"DOES CMR MEAN ADR?"

Is Case Management Resolution < than, = to, or > than Alternative Dispute Resolution?

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INTRODUCTION

The South and West Wales Court mediation service was launched in Cardiff in November 2003 by Lord Falconer of Thoroton, the Lord Chancellor. Almost three years hence and despite the fact that in excess of 100 disputes have been channelled towards mediation by the local bench, it would appear that some District Judges on the South Wales circuit are of the opinion that, with regard to lower value civil claims in particular, [1] court based mediation is superfluous, particularly since the reforms brought about by the Civil Procedure reforms have produced an efficient, cost effective civil court system that in their view provides its clients with a first class *"one stop shop"* dispute resolution service.[2]

There is a degree of impatience amongst members of the bench with the number of judicial training courses that have focused on mediation. There is a feeling that ADR has been done to death by Her Majesties Court Service and the Department of Constitutional Affairs. Any assumption that the judges do not possess sufficient knowledge of and or fully understand the importance and value of mediation is resented. Some go further and assert that District Judges routinely "***mediate***" between the parties during case management, often successfully, leading to the resolution of disputes through inter-party settlement agreements. Accordingly, they are of the view that outside mediation offers little or no added value for the court's clients and worse, that recourse to mediation invariably leads to increased costs and potential delay. Many legal practitioners concur with these ***views***. The track record for court based mediation in South Wales does little to dispel these views. It would appear from information available to the court mediation steering committee that in excess of 25% of the disputes were settled by mediation. Whilst some cases were discontinued, a number of others settled before or after mediation. Nonetheless, a sizable number in the region of 40-50% were returned to the court listing.[3] Care should be taken not to read too much into such figures. Whilst at first sight it would appear that the statistics raise questions about the effectiveness of the court mediation service, they reveal nothing about the nature of the disputes referred and whether or not mediation was the most appropriate vehicle for their resolution in the first place, which is not likely to have been the case at least in respect of those cases that were ultimately withdrawn.

Whilst some support for pro-bono mediation was evident from the bench, there was little evidence of confidence that the mediation community could or would provide such a service. The mini half hour mediation concept operated elsewhere outside the Principality did not appeal either, being dismissed by one senior member of the bench as a "*denial of justice*," on the basis that the time scale was too short to lead to a consensual settlement of the dispute, the implication being that the mediator shaped the settlement and coerced the parties to accede to the proposed solution. This was perceived of as a poor substitute for the "*high quality*" adjudicatory service that the District Judges consider they provide to the court's clients.

The issues : There are two distinct and separate, albeit interrelated, issues here. The first concerns whether or not case management and mediation are interchangeable. The second relates to the question whether or not mediation has anything of value to contribute towards the settlement of low value civil disputes.

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1 This article is not concerned with Family Mediation, about which the concerns expressed by some members of the judiciary were of a quite different order and nature. Contrary to the views gleaned from meetings with District Judges in South Wales about small civil claim mediation, the same judges expressed approval of community and social mediation in respect of disputes that do not fall naturally or easily within the remit and jurisdiction of the civil courts. Indeed, mediation was perceived of as a useful vehicle to get rid of what were considered to be "*nuisance*" cases. Equally, the same District Judges expressed the view that mediation has a valuable role to play in respect of higher value / complex disputes, offering the potential for timely settlement of disputes, cost savings and the avoidance of protracted civil trials.

2 Similarly, in respect of the view that the TCC now represents the ideal forum for the settlement of construction disputes see the comments of Mr Justice Jackson in ***Machenair Ltd v Gill & Wilkinson Ltd*** [2005] EWHC 445 (TCC) at paras 56-61.

3 The brief records maintained by the Civil Justice Centre, which are not generally available, are not complete and it is not possible to produce from them a statistical analysis of the success or otherwise of the South and West Wales court mediation service.

DOES CMR MEAN ADR?

ISSUE 1 : DOES CASE MANAGEMENT SUBSUME MEDIATION?

The courts ascribe legal meaning to words. They have the authority to do so. We have to accept their definitions since the courts then apply those meanings during the course of judicial proceedings. Paraphrasing Humpty Dumpty, *`When the court uses a word …. it means just what the court chooses it to mean -- neither more nor less.'* Here however, the assimilation of case management and mediation is taking place outside the court room, not during proceedings, leaving us happily free to challenge the assertion.

Are we being presented with an upside down Alice in Wonderland World, one where adjudication and mediation are indistinguishable and where the judge vacillates between his true magisterial being and an intermediary alter-ego? How could this possibly be the case? After all, did not the TCC in ***Glencot v Barrett***[4] make it clear that it was of the view that there is a strong potential of prejudice within the adjudicator cum mediator arrangement, to the extent that outcomes would be considered unsafe by the courts in the absence of informed consent to exposure to risk of prejudice. With that warning in mind, the TCC mediation panel[5] has taken clear steps to construct a Chinese wall between the trial judge and the mediating TCC judge.

The explanation lies in contextual uses of terminology and mixed metaphors which lead to conclusions which, reinforced by grains of truth, act as a barrier to the development of effective strategies for dealing effectively with low value disputes. Firstly ADR is here equated with mediation and secondly ADR is used in two distinct and separate ways. The Civil Procedure Rules refer in section 1 to recourse to "***An ADR***", which confusingly is not the same thing as ***ADR*** as in Alternative Dispute Resolution.

First, mediation is one of the alternative processes used to bring a dispute to an end. It is however only one of many alternatives. It is not the only game in town, even when ADR is limited to negotiated settlement processes as opposed to all alternatives to the judicial process. It is not satisfactory to assimilate mediation and ADR since this gets in the way of drawing distinctions between mediation and the other dispute resolution processes embraced by the term ADR such as conciliation and early / expert evaluation.

Second, ADR is commonly used as an alternative to the judicial process whereas "***An ADR***" is used, in the context of the Civil Procedure Rules, as any *"alternative dispute resolution procedure"* that the court feels is appropriate to the task of case management. Thus the overriding objective of the Civil Procedure Rules is stated to be to enable the court to deal with cases justly. This is to be achieved by case management. Section 1.4(2) of the Rules goes on to specify [*with emphasis on (e) and (f)]* that active case management includes -

(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
(b) identifying the issues at an early stage;
(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
(d) deciding the order in which issues are to be resolved;
(e) encouraging the parties to use an alternative dispute resolution (GL) procedure if the court considers that appropriate and facilitating the use of such procedure;
(f) helping the parties to settle the whole or part of the case;
(g) fixing timetables or otherwise controlling the progress of the case;
(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
(i) dealing with as many aspects of the case as it can on the same occasion;
(j) dealing with the case without the parties needing to attend at court;
(k) making use of technology; and
(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

[4] ***Glencot Development & Design Ltd v. Ben Barrett & Son Ltd*** [2001] EWHC TCC 15 per HHJ Humphrey Lloyd. The court considered that the impartiality of the adjudicatory process could be prejudiced by any exposure to unproven assertions of the type common in mediation, much of which might be inadmissible at trial. Further, whilst it is possible for an individual to possess the necessary skills to serve either as a judge or a mediator in respect of distinct and separate disputes, to attempt to make the necessary switch in mindset in mid-stream is considered by some commentators to be fraught with difficulties, in that it requires the mediator cum adjudicator to seamlessly move from one set of objectives to another without confusing the means involved in achieving either objective.

[5] See www.hmcourts-service.gov.uk/docs/tcc_court_settlement_process.pdf

The courts have further developed the concept of case management beyond the overriding objective of dealing with a case justly, to embrace efficiency in achieving closure. In ***Cowl v Plymouth***[6] Lord Woolf stated that "*The courts should … make appropriate use of their ample powers under the CPR to ensure that … parties try to resolve the dispute with the minimum involvement of the courts. ….. the parties should be asked why a complaints procedure or some other form of ADR has not been used or adapted to resolve or reduce the issues which are in dispute." N*ote that the scope of the ADR procedures the parties should have recourse to is widely drawn, embracing even complaints procedures, and secondly the objective is stated to be to resolve or reduce disputes, in order to achieve the minimum involvement of the courts. It is not surprising therefore that District Judges, with regard to the other specified matters, namely (a)-(f) and (j)-(l) see part of their management role as helping the parties to broker closure and not simply as preparing for and managing the trial process. Rather, if carried out successfully there is every chance that a trial might be avoided, if the parties can be persuaded or guided towards a settlement.

The similarities between the objectives of case management and mediation are striking, namely persuading or guiding disputing parties to a negotiated settlement. Further, if one looks at the case management "tool kit" and compare it with the mediator "tool kit" further striking similarities are evident. Both encourage co-operation between the parties; identify issues; priorities issues; establish the running order etc. There is virtually nothing between (a)-(l) that any mediator would not identify with. The mediator, just like the judge, will seek to case manage from referral all the way through to the end of the mediation, drafting and signing of the settlement agreement. It only takes a short but fatally flawed leap in logic to conclude that case management and mediation are one and the same.

Distinguishing features between judicial case management and mediation.

Hearings : An important difference, though one that on paper is not immediately apparent, is that the mediation process "***involves the parties***" and a "***hearing***" (even if it is a virtual hearing in the case of on-line mediation) whereas whilst District Court case management may involve a meeting of the parties, their solicitors and the judge in chambers, this is not the norm. It is more likely that only the solicitors would attend a meeting in chambers (or take part in a telephone-conference) and more often than not the management process will be conducted entirely as a paper process. The similarities between case management and mediation immediately start to evaporate. The general and specific pre-trial protocols set the scene for subsequent case management. Where for instance the construction protocol applies (*in general construction disputes involve higher value claims*), attendance of both parties and representatives is mandated but this is not a requirement in respect of the general protocol most applicable to lower value claims.

The general protocol encourages communication between the parties and then by contrast to construction, 4.7 specifies as follows : - *The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the Claimant and Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs.*

It concludes by directing the reader to ***The Legal Services Commission*** booklet, '***Alternatives to Court'***, CLD Direct Information Leaflet 23, which lists a number of organizations that provide alternative dispute resolution services. Clearly the protocol envisages ADR as something quite distinct and separate from the case management role performed by the judge.

Authority versus respect : The judge is by virtue of his standing automatically accorded authority and respect. At the end of the day, the judge will settle the matter if the parties fail to do so themselves. The parties are well advised to pay close attention to anything the judge says, particularly regarding any indication of likely outcomes and prospects. These will give an indicator of what the parties should pay most attention to as potential roads to success and correspondingly factors which are likely to be a lost cause. The only time counsel might choose to flog an apparently "*dead horse*" is if that is the only game in town and to do so could pave the way for an appeal which would be pre-empted if one conceded by default.

[6] ***Cowl (Frank) v Plymouth City Council*** [2001] EWCA Civ 1935

By contrast, the mediator has no inherent authority and has to earn the respect of the parties, though prior reputation will assist. The mediator has no power to impose outcomes on the parties. The extent to which a mediator will venture an opinion varies from those who will never do so, via those who will if both parties agree, to those who see it as their job to provide a considered evaluation of each party's prospects or even to second guess what the court would do if the case proceeded to trial. How much attention the parties will pay to any evaluation depends on the degree of respect and belief they have in the opinions of the mediator.

To sum this up, the judge is essentially inviting the parties to consider whether or not they think they can persuade the judge to alter his initial opinion based on their statements of case and skeleton arguments, whereas the mediator is inviting the parties to consider whether or not they think they could successfully persuade the court to reach a different outcome to that which the mediator deems to be likely. It would not be unreasonable to imagine that a party might fancy its chances far more with the second than the first.

Private and shared communications : Anything an adjudicator says to one party must be communicated to the other. All parties must have an opportunity to consider and respond to anything that is said and done before a tribunal. A failure to do so opens up any decision to a charge of breach of due process. By contrast, the private session/caucus is a standard feature of commercial mediation. The mediator is constrained from communicating anything learnt in a private session to the other party in the absence of express authority to do so. The rationale here is that this enables the mediator to brainstorm options with each of the parties without either prejudicing their position. Any idea, however absurd can be floated like a trial balloon and rejected out of hand if it does not find favour. The mediator can play devil's advocate without putting either party's head on the line, since they only have to respond to the mediator and not to the other party. Nor do they have to respond to the satisfaction of the mediator since the mediator does not have to be persuaded.

The mediator acts as a diplomatic communications corridor between the parties, but does not act as an advocate for either party. In so doing the mediator may temper a message, putting it in a less confrontational manner than a party might if communicating directly, but a mediator does not have to be convinced of a message in order to convey it. It is dangerous for a mediator to omit to communicate a message sent by one party to the other, even if the mediator feels the message is unhelpful, since the sender will act on the assumption that the message has been delivered and if no rebuttal is forth-coming is likely to assume that the message has been taken on board. The problem will then come back into focus when drafting the settlement order if crux of the message is to be included in the settlement terms, since for one party it is now a done deal, whereas for the other it is at best unfinished business or worse is something which had not even been put on the table.

There is a fuzzy edge between the expressing of an opinion and communicating the other party's bottom line. There is little difference between "*the best you can expect today is £x*" and *"£x is their final offer – take it or leave it*", but there is no requirement to opine that *"£x is a good (or bad) deal"* or even to express a personal opinion as to whether or not the mediator considers that it might be worthwhile to take the risk of hanging out for more. This is the time when a party has to put his hand up and be counted, to decide whether to go for what is in hand or to hang out for the glittering but potentially illusive prize that litigation offers. If a mediator commends an offer at an early stage, or where the mediation has made little or no progress in narrowing down differences, there may be a perception of bias. However, if the offer is the end result of compromise on both sides after extended mutual hard bargaining the mediator may well form a balanced view of what is on offer. There is a danger however that the mediator's view is coloured by a sense of progress towards the settlement goal rather than on the value to the respective parties of the offer. Even if it is the best that might be hoped for on the day does not mean it represents a "Win/Win" situation. Contrary to the jargon commonly promoted about mediation, mediation can and does produce "Win/Lose" outcomes.

To sum up, any brainstorming before a judge has to be done by hypothesis since everything is conducted in on open forum. This is a delicate if not tedious process, but to concretize would run the risk of concessions which would become final and hence impossible to row back from. The judge is limited in case management to encouragement of the parties to settle, based on what the parties have proposed to put to the court. By contrast the mediator can canvass with ease avenues for settlement that are beyond the scope of the judicial case management forum.

Barter-bank : A court will oft times act as a reservoir for payments in, Part 36 CPR settlement offers from either party, whilst open offers, Calderbank offers, with or without prejudice to costs, lurk in the fore or back ground. Open offers apart, whilst the judge may well be aware that settlement offers have been made, detail will remained concealed from view until judgment is passed and attention is turned to costs. For the judge during case management, all will remain to play for. By contrast, since the parties will be privy to all offers and counter offers, the mediator will be fully aware of the current state of play, which will thus define the differences between the parties that the mediation seeks to bridge. The "*cost card*" impacts upon both case management and mediation but in different ways. It is only in mediation that it is addressed head on.

CONCLUSION TO FIRST ISSUE.

Whilst case management and mediation share some common objectives, whatever else is involved in case management, it is not mediation. Its remit and modus operandi are quite distinct and different. The mediator's authority is less than that of the judge, but the mediator's scope and range is more extensive. Case management is not a substitute for mediation. Case management is free standing. Mediation may complement and assist it. As exemplified by the many recommendations of the Court of Appeal, where following a successful appeal the court sends a case back to the court of first instance for re-trial before another judge, with a recommendation that the parties first attempt to mediate a settlement, mediation can if successful pre-empt a retrial and hence obviate the need for case management.[7] Similarly, despite granting leave to appeal, the Court of Appeal frequently invites the parties to first attempt mediation.[8] Again, it is evident that the Court of Appeal considers that mediation is a distinct and separate process to case management.

ISSUE TWO : THE VALUE OF MEDIATION IN THE SETTLEMENT OF LOW VALUE DISPUTES.

A). Introduction : Background to Court based mediation.

The court based / promoted mediation cause is well advanced in the UK. Her Majesties Court Service has thrown all its might and support (if not its cash) at promoting mediation as an additional service available to its clients. The objective is that mediation will be available to every litigant in every civil court throughout the land, whether the claim be small, modest or large.

The appointment process under the HMCS court mediation scheme.

Driven forward initially by a small band of mediation enthusiasts, with different schemes in different courts, Her Majesties Court Service is gradually homogenizing the process, with the assistance of the Civil Mediation Council. The only obvious exception to the model is the Manchester Scheme presided over by a member of the court staff.[9] Otherwise, where mediation is advised or requested, from the 1st October 2006 appointments will be channeled through the Mediation Helpline, which will then pass applications onwards to mediation nominating bodies registered with HMCS.

HMCS has established 43 mediation centres to cover the whole county. CEDR, the ADR Group and the Chartered Institute of Arbitrators are registered in all 43 centres. Other providers (there are 15 other registered providers at the present time) operate at a more local level, ranging from a single to 8 regional centres. It is notable that a number of the most prestigious international mediation service providers in the City of London have not yet registered, which is an indicator that these organizations do not perceive court based mediation as being central to their business. In order to be listed by HMCS the mediator nominating body must first successfully apply for accreditation with the Civil Mediation Council and then demonstrate local capacity to HMCS.

Current CMC accreditation requirements (*note these are in the process of being amended***)**

7. The characteristics to be examined by the CMC in the pilot scheme when assessing a candidate provider are broadly:

[7] Eg. ***Burne v A*** **[**2006] EWCA Civ 24.

[8] Eg. ***Crowther v Brownsword*** [1998] EWCA Civ 1040.

[9] The Courts Service is planning a major expansion of in-court mediation by April 2007 as part of a drive to cut the number of defended small claims. The service is to set up nine more pilot court-funded mediators – probably located in the larger courts – on the same lines as that operated at Manchester County Court. The mediation will be free to the parties involved, meaning the only costs for parties would be the initial court fees. The Law Gazette. 14th September 2006.

(a) **Adequate mediator training** - the method by which the candidate has and will continue to admit mediators to membership of its panel, list or group: this includes the minimum training requirement it sets for candidate members, the means by which it assesses whether that training is sufficient and whether the candidate has a sufficient understanding of role and duties of a mediator to be appropriate for admission. The CMC has based its initial criteria on practice within the civil mediation community in the UK and abroad but will refine and may revise its requirements in due course following research work to be conducted in parallel to this pilot scheme on the effectiveness of mediator training, performance and outcomes.

(b) **Code of Conduct** – whether the provider has instituted or adopted, and implements, an appropriate Code of Conduct for its members to follow: the CMC endorsed and adopted the EU Model Code of Conduct for Mediators in 2004 and expects that the Code should be embraced by an accredited mediation provider.

(c) **Supervision and Monitoring** – the means by which the provider provides adequate and appropriate supervision, mentoring, monitoring and pupillage for its mediators; the provider's CPD policy and programme or requirements; the scheme the provider adopts for handling complaints and feedback; and the opportunity for peer review.

(d) **Insurance** – whether the provider can demonstrate that it has adequate insurance in place for the activities it and its members undertake.

(e) **Efficient administration** – whether the provider can demonstrate that it has a suitable and sufficient efficient administration proportionate to and for the work and workload it undertakes, including the handling of enquiries, the recording of calls, the accurate accounting for fees and the proper rendering of bills to the consumer.

(f) **Allocation of mediators** – the method by which the provider can demonstrate that it ensures (save where the parties decide their own choice of mediator) that an appropriately trained, experienced and skilled mediator is allocated to each case with which it deals.

8. In order to be qualified at the inception of this programme a provider must meet the following minimum requirements:

A. Mediator Training

(1) An Accredited Mediation Provider's mediators must have successfully completed an assessed training course.

(2) That course must include training in ethics, mediation theory, mediation practice, negotiation, and role play exercises.

(3) If the mediator is not professionally qualified in a discipline which includes law, the mediator must demonstrate a grasp of basic contract law.

(4) Performance during or on completion of training must be assessed.

(5) The training course will include not less than 24 hours of tuition and role-play followed by a formal assessment.

(6) An Accredited Mediation Provider will also be expected to require its mediators will be required to have attended at least two mediations as an observer before acting as the appointed mediator.

B. Code of Conduct

(1) An Accredited Mediation Provider must have an appropriate written Code of Conduct for its members to follow.

(2) That written code must be no less rigorous than EU Model Code of Conduct for Mediators published in 2004.

C. Complaints Handling and Feedback

(1) An Accredited Mediation Provider must have in place a written complaints handling procedure and keep written records of any complaints.

(2) An Accredited Mediation Provider must have a feedback system under which it invites, receives, assesses and reviews, internally and with the mediator, comments by the parties and their lawyers in respect of mediations.

D. Insurance

(1) An Accredited Mediation Provider must either provide or require mediators to obtain and provide evidence of professional liability insurance cover of not less than £1,000,000.

(2) Where mediators are doing work involving sums exceeding this amount, an Accredited Mediation Provider must have appropriate insurance cover in place and be able to provide evidence of the same.

In April 2006 HMCS issued National Mediation Helpline Provider criteria, but has subsequently withdrawn them. HMCS also revised its "Mediation Toolkit" but again this is not currently in the public domain. Nonetheless, the stated strategy appears to be to encourage local provision, but with a limit of 4-5 providers at each centre up to a maximum of 8 in London. It is thus envisaged that each area will have a localized nomination provider approved by the CMC. It is less clear how the Court of Appeal mediation service fits into this scheme, but presumably it does so through the registered London providers.

Does court based mediation offer value for money in respect of low value disputes?

The current rates for mediation through the Mediation Helpline are as follows :-

"Dispute	*Fees*	*Time allowed*
Claim under £5,000	*£250 (each party to pay £125) + VAT*	*2 hours*
Claim between £5,000 and £15,000	*£500 (each party to pay £250) + VAT*	*3 hours*
Claim between £15,000 and £50,000	*£750 (each party to pay £375) + VAT*	*4 hours*

For claims above £50,000, the fee would have to be agreed with the mediation provider.

Additional Costs : *Parties should try, where possible to provide a suitable venue for the mediation. If a venue has to be hired, the costs of the same are to be paid by the parties."* Note that whilst some court centres provide free accommodation this is not always the case.

The above of course does not represent the full costs of the mediation, since the parties will also have to fund the costs of representation. Assuming that there is the facility to extend the time allocated for mediation (which might not be the case, particularly where the court centre provides accommodation), the costs would also rise pro-rata for any additional time unless waived by the mediator. It is not uncommon for a mediation to resume at a subsequent date, allowing the parties time to sleep on the matter. This can happen where the mediation runs out of time or alternatively, where having had time to reflect on their position, an obdurate party subsequently seeks to return to the mediation table, having initially rejected what was on offer.

What does mediation bring to the dispute resolution table?

There is something satisfying about parties co-operating together to resolve their differences. It speaks of maturity and mutual respect which is conducive to future cooperation and the maintenance of relationships, which is desirable both socially and commercially. By contrast, in adjudication respect is accorded to a third party who imposes outcomes that are more likely to drive the parties further apart, leading to distrust and resentment. It is easier to blame the referee than one's own team for its shortcomings. All of this is all very well and good but is based on the assumption that relationships are worth preserving. Where this is not the case, it needs to be demonstrated that the other potential benefits of mediation over litigation are sufficient to justify resort to it in lieu of litigation.

An important commercial driver of mediation is the potential of cost savings. Examples abound of the cost savings of mediation compared to the costs of a major, extended trial. Indeed, the costs issue tends to play a central role in settlement negotiations, since potential litigation costs that are not recoverable can be set off against real loss or gain. Such irrecoverable loss may be substantial, particularly in terms of manpower, lost opportunities and cash flow. This leads into the other important driver, namely prompt and timely settlement. A mediation can frequently be put in place long before a case is scheduled for a hearing. The mediation is likely to be concluded in a relatively short period of time. A single day will often suffice.

However, when viewed from the perspective of low value dispute resolution, the bread and butter of the District Court, the cost/time saving benefit of mediation is much less apparent. First, once a party has paid the filing fee (see chart below) for a dispute below the small claims track threshold, there is nothing more to pay and nothing to be saved by settling out of court as opposed to going through the trial process and final determination by the judge whereas mediation will cost each party an additional £125 plus VAT. Whether or not the National Helpline Service can deliver a more timely mediation is another matter, but at best when the District Courts are regularly hitting their 11 week target and frequently beating it, any time saving is likely to be modest. Nor is the duration of the mediation likely to be shorter than a court hearing since it would appear that 1 hour 45 minutes is the average trial time before the District Court. Thus there are

virtually no savings to be made on representative costs if the case settles. By contrast, if it does not settle the client's bill could virtually double, especially if the clients have to pay for the venue.

High Court and County Court Fees: Includes Small Claims Court : As From 10th January 2006

Money Only Claim or Counterclaim		
Claim	**Fee**	**Money Claim Online**
Amount claimed is up to £300	£30	£20
Amount claimed is between £300 and £500	£50	£40
Amount claimed is over £500 but not over £1,000	£80	£70
Amount claimed is over £1,000 but not over £5,000	£120	£110
Amount claimed is over £5,000 but not over £15,000	£250	£240
Amount claimed is over £15,000 but not over £50,000	£400	£390
Amount claimed is over £50,000 but not over £100,000	£700	£690
Amount claimed is over £100,000 but not over £150,000	£900	
Amount claimed is over £150,000 but not over £200,000	£1,100	
Amount claimed is over £200,000 but not over £250,000	£1,300	
Amount claimed is over £250,000 but not over £300,000	£1,500	
Amount claimed is over £300,000 or not limited	£1,700	
Application for Summary Judgment	£60	
Claim other than money	£400	
Allocation Questionnaire Fee	£100 County Court £200 High Court	
Application Notice	£65 County Court £100 High Court	
Without Notice Application	£35 County Court £50 High Court	
Filing Proceedings against party not named in original proceedings	£50	

Judges' Fees

For every day or part of a day (after the first day) of the hearing before:
a) A judge of the commercial court - £1,800
b) A judge of the technology and construction court appointed as an arbitrator or umpire - £1,400

Two things are evident from the above. Firstly, that the potential savings from mediation are directly proportionate to the value of the dispute and secondly, that the Court Service has introduced a paper only internet dispute resolution service[10] which involves cost savings both in terms of the filing costs, and in terms of representation since the parties can complete all the paperwork themselves, though no doubt there are times when clients may seek legal assistance. Whilst limited to money claims, it is submitted that mediation has little to offer someone who can avail themselves of this service.

Other and further costs that a party contemplating mediation in lieu of litigation are set out below.

Trial Fee

Listing Questionnaire	£600 High Court
Multi-Track Cases	£500 County Court
Fast-Track and other cases (excluding small claims track cases)	£275 County Court
County Court Application for permission to appeal	£100 County Court £200 High Court
Appeal Notice	£120 County Court £200 High Court
Appeal Questionnaire (Appellant)	£400
Witness Summons	£35 County Court £50 High Court

[10] https://www.moneyclaim.gov.uk/csmco2/index.jsp

Where any of the above might be needed in furtherance of a trial costs continue to spiral. In such circumstances, the prospect of avoiding such costs where there is a realistic chance of brokering a mediated settlement, make the process increasingly attractive.

Enforcement

Attachment of Earnings	£65
Application for Charging Order	£55 County Court £100 High Court
Warrant for Recovery of Land / Property	£95
Warrant of Execution / Possession / Delivery	where the amount less than £125 - fee is £35 where the amount is over £125 - fee is £55
Application for 3rd party debt order	£55
Application for order that debtor attend court for questioning	£45 County Court £50 High Court
Warrant of Delivery	£95
Reissue Warrants of Execution, Delivery or Possession	£25
Judgment Summons	£95
Debtors Bankruptcy Petition	£150
Creditors Bankruptcy Petition	£190
Petition to wind up a company	£190
Certificate of discharge from bankruptcy	£60
Further copies of discharge cost per copy	£1
Appeals	£100 £200 (Court of Appeal)
Application to register a judgment or summons	£50
Certificate of Satisfaction	£15

Mediation : Structured settlement and insolvency.

The costs involved in bankruptcy proceedings represent but one factor that needs to be taken into account. The other is the potential recovery that might follow from such a petition. Evidently, a creditor has little option where administration is instigated by the debtor. However, where administration is threatened by a debtor or is the likely consequence of litigation, any victory enjoyed by a creditor may well prove to be empiric. Administration is not something that should be taken lightly and is best avoided by any debtor if an alternative strategy can be developed. Mediation has much to offer in the situation where a debtor would like to pay but is not currently in a position to do so, particularly if the premature demise of a business before the realization of prospective windfalls. Whilst a court award might not be immediately available or realizable by a successful litigant, it may be possible through mediation to broker structured payments over a period of time, or even for the creditor to take a stake in the business of the debtor, turning the debt into an investment. Whilst it is not possible to get "*blood out of a stone*" it may be possible to turn seemingly difficult if not impossible situations to one's advantage.

B). Independent / pre-filing Mediation :

It should not be forgotten that mediation may also be free standing. It does not have to operate in the shadow of case management. Mediation is quite possible without the filing of suit. Indeed, the same District Judges who have serious misgivings about court based mediation are of the view that mediation should take place before suit is filed. Two questions arise. Firstly, is independent mediation value for money for low value disputes? and secondly, how can a market in mediation independent of the court be established?

1. The value of self standing mediation for low value disputes. It is unlikely that mediation can compete with fast-track litigation on price alone, as noted above. Furthermore, if the mediation fails and the dispute then goes to court, the recourse to unsuccessful mediation will have resulted in additional expenditure. The value of self standing mediation lies therefore not in cost, but in added value. First, the parties remain in control of the outcomes, taking an active part in shaping them, leading to a sense of fairness that is shared by both parties. The same cannot be said of litigation where hard and harsh outcomes are not uncommon.

Second, the earlier a mediation takes place the better, since a negotiated settlement is far more likely to be brokered at a stage when the parties positions have not yet hardened. It is possible to arrange a mediation at a very early stage as a substitute for the extended period of time of exchange of letters between solicitors in the run up to litigation. In such circumstances mediation can result in very timely and prompt resolution. Third, where the prospective protagonists have continuing relationships, as in landlord and tenant, utility provider and client, employer and employee etc, a mediation which minimizes antagonism between the parties is beneficial to the maintenance of long term relationships.

The advantages of mediation in clarifying issues and resolving satellite disputes even where the main dispute is not resolved, which lead to cost savings in the subsequent trial, are well known. However, the value of this aspect of mediation grows proportionately with the value and complexity of a dispute and has little relevance to low value disputes.

The conclusion is that whilst mediation has distinct advantages over litigation, it is not clear that all low value disputes would benefit from mediation. Where one of the parties needs to a legal precedent to guide future commercial conduct mediation is not ideal. Where one of the parties is not prepared to contemplate compromise mediation is unlikely to work. Where both parties want "an answer" litigation is ideal. Mediation should be used where both parties will benefit from the "added value" set out above.

2. Establishing a mediation market independent of the court. The problem here is working out how to inform potential litigation partners of the existence and or value of mediation and persuading them to exhaust that avenue of settlement first. In most cases this would require the intervention of solicitors in the absence of an ADR provision governing the relationship between the parties, a route paved with more good intentions than reality at the present time.

Mediation facilities are advertised in many court buildings. Where a court sends out an information pack to potential clients, the parties can be averted to the value of mediation before filing. There is a chance that the applicant might then invite the other to mediate and that the other might accept the invitation. However, if the first introduction to mediation for a client is a brochure in the court house, collected on the way to file a claim, it is unlikely that the applicant will change course at that late stage.

If a solicitor is handling a case, mediation is likely to depend on whether or not the solicitor commends that course of action to the client, as opposed to merely inviting the client to consider mediation to ensure that the client can reassure a judge, if asked pursuant to 4.7 of the General Practice Direction to provide evidence that alternative means of resolving their dispute were considered. The low level of mediation referrals pre-filing is indicative of an absence of enthusiasm for civil mediation (with the exception of Family Mediation) within the broader ranks of the legal profession. This cannot be because solicitors are not aware of the existence of or the asserted benefits of mediation. Mediation has been widely promoted to the profession over the last 15 years and most solicitors will have taken part in at least one CPD mediation program. The conclusion must be that solicitors in general do not value mediation as a beneficial service for their clients or perceive mediation as not being in their own best interests. Whether or not this should be the case however, is a matter for consideration at another time.

If self standing mediation is the way forward, the key to expanded take up must lie in client awareness campaigns. If clients made it clear to their solicitors that they wished to engage in mediation in lieu of litigation, the profession would quickly embrace the process and fulfill the role of client representative / advisor. Equally, if ADR became a common feature of general contract documentation, self standing mediation would become the norm. Whilst various of the ADR service providers have targeted specific industries and activities[11] there is no obvious candidate to provide the pump-priming finance for such an advertising campaign. The ADR providers have not sought to reach out to the general public. The potential returns on such an investment are far too uncertain to commend such a course of action. It appears highly unlikely that the legal profession would mount such a campaign given its evident antipathy to the process. Perhaps what is needed is a government sponsored TV advertising program to promote mediation to the general public as a viable alternative to litigation. As will be demonstrated below this does not appear to

[11] e.g. pet care, travel and landlord & tenant etc

form part of the current ADR development strategy being pursued by the government through Her Majesties Court Service. Indirect public exposure to the mediation concept through TV documentaries and mediation based story lines in popular sitcoms and soaps such as Coronation Street and East Enders could do much to promote general public awareness of the process.

In the UK mediation is wedded to the main stream mediation service providers, who act both as a quality assurance and regulatory mechanism and as mediator nominating body. By contrast, whilst court appointed mediation and mediation service providers are common features, there is also a vibrant market in private mediation practice, whereby specialist mediators advertise their services and parties who have agreed to mediation approach the mediator of their choice directly. Alternatively, if approached by one party, a mediator will approach the other party, often successfully, with an invitation to mediate. Since overheads are less and the costs of a mediation service provider are avoided such services tend to be cost effective in this competitive market and speedy. This market is only possible because there is a high degree of awareness and understanding in the general public about the value of mediation and the advantages that it offers over litigation. Whether or not such a market could be realized in the UK is another matter.

The drivers behind mediation in the US are quite distinct and it would be a mistake to imagine that mediation can achieve the same degree of take up in the UK since the reasons for its success are not replicated here. "***Doing a deal***" is part and parcel of the US psyche, which means that the public is more susceptible to the mediation concept. The US citizen has far less expectations of the state in terms of education, health care and social services. Thus the concept of self help and getting on with things and making the best of a situation is far stronger. All of this has contributed to the development of the mediation market in the US. Furthermore, the civil trial is a far more elaborate affair in the US, involving juries. The process is potentially intimidating for litigants, making informal alternatives much more attractive. Mediation if it is to grow in the UK it will be necessary to identify and promote its unique selling points over and above what is provided by the UK courts. Rather than reaching out to the general public, it is likely that future growth will come out of the further development of niche markets.

CONCLUSIONS.

Mediation provides a viable method of dispute resolution. In appropriate circumstances mediation can be very cost effective. It also has many additional attributes over and above those offered by litigation. It is particularly suited for the resolution of larger scale domestic disputes and even more so for international disputes, since it can overcome many of the conflicts of laws barriers. Mediation is very useful for class actions and multi-party disputes. It also has a useful role to play in Family, domestic and social dispute resolution. All that apart however, it is far from evident that mediation is either efficient or cost effective for the resolution of low value disputes that can be dealt with quickly and efficiently by fast tract procedures, particularly where the mediation is conducted at the behest of a District Judge post filing of fees.

If the commercial mediation community and HMCS consider that there is a valuable role for mediation to play in respect of such disputes, it is submitted that there is a need for a major rethink about how to realize that objective. One pointer towards a potential way forward lies in the on-line adjudicatory service provided by HMCS noted above. It may be possible to develop on-line small claims mediation facilities which could be promoted by HMCS in addition to the current Mediation Helpline services currently on offer, provided the main-stream mediation providers such as CEDR, The ADR Group and the CIArb were willing to take the initiative and set up such a service. The advantages lie in that such a service could be very cost effective. No accommodation is required. The parties could participate from their own computer terminals. Organisations such as ***The Mediation-Room***[12] provide the soft ware for on line mediation, so the means of providing such a service exist. Such a mediation may be conducted in real time or over an extended period of time as messages are sent back and for between the parties. Such a facility could prove to be very attractive for the parties since it would not impact adversely on work commitments. One further advantage for such a scheme would be that it would provide an opportunity for newly qualified mediators to gain invaluable experience, which at the present time is not readily available, given the small numbers of low value disputes that are currently dealt with by mediation.

[12] www.TheMediationRoom.com.