APPENDIX D

Para. 53(3)

GUIDELINES FOR ADVOCATES AND SOLICITORS ADVISING CLIENTS ABOUT ADR

1. WHAT ARE THE ALTERNATIVES TO LITIGATION?

1.1 Mediation
1.2 Neutral Evaluation
1.3 Expert Determination
1.4 Conciliation

2. CHOOSING THE MOST SUITABLE ADR PROCESS

2.1 Consider with your client what your client wants to achieve, and then advise which route would be quicker, most economic and most likely to achieve the objective, and then seek the consent of the other party or parties to that course.

2.2 **NEUTRAL EVALUATION** If the matter requires specialised legal or technical expertise then appointing a neutral evaluator with that necessary expertise to give either a binding or non-binding evaluation may be a better way of cutting to the point and informing all parties what the probable outcome may be. This can then form the basis for negotiation or mediation.

2.3 **EXPERT DETERMINATION** If the dispute turns on an expert's opinion, and each side's expert holds a different view, then appointing a third party expert to give an expert determination, again either binding or non-binding as your client prefers, will often clarify the issue and provide a basis for resolution by negotiation or mediation.

2.4 **CONCILIATION** If the dispute involves a breakdown in a commercial or personal relationship, notably a workplace dispute, then conciliation is probably the best route to resolution.

2.5 **MEDIATION** All disputes, regardless of the basis for them, their nature or their provenance, are capable of resolution through mediation **provided all disputants** are willing to seek resolution if they can. The advocate and solicitor's duty is to explain the advantages of mediation, the mediation process itself, and what might be achieved over and above what remedies are available through the courts. The attached comparison table might assist in explaining the advantages and disadvantages to your clients.

3. MEDIATION

3.1 The essential advantage for the client in mediation is that the client is an active partner in the process, takes part in fashioning the resolution, and has the final say on whether or not to accept the settlement.

3.2 Quintessentially, the types of disputes which are ideal for resolution through mediation are:

- 3.2.1 Commercial disputes in which the disputants have an ongoing relationship that needs to be preserved.
- 3.2.2 Small value construction disputes where the costs and time involved in having the matter resolved through the courts is out of proportion to the sums at stake.
- 3.2.3 Neighbourhood disputes over noise, boundaries, rights of way or user.
- 3.2.4 Professional partnership disputes over dissolution or the respective rights of outgoing and remaining partners.
- 3.2.5 Actions by liquidators in which the available assets are limited and likely to be consumed by the costs of the liquidators and litigation.
- 3.2.6 Clinical and medical negligence cases where the victim needs to be heard in an environment which is less formal than a courtroom and where the medical professional may more easily apologise and explain.
- 3.2.7 Most employment cases, including all forms of discrimination, in which the complainant and the defendant can confront each other in an informal environment which is less inhibiting than a tribunal or court.
- 3.2.8 All types of claims where the costs of any proceedings are likely to equal or exceed the value of the claim.

3.3 This list is by no means exhaustive. Some foreign judicial statements suggest that cases involving fraud may not be suitable for mediation. However, fraud can be dealt with in mediation – not least because the process is confidential and 'privileged' plain talking often defuses fraud allegations. Moreover, withdrawal of such allegations, as with all allegations made by litigants, is commonly a term of any settlement agreement.

3.4 If the case is a test case, or likely to set a judicial precedent for future cases, then mediation might not be suitable. However, it must be remembered that not every client would wish to fund litigation to establish a precedent, and very often a settlement resolves all the other pending cases. Mediation can deal with class actions.

3.5 Two popular reasons for litigating: 'a matter of principle'; or 'a desire for revenge or punishment'; are the very disputes which are better suited for

mediation than litigation. ‘Principles’ are very expensive at law. Few litigants, seeking retribution, come away from a court hearing satisfied. However bitter the dispute, it is likely to be resolved more permanently than a judgment given after a court hearing. ‘Give and take’ is infinitely better than ‘all or nothing’.

4. MEDIATION IS A PROCESS NOT A PERIOD OF TIME

4.1 Remember there is no ‘right’ time to mediate. The ‘wrong’ time to mediate is when the legal costs are disproportionate to the claim so that they are the issue in the mediation rather than the original dispute. Essentially, you need to know your client’s case and the case of the other party(ies) sufficiently well to enable you to give advice and enable the mediator to assist both parties towards a resolution. If you are in doubt or cannot agree with the other party what needs to be disclosed, you may wish to seek further directions from the Court to facilitate mediation.

4.2 Remember that mediation can be undertaken at any time and need not be concluded in a day.

4.3 To give your client the best chance of resolving the issue, decide with your client and the other side’s legal representatives what is essential to know before the mediation: what documents might need to be disclosed; whether more details are required about the quantum being claimed; whether any expert evidence might be necessary to assist the mediator in his or her task.

4.4 It is the experience of some jurisdictions where mediation has been part of the legal landscape for decades that some disputes need more than one attempt at mediation before resolution is achieved. Even if settlement is not achieved, it is the invariable experience that issues are refined and often reduced during a mediation with the consequent saving of court time and costs for your client.

The following table is a simple guide to the essential differences between Litigation and Mediation as a means of resolving commercial disputes:

Litigation	**Mediation**
Public – not confidential	Private – confidential
Protracted, and settlement often late in the process	Ought to occur at an early stage in the dispute leading to a cheaper, quicker settlement
Formalistic: pleadings, document production and trial	Informal procedure: no pleadings, minimum document production
Limited to pleaded issues	Parties can raise whatever issues they wish to resolve
Exacerbates emotions	Allows genuine emotions to be expressed
Expensive for large commercial action	Each party can choose how much it wishes to spend
Loser often pays all the costs	Each party pays his or her own costs
Destroys any prospect of future relationships	Often creates better prospects of future relationships