinised by the DCA's own research team. On June 10th Exeter was delighted to receive the CEDR award for Best Designed Court-based mediation scheme, which was received on behalf of the court by Johnny Walker, mediation clerk.

COURT REPORT – DEVON AND CORNWALL 2004 /2005

Mediation is once again proving very successful in Exeter. On 10th June 2 004 Johnny Walker accepted CEDR's award on behalf of the Exeter Court for the best-designed Court-based mediation scheme. Its mediation schemes have been studied by researchers at Exeter University (Dr Sue Prince and her team) and by the DCA. They have informed much of the basis for the DCA's recently produced best practice ADR Toolkit. The DCA has currently agreed to provide funds for a further 12 months small claims mediation project from 1 Jun 2005, which will be operated by the Devon and Exeter Law Society (DELS) not only in Exeter but also in Torquay and Barnstaple. That DCA project will also be researched by Dr Prince. In addition, the DCA has also agreed to fund a member of staff at Exeter to keep data on the new mediation projects – which will assist Dr Prince and her team in analysing research data. A new small claims mediation brochure has also been funded by the DCA.

The Fast and Multi-Track mediation schemes have also mutated and developed during a year which has seen the creation of the National Mediation helpline (www.nationalmediationhelpline.com). The first change was to reduce the amount of administration carried out by the court staff, by passing on the responsibility of collecting mediators' fees to the ADR providers. The second was to permit the providers to offer their own premises, rather than the court's, as part of the new court-based, or rather court-associated scheme. The general impression is that although the uptake of court-based mediations has declined somewhat, the incidence of external mediations has increased, as local solicitors have followed the court's lead and are now espousing mediation more readily than before.

[32] by HHJ Sean Overend p8 – 9. See in particular the statistical analysis in the appendix to this report.

CHAPTER FOUR

Making a claim [33]

Why should I use an alternative dispute resolution scheme instead of going to court?

Alternative schemes are not meant to replace the courts. But they can have advantages over going to court. The advantages include:

- being more flexible;
- solving your problem faster;
- being less stressful; and
- costing you less money.

If you have a problem with a person regularly (a neighbour for example) or organisation you deal with, an alternative process such as mediation could mean a better, longer-lasting solution to your problem.

You can find out more about mediation by contacting the National Mediation Helpline on 0845 60 30 809 or by visiting the website www.nationalmediationhelpline.com

How do I decide whether to use an alternative dispute resolution scheme?

How you choose to solve your problem depends on:

- the result you want;
- what you can expect to achieve;
- how you want to go about solving your problem; and
- how willing the other party is to try and solve the problem.

By going to court, you might get:

- an order that something be done or stopped;
- compensation; or
- a judgment from the court about who is right and who is wrong.

By using alternative dispute resolution, you might get:

- an agreement over a debt
- a change in the way a person or organisation behaves;
- a promise that a person or company won't do something;
- getting something you own fixed;
- getting something you own replaced;
- an apology;
- an explanation for what happened to you;
- a mistake corrected; or
- compensation (for example, for an injury).

If having read information leaflet 23 from the Community Legal Service (see above), you think that your case would be better dealt with by a court, read on.

Why go to court?

If you are unable to settle your dispute any other way, you may decide to issue a claim through the county court. If you have accessto the internet you can visit www.moneyclaim.gov.uk for a simple, convenient and secure way of making a claim. You can issue claims for a variety of reasons, including:

- someone owing you money;
- bad workmanship;
- damage to property;
- road traffic accidents;
- personal injury;
- goods not supplied; and
- faulty goods.

[33] http://www.hmcourts-service.gov.uk/infoabout/claims/questions/settle.htm Page 2 of 8

County courts deal with all these types of claim. You will sometimes hear people talk about the 'small claims court'. What they really mean is the special procedure for handling smaller claims in a county court.

The system for handling smaller claims in the 'small claims track', is designed to be quick, cheap and easy to use. But it will usually only apply to claims for £5,000 or less (or £1 ,000 or less if the claim is for personal injury or housing disrepair), against a person, firm or company in England and Wales. Courts in Scotland have their own legal system.

Claims of more than £5,000 are generally dealt with differently in either the 'fast track' or the 'multi-track'.

Leaflets which explain more about the allocation of claims to the small claims track, the fast track and the multi-track and how they are handled, are available free from any county court office or from our website www.hmcourts-service.gov.uk

If I decide to go to court, should I still try to settle the claim?

Even though you might choose to go to court rather than use an alternative dispute resolution process (see above), issuing a claim should always be your last resort. The court will expect you to have acted reasonably, such as by exchanging information and relevant documents about the dispute and to generally try to avoid the need for making a claim. For example, if you are owed money, you could write a letter to the person who owes it. Say how much they owe and what it is for, and what steps you have already taken to recover the money. Include a warning that you will issue a county court claim if they do not pay by the date you give. Sometimes this warning will encourage them to pay and you will not have to go to court. Keep a copy of your letter and any reply.

This is an example of the sort of letter you might send.

2 Spring Gardens

Anytown

AO6 3BX

11 April 2005

Dear Mr Green,

You came to repair my central heating boiler on 6 January. I rang you on 7 January and again on 10 January to tell you it was still not working properly.

You promised to call and put it right but did not. I had to get someone else to come and repair it on 26 January which cost £157 + VAT.

I asked you on 2 February to pay this money because it was work you should have done.

You have not paid it.

If you do not pay me the money by 19 April 2005, I will issue a county court claim against you.

Yours sincerely

Mrs V Cross

What are pre-action protocols?

There are a number of disputes including personal injury, disease or illness, professional negligence, housing disrepair, defamation or construction and engineering, where court rules tell you about what steps you should take before you issue a claim. These are called 'pre-action protocols'. You can find out more about these protocols on the Department for Constitutional Affairs website www.dca.gov.uk/civil/procrules_fin/menus/protocol.htm.

CHAPTER FOUR

ADDITIONAL READING MATERIALS
ADR AND THE COURTS

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