ADR NEWS

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For current developments in Arbitration, Adjudication, Dispute Review Boards and Mediation

MEDIATION WEEK

WHAT IS MEDIATION ?

A presentation at Cardiff Justice Centre by the Association of Welsh mediators for

Web Library photo

Mediation is a third party facilitated continuation of the settlement negotiation process engaged in by the parties to a dispute, that precedes and continues in the background throughout the litigation process.

Mediation offers the parties the opportunity :-

to come face to face in a protected environment,
to confront the realities of their situation,
to re-evaluate their risks and opportunities,
to develop solutions which are not available at law.
to temporarily re-establish direct control over the settlement process by freely engaging in immediate without prejudice negotiations

Case management generated mediation provides a final opportunity for the parties to re-hear the cautionary advice (if any) of counsel which may previously have been given less attention than merited.

Mediation provides a private forum for pragmatic compromise in lieu of the litigation lottery, a chance to procure a bird in the hand in preference to those in the bush.

Mediation does not enable the parties to gain what is due to them under the law, since that is never established. Rather they seek to achieve a settlement which they deem is “fair enough” in the circumstances and with which they are able to live.

WHY STAY A COURT ACTION TO MEDIATION ?

When a dispute arises the parties may chose to, or may be able to :-

1 Walk away / let it go / give up *(e.g. when the pot is empty)*
2 Resort to self help (take matters into their own hands)
3 Pass the buck *(make it someone else’s problem).*

If not, the remaining options available to them are to either :-

4 Sort it out between themselves through discussions and / or negotiation, or
5 Let someone else decide (third party determination).

Litigation is the consequence of the parties to a dispute

a) failing to sort out their differences between themselves and
b) one of them insisting on an answer.

If common sense dictates that given the available facts and circumstances :-

i the parties should have been able to sort it out together and
ii there is a reasonable prospect that a mediator could break the IMPASSE, then
iii providing the time/cost differential between mediation and litigation is significant

mediation may be worth attempting and accordingly a stay to mediation justified.

WHAT DOES A MEDIATOR DO ?

A mediator helps the parties to a dispute to :

1 re-examine their differences *(distinguish between wants / needs and common ground)*
2 re-evaluate their respective risks and opportunities, *(refine and affirm what is on offer)*
3 work towards, and if successful draft, a mutually acceptable resolution.

WHEN IS MEDIATION UNLIKELY TO SUCCEED ?

1 The parties cannot or will not sort it out together
2 The parties need an answer as a guide for the future
3 The parties need an answer for third parties *(e.g. insurance or to justify actions to superiors or some other wider community with an interest in the outcome)*
4 It would not be in a party’s best interests or cost/time effective to put off litigation.
5 The parties cannot or will not sort it out together
6 The parties need an answer as a guide for the future
7 The parties need an answer for third parties *(e.g. insurance or to justify actions to superiors or some other wider community with an interest in the outcome)*
8 It would not be in a party’s best interests or cost/time effective to put off litigation.

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WHEN IS MEDIATION LIKELY TO SUCCEED ?

1) Where the court perceives
   a) an appearance of an unreasonable expectation(s) on the part of one or both parties and
   b) considers that a mediator facilitated reality check could/should result in either
      i) an abandonment of the unreasonable expectation or
      ii) the adoption of a more reasonable position,

   it is likely that mediation would be worthwhile/successful.
2) Where the court feels that further effort and focus could achieve an accommodation of reciprocal rights and wrongs *(i.e. a negotiated settlement).*
3) Where the court is of the view that either :-
   a) fear and suspicion, or
   b) the absence of any acknowledgement of suffering/injustice

   has created a barrier to settlement that could be overcome by mediation.
4) Where the court senses that a party simply wants an opportunity to be heard by the other party which mediation would fulfil, paving the way to a settlement.

LITIGATION SHOULD BE THE LAST RESORT, NOT THE FIRST PORT OF CALL

....

IN SEARCH OF JUSTICE – PART II [1]

The law, justice & the arbitral process. Arbitration is often referred to as private judging and even by the derogatory slogan "***rent a judge***." Albeit a useful shorthand analogy, it is in many ways far too simplistic, since the arbitrator's relationship with the law differs from that of the judge.

It is oft times asserted that the arbitrator's hands are not tied by precedent – a partial truth seldom borne out by circumstances and the applicable procedure[2]. Whereas early arbitration practice was based primarily on merchant practice,[3] conducted under the auspices of lay arbitrators with little or no grounding in the law, the modern arbitrator is required to apply the law, where applicable, to the established facts. Accordingly, whilst it is not necessary for an arbitrator to be a qualified lawyer, an arbitrator needs to have a thorough understanding of the law (both substantive[4] & procedural[5]) applicable to the dispute at hand.

Nonetheless, the arbitrator plays no role in establishing binding precedent, a privilege reserved to the judiciary.[6] Even if this were not so, whilst a limited range of arbitration cases are reported, particularly by specialist international tribunals, apart from any details of an arbitral decision that are set out in subsequent appeals[7], or at judicial review hearings, arbitration remains a private process : that being the case, the rationale underpinning most arbitral awards is not public knowledge and thus not available (*a pre-requisite to any concept of binding precedent)* to future litigants,.

Procedural law & justice. Even before the adjudicator or arbitrator can turn to the central dispute, he is likely to have to settle matters of jurisdiction[8] – including whether he has jurisdiction and further whether there is a dispute, and if so, the scope of the dispute before him.[9]

The latter issue is central to perceptions of justice, in particular regarding the extent to which a judge, arbitrator or adjudicator should seek to limit the scope of a dispute to disputed matters and materials

1 continued from ADR News Vol 5 No2, p7

2 S46(1)(a) Arbitration Act 1996 requires the arbitral tribunal to decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute. S46(1)(b) Arbitration Act 1996 : Art 28(3) Model Law provides the exception.

3 Keynote Introduction, Prof Geoffrey M. Beresford Hartwell. Volume 5 Special "ADR DAY" Issue 29th April 2005 p3.

4 See below regarding impact of s69 Arbitration Act 1996 in respect of appeal on a point of law.

5 See ***Wicketts v Brine Builders & Siederer [2001] APP.L.R. 06/08*** regarding removal of an arbitrator pursuant to s24 Arbitration Act 1996.

6 In public international law, arbitral decisions have contributed to international common law. Furthermore, the decisions of state controlled alternative processes such as the employment appeals tribunals (EAT) are authoritative.

7 During the appeal process the court will, if requested by a party, respect the privacy of private information unnecessary to the appeal, unless disclosure is in the public interest. ***Dept. Economic Policy & Dev. City of Moscow v Bankers Trust*** *[2004] EWCA Civ 314* **:** ***Glidepath BV v Thompson*** *[2005] EWHC 818 (Comm).*

8 See further section 30-33 Arbitration Act 1996.

9 See *Annie McCartney*. ***What is a Dispute?*** ADR News Vol 5 No1 p7 et seq

that have been canvassed between the parties prior to submission of the dispute. On the one hand, allowing new disputes and new material is open to allegations of ambush and a loss of control of the process by the adjudicator, whereby in order to enable a party to adequately address the new material the process grows like Topsy. On the other, a refusal to widen out the scope of the process can lead to allegations that the ***"real dispute"*** has not been addressed and that justice has not been served.

The law in this regard, be it for the courts[10], for arbitrators[11] or for construction adjudicators[12], is far from straightforward. It is hardly surprising that both the parties and decisions makers have been deemed from time to time to have got the answer to such questions (be it the factual issue of crystallisation or the legal aspect) wrong. [13]

Furthermore, there is a duty imposed upon the decision maker to manage the process. This involves the exercise of discretion, which in turn is governed by the overriding objectives of the relevant process.[14] For the arbitrator, management powers are set out in sections 34-40 Arbitration Act 1996. Without such powers, it would be impossible to control the process and reach outcomes in a fair, speedy and cost effective manner, but whilst the parties retain autonomy over the process, such autonomy is largely restricted to the protocols established prior to the process. Perceptions of injustice are quite common when a party is deprived of the opportunity to present yet one more witness, one more expert report, to dig even deeper into an issue or open up a novel (*related?*) issue.[15]

Substantive Law & Justice. The arbitrator must apply the law but in order to do so he has to satisfy himself as to the law. As with the judge he will be assisted in this task by counsel who will direct him to their asserted view of the applicable law. Unlike the judge who is deemed to know the law, the legal expertise of the arbitrator is not a "***known***" quantity.[16] Consequently, unless the parties have agreed to dispense with reasons, *"a party may apply to the court to determine any question of law arising in the course of proceedings which the court is satisfied substantially affects the rights"* of a party.[17] That which an arbitrator cannot do, is to disregard the views of the parties and apply his own version of the law (or indeed of facts), rather than to determine which of the versions posited by the parties is correct.

In the event that a party seeks to challenge that considered view, as expressed in an award, appeal lies, by virtue of s69 Arbitration Act 1996 to the courts unless the parties have otherwise agreed to dispense with reasons.[18] To dispense with reasons is a commercial decision that ensures more rapid closure, minimises costs and ensures privacy, but it is not without risk. The dilemma for commercial partners when choosing a dispute resolution process in advance is that the desirability or otherwise of a facility to question the current state of the law on a particular matter will not be apparent at that time, assuming that either party would be prepared to fund such legal creativity in the first place, which given their primary objective, the pursuit of profit, is unlikely. However, once a dispute materialises, attitudes may well have changed, but by that stage it is far too late to alter the pre-arranged process.

Conclusion. There is unlikely to be much difference today between the final outcome in arbitration or litigation, though the road to travel, and the costs and time involved in the journey might differ. The days of the amateur arbitrator are nearing the end. Is there still scope for common sense? Common sense is neither common nor, in the absence of objective criteria, amenable to definition and objective criteria. In the criminal sphere we still retain the concept of lay justice, but for not much longer it would seem in the civil sphere. Whether or not the primacy of a common law concept of judicial justice is universally embraced is another matter. The Civil Law inquisitor for one might not do so. C.H.Spurin

10 See the Preaction Protocols and the CPR in general.

11 See ***Halki Shipping Corporation v Sopex Oils Ltd [1997] EWCA Civ 3062***

12 See ***Adjudication – The changed model***. T.Bingham. ADR News Vol 4 Special Ed. p34

13 See ***Decision making – can it be judicial?*** D.Atkinson. ADR News Vol 4 Special Ed. p42

14 See s1 CPR 1998 in respect of the court, s1 & s33 Arbitration Act in respect of arbitration and s108 HGCRA 1996 / The Scheme in respect of adjudication.

15 Appeal to the courts in respect of jurisdictional issues is governed by sections 67, 72 & 73 Arbitration Act 1996. Appeal to the courts on grounds of serious irregularity in the arbitral process is governed by s68 Arbitration Act 1996.

16 Today, many adjudicators, in addition to their professional expertise are extremely learned at least in respect of the law pertaining to their special area of practice.

17 S45 Arbitration Act 1996.

18 In adjudication the procedure is quite different. The adjudicator's decision is subject to temporary finality. Even if the adjudicator gets a point of law wrong, the decision is immediately enforceable. The safeguard is a de nouvo process or arbitration or litigation. ***Bouygues UK Ltd v Dahl-Jensen UK Ltd*** *[2000] EWCA 2/2000/0181 : [2000] BLR 522*

"MEDIATION – THE NEW REALITY" ♦

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.

However, October 24th – November 4th sees the launch of the Mediation Awareness Campaign by Her Majesty's Court Service. London started to trial court annexed mediation in 1990. Gradually other courts have followed suit.[19] The government perceives that court annexed mediation can help to save time and money for the court service. HMCS has launched an initiative aimed at ensuring that eventually mediation services will 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 objective is 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.

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.

In Wales there will be court based mediation activities in Cardiff, Newport and Swansea, ranging from meetings with the judiciary to mediation advice desks for the public and briefing sessions for court stag. For the profession there will be a discussion forum at the Law School, University of Glamorgan. The new reality is that mediation is entering the main stream, with a generous helping hand from the government, as a central plank of the administration of justice reform initiative. Practitioners can no longer afford to ignore it but rather should embrace it and learn 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. 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. 15 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

♦ First presented at the Legal Wales Conference, 8th October 2005. Cardiff.

19 Manchester, Birmingham, Exeter, South Wales, Midlands.

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[20] 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. 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

[20] 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.

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.[21] 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.[22]

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.

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SMILE OF THE DAY

Who needs anyone else for a dispute?

Its eleven thirty on a Thursday morning in May – I have been working since 8:30 – emails to check – phone calls to answer. Examinations are in full swing. I have no exam invigilation today. I am still in my dressing gown. Another phone call, just coming to an end. The door bell rings. I open the door. Two ladies – fifties plus - neat – smiling – I nod a greeting, give a brief sign to wait a short while and drift into the living room to end the call. Then, returning to the door inquire *"Ladies, what can I do for you?"*

By return, a question *"Does God still care?"*

"Ahhh!" says I *"Now that's an interesting question, but one I am not going to spend any time on today."*

My reward an offer *"Would you like to have something to read?"* and a polite response *"No thank you, I have plenty to read."*

Encounter over, they turned and climbed the path to the road above. The front door closes on a brief encounter but the question, an interesting one, forces many a wry smile as the day passes by and provokes an extended inner conversation – interspersed with interruptions.

I was wrong. Despite my better intentions and a mass of exam scripts to grade, I did spend time on the question and related matters after all. Not that it changed anything at all! Or did it?

Is he? If he is, does he? Did he ever? Why should he? What else has he got to do? This could go on forever! Adjudication required. Case stated? Appeal? Mediation? At least scope for meditation!

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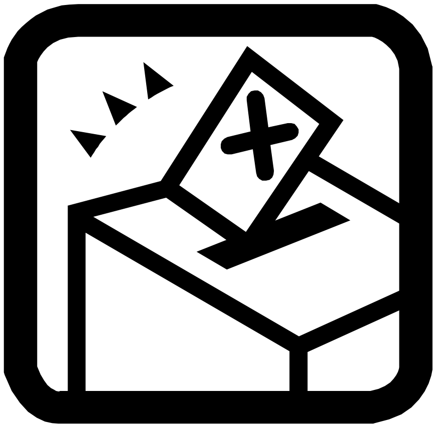
21 See ***Halsey*** for Civil Practice and ***Cowl; Royal Bank of Canada v MOD*** in respect of Public Practice.

22 See the NADR ADR Law Reports which detail all the recent judicial developments in respect of mediation. Currently there are

The Court of Public Opinion – Reflections on the Grandest Jury.



Every four to five years for three weeks political dispute resolution takes centre stage in the UK. Once more the great court of public opinion has spoken. On the 5th May 2005 the people's tribunal delivered its verdict : an electoral award, expressed in terms of seats at the Palace of Westminster rather than pounds and pence.

Unlike a court however, the next step is not taxation and award of costs, apart of course from those who lost their deposits. But, if it were, should costs follow the event or should they be apportioned as on a fair and reasonable basis applying the CPR rules? If so what would be the base line – seats won, support within the electorate or as a percentage of votes cast? Respectively these would give

Labour	55% : 22% : 36%
Tories	31% : 20% : 33%
Liberals	9.5% : 14% : 23%
Others	4.5% : 5% : 8%

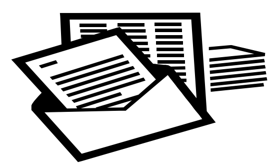
The clear winners on the basis of support within the electorate were the abstainers, a massive 39% of those on the electoral role, so perhaps after all that juggling with figures each of the "losing" parties should continue to bear their own costs.

Alternatively, perhaps the general election is better viewed as a three week negotiation of a multi-party contract, with the press acting as mediator, delivering, shaping, interpreting and commenting on the candidate's / parties' submissions? Would all or any of the press pass the impartiality requirements imposed upon mediators or might there be concerns about duress and undue influence? Or is this requirement reserved solely for the BBC, the public service broadcaster?

On a more serious note, since the government was returned for a third successive term continuity in government policy in support of ADR is ensured. Whilst this is to be welcomed, uncertain times lie ahead for the legislative process as the government progresses the next stages in its plans to reform the House of Lords, including proposals to reduce the House of Lords' power of delay to 60 days. With a reduced government majority in the Commons interesting times lay ahead.

READERS LETTERS

A number of questions have been received regarding the attitude of the courts towards mediation, with particular reference to the ECHR and the Human Rights Act 1998.



Sir,

I'm a Swedish law student currently working on a paper on the relationship between ADR and article 6 of the European Convention on Human Rights.[23] I would be very grateful if you could recommend material from the U.K dealing with that subject.

23 *"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. ……."*

Sir,

There are a number questions in the letters section (ADR News Vol. 5 Issue No 2 July 2005) which refer to the courts having power *"to impose mediation .... "* I would be interested in you views of how this sits with the ***Halsey v. Milton Keynes General NHS Trust***[24] judgement. In particular with the words of Dyson L J where he said

"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:*

> *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."

This implies that compelling mediation is just not on except in exceptional - possibly even inconceivable - circumstances.

REPY : It is convenient to answer both queries by addressing the question *"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.[25] 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.

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

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

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.[26] 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***[27] 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.

However, it is not beyond question that this is something the courts cannot do. Consider the order given by the court in ***Rickards v Jones***.[28] 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.***[29] 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***,[30] *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

26 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. It is common for satisfactory settlements to be brokered even where one of the parties was initially sceptical about the process and a reluctant participant.

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

28 ***Rickards v Jones*** *[2002] EWCA Civ 260.*

29 ***Shokusan Co Ltd v Danovo Ltd*** *[2003] EWHC 3006.*

30 ***Kinstreet Ltd v Balmargo Corporation Ltd [1994] Ch 1994 G2999***

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 Overseas Limited v. Donald Lee Kaye***[31] *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)***[32] 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 ***Rickard***s 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.

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

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

32 ***H (A Minor) [1998] EWCA Civ 98***

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.

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***[33] and ***Royal Bank of Canada***[34], 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***[35] this was held to conform with Human Rights, which were the central issue under consideration by the court.[36] 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.[37] 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.[38] 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 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.[39] 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.

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

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

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

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

37 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.*

38 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 :*

39 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.*

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.[40]

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***[41] 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.[42]

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.[43]

MEDIATION CASE CORNER

Case Commentary by

Corbett Haselgrove Spurin

Bradford & Bingley Plc v Mohammed Rashid (2005) Lawtel AC9300623

The mortgagees sold a property after the mortgagor defaulted. There was an outstanding balance which they subsequently sought, many years later to recover. In fact the claim was statute barred. Their first request for payment was met with a letter stating that the ex-mortgagor could not pay, but a follow up letter stated that he was in a position to pay £500. The mortgagees sought to rely on that letter as an admission of and acknowledgement of the debt, to defeat the time bar. In the Court of Appeal Buxton LJ, Latham LJ, Sir Martin Nourse held that the correspondence was confidential and privileged and was insufficient to fall within the admission of legal right exception to the privilege rule. 22nd July 2005

Comment : It is not entirely clear what the distinction is, in this case, between admissions of a legal right that fall within the exception, apart from the limitation factor. However, it is easy to envisage situations where a private individual might initially respond in such a way without realising the legal implications, and only

40 **Employment Rights (Dispute Resolution) Act 1998**

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

42 ***R G Carter Ltd v Edmund Nuttall Ltd (2002) BLR 359***

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

subsequently take legal advice and guidance. But for this decision new life might by such means be injected into otherwise lapsed claims, defeating the purpose of the legislation.

Byrne v. Byrne [2005] IEHC 55

This case concerns questions related to the interpretation and enforceability of a "Mediation or Arbitration" clause in a contract, which fell to be considered by Judge Macken sitting on the bench of the High Court of Ireland. Macken. It came to the court by way of case stated, a device which is no longer a feature of arbitration practice in the UK since the introduction of the Arbitration Act 1996, which swept away the device which was a central feature of the Arbitration Act 1970. Case stated continues to be used in a variety of jurisdictions, including Malaysia, where the Arbitration Act 1972 was modelled on the UK Act. Be that as it may, today, in the UK an application for a declaration would achieve the same outcome in that the court can deliver a judgement on jurisdiction and the interpretation of contract terms, the major difference being that in the UK an arbitrator is able to do so first, leaving it to the parties to defer to the courts if dissatisfied with the arbitrator's award. However, since a mediator cannot issue an award, any questions of jurisdiction and interpretation of contract terms would still need to be referred to the court for clarification. If the parties are in doubt, it is sensible to do so, since this ensures that time and money is not expended upon a process which may in the event turn out to be unenforceable.

The shareholders of a company set up to run a public house entered into a management agreement for the running of the business and manner of dissolution. Clause 7 of the agreement was as follows :

a. *"The parties agree that in the event of any dispute arising between them in the carrying out of their respective duties as Directors of the Company or in the exercise of their rights as Shareholders in the Company, their initial recourse shall be to the services of an Arbitrator or Mediator (and in default of agreement on which, then an Arbitrator) and in default of agreement between them on the nomination of an Arbitrator or Mediator, then such nomination shall be made by the President for the time being of the Incorporated Law Society of Ireland.*
b. *The costs of a Mediator shall be borne by the Company. The costs of an Arbitrator shall be borne by the Company or by either or both of the parties as deemed appropriate by the said Arbitrator."*

A dispute arose which was referred to arbitration. When a question arose as to whether or not the award would be final and binding, the arbitrator referred the matter, by way of case stated, to the Irish High Court.

The claimant asserted that the award would be binding and that his intention on signing had been to keep any dispute out of the courts. The respondent asserted that the plain meaning of the words was that it was not binding, but declined to give evidence as to his intention on signing the contract. Neither party chose to call the solicitor who had drafted it to give evidence as to his understanding of its meaning.

The respondent asserted that since the option to mediate left the way open for litigation, the plain intention was that the outcome of arbitration would also be non-binding, particularly since this was stated to be an "*initial*" recourse, indicating a follow on process. Macken J looked at the evidenced intention of the parties, viz "*to keep matters out of court*", and concluded that whilst mediation would not achieve that objective, binding arbitration would. He was reinforced in this view in that in the absence of agreement of the appointment of a mediator (where the company would shoulder the burden of costs) an arbitrator would be appointed (who had the power to award costs against either party or the company). Furthermore, clear words were required to displace the default position under the Arbitration Act 1954 which states that unless otherwise stated, an award is binding and final. The words used were not sufficiently clear to achieve that result. 3rd March 2005.

COMMENT : The interesting factor in this judgement is Machen J's understanding of the nature of mediation and the mediation process, at least in the context of Eire, though not necessarily of the UK. Indeed, whilst relying on the persuasive authority of UK jurisprudence in respect of guides to interpretation, he specifically noted that whether or not the UK had developed a "*one stop shop*" approach to ADR (*whatever that means*), that stage had not yet arrived in Ireland.

Machen J expressed the view that mediation is usually a non-binding process that results in a non-binding agreement. Whilst the process in the UK is regarded as non-binding, in that a party can quite necessarily (*given it consensual nature*) bring the process to an end without reaching an agreement, it is a prerequisite to litigation (or arbitration as the case may be) that the process is commenced, even if a claimant merely goes through the motions in order to satisfy the contract requirements.[44] By contrast however, where a respondent refuses to attend, the pre-requisite is discharged, since to do otherwise would deprive the claimant of a forum.

Whilst non-binding mediation is common in the UK for ACAS conciliations/ mediations between employee representatives (unions) and employers and neighbourhood disputes etc, the general expectation is that commercial disputes, such as the present case, would normally result in a binding contract or, if an action is filed, a compromise of the action. If that is not the usual understanding in Ireland, then perhaps some additional, clear words to that effect should be inserted into contracts, where that is what the parties hope to achieve by mediation. At the very least, in the absence of such language in the mediation agreement, any mediated settlement should carry words to the effect that the settlement is "*final and binding*" or "*legally enforceable"* to put the matter beyond doubt., but that would impose an additional and undesirable burden on the mediator and an additional hurdle to be cleared in the mediation.

Care is needed in the drafting of mediation agreements and contract advisors should either be well versed in the process or alternatively should incorporate the contract language and or/rules of a body specialising in mediation. Such rules (tailored for a particular community) will normally make it clear whether the outcome will be advisory only, binding in honour only or legally enforceable.

C v RHL [2005] EWHC 873

The full facts are not set out in this short report of an application for injunctive relief. It would appear that C entered a Share Purchase Agreement with RHL on terms including an ICC London arbitration clause. A dispute arose, as to whether or not this was a sham sale, which was referred to the ICC by C. RHL in response commenced action in the Moscow courts for enforcement of outstanding payments. RHL had a number of associate / subsidiary companies and further 'satellite' litigation was in the pipeline.

C wished to stop the Moscow hearing and any other potential hearings on the basis that any finding by the Moscow Court that the transaction was lawful would prejudice the ICC arbitration. C sought an anti-suit interim injunction against RHL and its associates. The court was made aware of pending negotiations between the parties and recognising that mediation / ADR could provide remedies not available to courts and arbitral tribunals, which had the potential to end the dispute, made an ADR ORDER.

The ADR order issued by Colman J has the same effect over international litigation as a domestic "stay of action" in that it restrained the procurement of further court or tribunal proceedings prejudicial to either party pending the outcome of mediation and further required both parties to take all steps necessary to ensure that nothing be done in existing proceedings to prejudice either party. The object was to preserve the status quo and prevent anything that might exacerbate their relationship in the intervening period leading up to the mediation. The Order extends the range of actions that the courts are prepared to take in support of ADR. In the circumstances the Moscow hearings were currently adjourned but the order would prevent participation should the hearing recommence before the mediation and thus amounted to an interim anti-suit injunction (by another name – viz ADR ORDER) as requested by the applicant. 28th April 2005

Davies v Stockwell Building Contractors [2005] EWCA Civ 444

The claimant broke her ankle on a misaligned paving slab in a poorly lit shopping precinct. The appellant, a contractor had laid the paving slab around a post installed to hold shuttering around refurbishment works to a shop. The area was then cordoned off. Vandals removed the bunting used to cordon the area off and pulled out a fence post pushing the paving slab out of line.

The four circumstances where there may be liability for the wrongful acts of third parties are set out by Lord Goff in **Smith v Littlewood** :- namely *"(a) where there is a special relationship between defendant and plaintiff based on an assumption of responsibility by the defendant; (b) where there is a special relationship between the defendant and the third party based on control by the defendant; (c) where defendant is responsible for a state of danger which may [be] exploited by a third party; and (d) where the defendant is responsible for property which may be used by third party to cause damage*".

[44] See ***Torith Ltd v Stewart Duncan Robertson [1999] LTL C8200316.***

HHJ Isobel Parry at first instance applied test (c) above and found SBC liable. SBC applied for leave to appeal on the grounds that the (c) was designed for circumstances where the defendant created a danger (eg by bringing a dangerous substance onto land) and seeks to demonstrate that he had not created a danger. Rather it as the vandal who turned a safe situation into a danger.

Waller LJ concluded as follows *"… the defendant should not be too encouraged by permission to appeal being granted. Indeed, the defendant and those advising the claimant might also like to give a thought to the question whether it might not be preferable to try and reach some compromise, if necessary through the **mediation** service which the Court of Appeal can provide. That might be a better way of spending time and money as compared with incurring the considerable costs which would be incurred in fighting what is a difficult point of law in the Court of Appeal. But I would grant permission to appeal."* Waller LJ; Mr Justice Wall.15th April 2005.

COMMENT : From the jurisprudential perspective, the problem with ADR is that it does not advance the law, in that no precedent flows from it. Here Waller LJ is essentially inviting the parties to consider the adoption of a pragmatic approach to their dispute based on the odds of success. This takes the concept of litigation as nothing more than a "*crap shoot*" to the ultimate. Certainly for SBC there are good commercial risk management grounds for adopting such an approach. Bearing the cost of making new law for the benefit of society is not commercially attractive. However, if all litigants in similar legal ground breaking situations took that advice the common law would lose its evolutionary element. Eventually the law would stagnate and lose its ability to adapt the changing needs of society.

Devon County Council v Clarke [2005] EWCA Civ 266 (17 March 2005)

This case provides yet another instance of a public authority case (*though not a public law case*) ideally suited for mediation that should have been settled by that process. It involved a damages claim for a school's negligent failure to identify dyslexia in a pupil and provide appropriate education. The claim partially succeeded in that one of five teachers was found to be in breach of duty. The court had awarded 100% costs, even though four counts had failed. The appeal failed except as to costs. The claimant's costs were reduced to 70%. Having observed that mediation had failed in this instance, Mummery LJ noted that "*The result at the end of the day may well be that, despite the large expenditure of public money (estimated at £150,000) on the litigation about education, no benefit has been derived from it by either of the parties or by the public. This is not a satisfactory outcome."* The reduction in costs meant that the claimant derived no real benefit from the litigation. Keene LJ; Dyson LJ. 17th March 2005.

COMMENT : whilst it is clear that from a financial perspective cases such as this are ideally suited to mediation, it is also evident that the reputation of teachers and confidence in the education system is likely to lead to highly contested cases. What appears to being missed in such action, at least from the public authority's perspective, is that where such a case is settled by mediation, the privilege attached to the process will protect the reputation of the professionals involved. However, in the absence of some agreed mechanism between the authority and its employees the professionals are still likely to wish to exercise any opportunity available to them to demonstrate that they have not acted in an unprofessional manner.

Fusion Interactive Communication Solutions Ltd v Venture Investment Placement Ltd [2005] EWHC 736

Business partners fell out. On two previous occasions the court advised mediation but the mediations appeared to have failed. The judge noted "*I, of course, do not know whether and to what extent the mediations took place and to what extent and why they failed **as those matters are not properly within my domain**.*"

As part of their on-going dispute an application for winding up was made to the court. HHJ Peter Smith dismissed the application but noted that this would not end the argument between the parties, stating *"I reiterate again the need for these parties to sit down and resolve the disputes. This exercise has been costly and any further litigation is, in my view, to be firmly resisted. I have already directed **mediation** and that apparently has been unsuccessful. There is little else I can do except to record my disappointment (to put it mildly) that these parties seem to be intent on fighting issues unnecessarily in the Courts."* 10th May 2005.

Gibson v Commission for Social Care Inspection [2004] EWCST 266(EA_Costs)

The Gibsons were removed from the register of care homes providers. They unsuccessfully appealed the decision. This hearing considered the costs of the appeal, finding the appellants responsible for costs under

Reg 24 - Care Homes Regulations 2001 which empowers the tribunal to order an appellant to pay the costs of an appeal which is conducted unreasonably. The respondents asserted amongst other things that the appellants had unreasonably failed to respond to offers or to mediate.

The Tribunal noted that " … there is no ***mediation*** *built into this appeal process nor is there any requirement that either party has to attend the meeting. Indeed in some cases there may be good reasons why a meeting might be inappropriate. However, in this particular case, in circumstances where the Applicants challenge to the Respondents case was still unclear and where proposals to settle were on the table, it does appear to have been unreasonable on the part of the Applicants simply to refuse to attend the meeting. Even if the meeting had not resulted in a settlement, at the very least it could have served to narrow the issues, thereby reducing the length of the hearing and saving substantial time and costs".* Mr Stewart Hunter (Chairman), Mrs Linda Elliot, Mr Jeff Cohen. 21st June 2005

Hertsmere Primary Care Trust v B & K Rabindra-Anandh [2005] EWHC 320 (Ch) Lawtel AC0108513

The purpose of Part 36 payment in is to encourage settlement and keep unnecessary cases out of the courts. Contrary to previous indication, the mere fact that an offer did not include an expiry date will not necessarily prevent it being treated as a payment in for costs purposes, provided it is clear and in other ways satisfies the standard of clarity and contained equivalent rights to a Part 36 payment in. Lightman J. 7th March 2005

Longstaff International Ltd v Evans [2005] EWHC 4 (Ch),

The court took into account an attempt to impose unreasonable conditions for the conduct of a mediation when assessing costs. In the event a 50/50 costs order was reasonable, given that both parties conducted themselves in an unreasonable manner. Warren QC Nicholas (sitting as a deputy judge of the Chancery Division). 21st January 2005.

Munkenbeck & Marshall v Harold [2005] EWHC 356

A payment dispute and professional negligence counterclaim in respect of architectural work was largely settled at the 11th hour, save for the question of the claimant's pre-trial/settlement costs. The settlement saw the architect recover £53K outstanding fees. The counterclaim was dropped. The trial here was thus largely a costs trial. The first element of the architects costs claim included an allowance for time spent preparing the claim and defence to counterclaim. This failed because there was insufficient accurate evidence to support and quantify the claim and because the terms imported by reference from the RIBA contract were not drawn to the attention of the private client, and were onerous and oppressive in that they provided recovery for the architect if successful but mandated no recovery for a successful client. The legal costs claimed (arising out of a contingency fee arrangement) amounted to £186K. 90% of the costs of this hearing were to be covered by the architect since he failed to establish his claim of £16K for his own time. Otherwise, subject to taxation, HHJ Richard Havery ordered Harold to make a payment on account of £90K. 17th March 2005.

COMMENT : The RIBA terms may be perfectly acceptable business to business, but at the least there is a need to expressly draw a private client's attention to them, or perhaps RIBA may need to revisit the proportionality of the provisions for the private sector.

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

This concerned an application to the Patent Office under section 72 of the Patent Act 1977 for the revocation of a patent. The defendant wrote to the Patent Office asking the comptroller to exercise his inherent discretion and order the parties to undertake Alternative Dispute Resolution (ADR) in accordance with a specified timetable and to stay the revocation proceedings until this had been completed. Mr P M Back, Divisional Director acting for the Comptroller delivered an interim decision with regard to this application. First, he noted that even if the parties agree to revoke the patent, the final decision on whether or not it is in the public interest to do so vests with comptroller. ***R v Comptroller-General, ex p Ash and Lacey Building Products Ltd*** [2002] RPC 46) before considering the mediation issue.

The defendant drew the Director's attention to ***Shirayama v Danovo*** where the court ordered mediation. The Director also considered the implications of ***Halsey v Milton Keynes*** on the power to mandate mediation. He concluded that the special circumstances of Shirayama did not apply to the instant case and noting that in Halsey Dyson LJ expressed the view that extra-ordinary circumstances would be required in order to order mediation, concluded that this was not an appropriate case to order mediation and that no relevant extra-ordinary circumstances existed to support such an application. 5th January 2005.

Trustees of Stokes Pension Fund v Western Power plc [2005] EWCA Civ 854 : Lawtel AC0109158

A settlement offer, which complied with the general requirements of a Part 36 payment in, of £36K was rejected. The offer was consequently withdrawn and subsequently a £20K payment in was made. The courts awarded £26K. The Court of Appeal (Auld LJ; Dyson LJ.) treated the offer as equivalent to a payment in for cost purposes. 11th July 2005

Vahidi v Fairstead House School Trust Ltd [2005] EWCA Civ 765

A claim and subsequent appeal for damages for stress at work failed. Longmore LJ dismissing the appeal observed that *"One shudders to think of the costs of this appeal and of the trial which apparently took as long as 9 days. As the courts have settled many of the principles in stress at work cases, litigants really should mediate cases such as the present. Of course, **mediation** before trial is infinitely preferable to **mediation** before appeal. But it is a great pity that neither form of **mediation** has taken place in this case, or, if it has, that it has not produced a result".* Ward LJ; Scott Baker LJ. 9th June 2005.

COMMENT : From this and other related stress cases, it would appear that the courts are arriving at the stage where litigation is not viewed as the appropriate forum for settling such disputes, or at the least, should not be deemed to be the first port of call. If followed by the lower courts, it is likely that in future, most such cases will be stayed pending mediation at the case management stage.

Venture Investment Placement Ltd v Hall (2005) ChD.Lawtel 18/5/2005

The parties to litigation engaged in an unsuccessful mediation. This action involved *"an application by the claimant for interlocutory relief in the form of an injunction to restrain the defendant from referring to, or disclosing, (either verbally or in writing) to any other person, natural or corporate, any discussions which took place during the course of a mediation relating to other proceedings between the parties …. or contents of documents and so forth, governed by the confidentiality agreement contained in the mediation agreement and consequential relief on that."*

Mr Hall made a complaint to the Police that Mr Watts, the director of VIP, had threatened to *"do things to Mr Hall."* The Police interviewed Mr Watts about the complaint but that matter had, to date, gone no further. Mr Watts believes that Mr Hall has repeated the allegations to outsiders, Mr. Gold and Mr. Smith. Mr Watts came to the conclusion that the complaints etc related to a meeting that he had with Mr Hall and his fiancée, lasting between 30-50 minutes that occurred during the mediation. The court was unsure whether or not the alleged conversations related to this meeting but were prepared to accept for present purposes that this might well be the case. His Honour Judge Reid stated :-

*"The assertions made on behalf of the claimant …. are that, in general, "without prejudice" discussions, of any form, are to be protected and are not to be allowed to be brought into the public arena. I was referred, in particular, to **Unilever v Proctor & Gamble** [2000] WLR 2436, and to the exceptions as to when "without prejudice" negotiations can be put before a court, set out in the judgment of Walker LJ …. at page 2444. What was said was that, in this instance, the allegations made related to something that took place in the course of a mediation meeting and was, therefore, covered by the banner of "without prejudice", and the only exception that was being sought to be relied on was the unambiguous impropriety exception. Walker LJ said this about that exception:*

> *"The following are among the most important instances, ie exceptions, for apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety" (the expression used by Hoffmann LJ in **Foster v Friedland**, November 10, 1992, CAT 1052). Examples (helpfully collected in Foskett's Law & Practice of Compromise, 4th ed., paragraphs 9-32) are two first- instances decisions, **Finch v Wilson** (May 8, 1987) and **Hawick Jersey International v Caplan** (The Times, March 11, 1988). This court has, in **Foster v Friedland** and **Fazil-Alizadeh v Nikbin**, 1993 CAT 205, warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion." "*

Whilst Reid held that the meeting was clearly not part of a bona fide mediation, he made it clear that *"Mediation proceedings do have to be guarded with great care. The whole point of mediation proceedings is that the parties can be frank and open with each other, and that what is revealed in the course of the mediation proceedings is not to be used for or against either party in the litigation, if mediation proceedings fail."*

Reid held that there was a case here to be tried (an application to strike out was refuses) but in the interim period he was prepared to grant the injunction to prevent repetition of anything that may or may not have been said at that meeting, on the basis that this was essentially a question of defamation. 16th May 2005

Willis Management (Isle Of Man) Ltd v Cable and Wireless Plc [2005] EWCA Civ 806

Willis, a management company employed Mr Foulger as an underwriting manager for Pender, the insurers of C&W. Five employees of C&W were accused of fraudulently diverting insurance funds with the assistance of Mr Foulger. Here, Willis sought to appeal a finding by Cooke J, at first instance, that Willis had made a binding agreement with C&W as to the extent of their liability for the acts of their employee, Mr Foulger and to overturn a summary judgement to enforce payments flowing from that agreement.

In exchange for not being made parties to any legal action Willis had intimated to C&W that they were prepared to accept a reasonable share of responsibility for Mr Foulger's actions, but noted that a mechanism such as negotiation/mediation/arbitration would be needed to establish quantum. C&W followed this up with a draft agreement which Willis signed, subject to the caveat that they were only acknowledging responsibility for a share or but not all of the losses. Cooke J held that this amounted to an agreement on liability and asserted that quantum could be assessed by the court. The un-stated fear of C&W would have been that on a finding of joint and several liability Willis could be held to account for all C&W's losses.

The Court of Appeal accepted that in reality, in the absence of an agreement on quantum, this amounted merely to an agreement to agree. There was no binding contract. Appeal from ***C&W v Valentine*** allowed. Tuckey LJ, Rix LJ, Mr Justice Wilson. 30th June 2005.

Wills (Alexandra) v Mills Solicitors [2005] EWCA Civ 591 3rd May 2005

The claimant (a barrister) was employed by the defendants on a 6 month trial basis. The defendants terminated the contract but the claimant continued to work on a large case. The claimant sought to overturn the termination and to remain in employment, asserting that working relations with other partners made maintenance of the relationship viable. A dispute arose about the applicable notice period. In the run up to the trial at first instance there were delays in exchange of documents relating to the claim. The court adjourned to facilitate issue of witness statements. Behrens J stated by way of explanation that the adjournment would provide an opportunity to tell the other party [*relevant information*] or negotiate. Problems with paperwork continued. The claim failed and a costs order ensued. The claimant challenged the costs order on the grounds that the defendants had not mediated. Mance LJ rejected the assertion that Behrens J had ordered mediation and considered the ***Halsey*** guidelines. The defendants had not unreasonably failed to mediate since it would not have been practicable to do so without knowing the full grounds of the claim and the nature of the evidence to be relied upon by the defendant. In the circumstances Behrens J was justified in refusing an apportionment of costs.

CONSTRUCTION CASE CORNER

C.H.Spurin

With the launch of the Adjudication Law Reports, Adj.L.R. through the publications section of the NADR web-site, Construction Case Corner will no longer feature construction adjudication summaries. Full reports of all reported cases are provided year by year. Summaries are available in the index, along with the NADR Adjudication Case data base.

Abbott v Will Gannon & Smith Ltd. [2005] EWCA Civ 19

The underlying facts of this appeal are similar to ***Pirelli G.C.W. v Oscar Faber*** *[1983] 2 AC 1* where it was held that a cause of action by a building's owner against is consulting engineer, for negligent design, accrues when physical damage to the building first occurred. This was applied by Childs J, Exeter CC. against Abbot, who appealed, asserting that ***Murphy v Brentwood*** *[1991] AC 398* over ruled Pirelli and consequently the action accrues when the building owner suffers economic loss, that is to say, at the time when the building is completed and the owner is left with a defective building in need of remedial work.

The court disagreed. ***Murphy*** (per Lord Keith) merely added an additional element. Where a party discovers defects before damage is cause, a claim for economic loss can arise if supported by a special relationship.

Furthermore, in the instant case both parties accepted that there was a special relationship. Lord Keith had already previously endorsed Pirelli in ***Kettman v Hansel Properties*** *[1987] 1 AC 520.*

In conclusion, the CA found that the cause of action accrued when the problem manifested itself, either by requiring remedial work to the property or when the problem resulted in the value of the property being devalued. In this case, these were one and the same. Appeal failed. Mummery LJ; Tuckey LJ; Clarke LJ. 2nd March 2005.

Henry Boot Construction Ltd. v Alstom Combined Cycles Ltd. [2005] EWCA Civ 814

When does an action for payment accrue and time start to run for the purposes of limitation - when work is done or on certification? The CA (Dyson LJ; Thomas LJ.) held that the action accrued on certification or when the certificate should have been issued, whichever was the latest.

This applies individually to interim payments, so that an action challenging the amount certified in / or a failure to certify an interim account may in the circumstances of the case be time barred under the Limitation Act 198) and to the final account, which might not be time barred.

Each certificate is a separate cause of action. However, it is not normally possible, under the contract payment mechanism, for the contractor to revisit previous certifications during the final account. Clearly there may be new money claimed. Equally, since the Architects certificates are not final previous certificates can be revised downwards for the purposes of repayment. In the absence of a certificate time accrues from the time that the certificate should have been issued. If a certificate is eventually issued, albeit late in the day, time accrues for challenging that certificate and equally for enforcement of payments due under that certificate, from the time the certificate is issued.16th June 2005.

PRACTICE & PROCEDURE CASE CORNER

Case Commentary by

Corbett Haselgrove Spurin

Ian McGlinn v Waltham Contractors Ltd [2005] EWHC 1419

McGlinn commenced an action against contractors, architects and engineers for damages in excess of £4.5 M for defective work to his property on Jersey , asserting that the property had to be demolished. The original demand included claims for over-payment and recovery of payments for loss and expense made to the contractor. Following case management under the Pre-Action Protocol these items were dropped from the action. In this action Waltham et al seek to recover the costs thrown away at the pre-action stage of combating these subsequently discarded elements of the action

Callery v Gray *[2001] 1 WLR 2112* established that the costs of complying with the pre-action protocol are recoverable. However, applying the dicta of Sir Robert Megarry V.C. in ***Re Gibson's Settlement*** *[1981[CH 179,* His Honour Judge Peter Coulson held that these thrown away costs are not costs incidental to the proceedings qua s51 Supreme Court Act 1981 and as such were not recoverable. Even if he were wrong about that and they were recoverable, exercising his discretion in the matter he would not in the circumstances of this case, award costs in relation to these very ordinary matters.

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