THE COURT OF APPEAL

Kelly J.
Irvine J.
Hogan J.

547/2013
[Article 64 Transfer]

Between

Keith Ryan

Plaintiff/Respondent

And
Walls Construction Limited

Defendant/Appellant

Judgment of Mr. Justice Kelly delivered on the 6th day of October 2015

Introduction

1. Reports prepared by Lord Woolf in the mid 1990s entitled *"Access to Justice"* criticised the civil litigation process in England as being *"too expensive, too slow and too complex"*. He described the process as placing many litigants at a considerable disadvantage when compared to their opponents and said that the result was inadequate access to justice and an inefficient and ineffective system.
2. On foot of his reports, sweeping changes were made to the way in which civil litigation is conducted in England and Wales.
3. The criticisms of Lord Woolf apply equally to the process of civil litigation in this jurisdiction. Indeed they were entirely apposite to this country's system in 1995/96 when his reports were published.
4. Unlike the adjoining jurisdiction, there has been no root and branch reform of the way in which civil litigation is conducted in this State. Instead, such reforms as have been made have been piecemeal and patchy with little to demonstrate any coherent policy or plan supporting them.
5. This judgment concerns one such measure which was enacted in 2004. It is s. 15 of the Civil Liability and Courts Act 2004, (the Act). That section confers a jurisdiction on the High Court in personal injury claims to compel parties to mediate their differences. The question which arises on the appeal is whether or not Cooke J. was correct in making such an order on the 19th December, 2013. Before considering that question I wish to say a few words on the topic of alternative dispute resolution.

Alternative Dispute Resolution

6. In addition to the shortcomings of expense, delay and complexity identified by Lord Woolf, litigation has other disadvantages. It can be damaging to both reputations and relationships. It is adversarial in nature and uncertain as to outcome.
7. Given these many drawbacks it is hardly surprising that alternative methods of resolving disputes have been sought.
8. Alternative Dispute Resolution (ADR) is a term which became popular in the United States about thirty years ago. It describes less costly and more expeditious methods of resolving disputes developed in that country.
9. ADR crossed the Atlantic and entered into the legal lexicon in this jurisdiction about twenty years ago. Since then its benefits have been generally recognised and its use encouraged.
10. ADR is the generic term used to describe numerous processes. They include adjudication, neutral fact finding, expert determination, early neutral evaluation, and independent review. None of those processes have achieved anything like the popularity of mediation. I think it can fairly be said that it has established itself as the prime ADR process after face to face negotiation fails and litigation looms or is underway.
11. Mediation is firmly established and well respected in this jurisdiction. It has been part and parcel of the conduct of commercial litigation since the Commercial Court came into existence in January 2004. It has proved itself to be highly beneficial and successful by times in bringing about settlements of seemingly intractable disputes. Experience in that court teaches that even if a mediation is unsuccessful, it frequently succeeds in disposing of some of the issues in dispute or creates a climate for continued negotiation.
12. When the Superior Court Rules were amended so as to provide for the commercial list, they expressly addressed alternative dispute resolution. Under O. 63A, r. 6(1)(xiii) of the Rules of the Superior Courts, the judge in charge of the Commercial Court is given power to direct that the proceedings or any issue in them may be adjourned for a period not exceeding 28 days so as to allow the parties time to consider whether the proceedings ought to be referred to a process of mediation, conciliation or arbitration. That was a novel power in the context of commercial litigation. Such was its success that in 2010 the Superior Court Rules Committee amended the Rules of the Superior Courts so as to permit the High Court in all civil litigation to adjourn proceedings to allow the parties engage in an ADR process. The Mediation Conciliation Regulations of 2010, O. 56(A) came into force in November of that year and provided any High Court judge with powers similar to those available to the Commercial Court judge.

Mediation

13. The wordings of both O. 63A, r. 6(1)(xiii) and O. 56(A), r. 2 make it clear that the court does not have power to direct that the parties submit a dispute to an ADR process. In both instances the court is limited to adjourning the proceedings so as to allow the parties' time to consider whether ADR is appropriate. This is a reflection of the voluntary nature of the ADR process and mediation in particular. The recognition of the voluntary nature of the mediation process is not confined to the rules of court in this jurisdiction. The equivalent provisions of the Civil Procedure Rules in England are framed in non mandatory language. They speak of an overriding objective similar to what is sought to be achieved in this jurisdiction namely, a just, expeditious and cost effective determination of proceedings. In furtherance of that, the English Courts are required to engage in active case management which includes, "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate" (see CPR r. 1.4(2)(e)).
14. Prior to the introduction of the Commercial Court rules in this jurisdiction, consultation took place with judges and practitioners in the Commercial Courts in London, Edinburgh and Belfast. As I wrote in the Arbitration and ADR Review in 2010:

> *"All of those jurisdictions had a Commercial Court prior to Ireland. Indeed the Commercial Court in London has been in existence for well in excess of 100 years.*
> *All of the judges and practitioners involved in the work of the Commercial Courts in those jurisdictions were unanimous in underscoring the importance of the voluntary nature of the alternative dispute resolution process. In other words, it is not possible to force people to go to mediation and if one does so, it is unlikely to be successful . . . . Thus, the idea behind the rule was to confer a power on the court which would cause parties to give serious consideration to the question of resolving their dispute other than by litigation. The court cannot direct mediation, but may encourage it by the use of this rule."*

15. Judicial dicta have also underscored the importance of the voluntary nature of the process. For example the Court of Appeal in England in *Halsey v. Milton Keynes General and HS Trust* [2004] 1 WLR 2002, made it clear that it was of the view that the key to effectiveness of ADR procedures are that they are processes voluntarily entered into by the parties in dispute.
16. Thus, it can be seen where ADR has been addressed by rules of court or judicial decision, the voluntary nature of the process has been recognised and accepted. My own experience in dealing with the Commercial Court rules for in excess of ten years leads me to conclude that any element of compulsion attendant upon a reference to mediation will certainly not enhance it's prospects of success, a topic which I discussed more fully in the article already quoted.
17. Notwithstanding the experience of judges and practitioners here and in England and the approach of the Superior Court Rules Committee the legislature in enacting s. 15 of the Act, took a very different approach. It has legislated for compulsory mediation. That in is its prerogative and must be respected. The terms of s. 15 and, how it should be implemented and its consequences will be considered later.

Background

18. The plaintiff was, in the course of his employment, involved in two accidents. The first occurred on the 15th August, 2005 and the second on the 4th January, 2006. He brought two separate High Court claims which were consolidated by an order made on the 27th July, 2009 by Herbert J.
19. In the first accident it is alleged that the plaintiff was struck by a roller while working on a building site. He commenced his proceedings in respect of that accident on the 10th December, 2008. A defence admitting liability was delivered on the 18th September, 2009. Accordingly, the case is proceeding as an assessment of damages.
20. The second accident occurred on the 4th January, 2006. It is alleged that the plaintiff in the course of his work was required to use a hammer and chisel to break up concrete and in the course of so doing a piece of concrete flew up with such force that it penetrated the plaintiff's clothing and injured his scrotum and left testicle. A defence to this claim was delivered on the 18th September, 2009. It is contended that this defence denied liability. That is by no means clear having regard to the way in which the defence is drafted. Paragraph 1 of the defence reads, insofar as it is relevant,

> *"The defendant does not require proof of the following allegations specified or matters pleaded in the personal injuries summons: - . . .*
> (xii) *That there was any negligence, breach of duty or breach of statutory duty on the part of the defendant, its servants or agents as alleged or at all.*
> (xiii) *The particulars of negligence, breach of duty and breach of statutory duty.*
> (xiv) *The particulars of the acts of the defendant constituting the wrong and of the circumstances relating to the commission of the wrong.*
> (xv) *The particulars of personal injury.*
> (xvi) *The particulars of special damage.*
> (xvii) *The relief claimed."*

21. That extract from the defence would suggest that liability is not in issue in respect of this accident either. However, the following paragraph of the defence reads:

> *"The defendant require* (sic) *proof of the following allegations specified or matters pleaded in the personal injury summons:-*
> (i) *There was no*(sic) *negligence, breach of duty or breach of statutory duty on the part of the defendant, its servants or agents, as alleged or at all.*
> (ii) *The defendant does not admit and requires proof that the incident, the subject matter of these proceedings occurred in the manner alleged or at all."*

22. Thus, in para. 1 of the defence having contended that the defendant did not require proof of any negligence on its part, at para. 2 it contends that the plaintiff is obliged to prove "no negligence" on the part of the defendant.
23. Counsel admitted that this was very poor draftsmanship, but said that the plaintiff was at all times aware that liability was in issue in respect of this claim. In any event, there is a plea of contributory negligence made in the third paragraph of the defence.
24. The High Court judge was incorrectly informed by counsel for the defence that the proceedings did not involve a contest on liability. I should point out that the counsel who gave that wrong information was not the drafter of the defence.

The judgment

25. According to the agreed note of what took place in the High Court, Cooke J., in the course of his ruling, pointed out that the plaintiff and defendant were in an employment relationship, although the defendant was insured and it was its insurers that were conducting the litigation on its behalf. He noted that the case did not involve a full contest. Having considered the submissions on both sides, he took the view that the case was apt for an attempt at mediation. The judge expressed himself of the view that the long delay in the proceedings *"militated in favour of such an order".* He directed that the mediation conference should take place on or before the 1st March, 2014.
26. As is clear from his ruling, one of the matters which the judge took into consideration was the fact that the cases did not involve any liability issue. He was quite entitled to do so in the light of the incorrect information given to him by counsel for the defence.
27. The judge's reference to the delay in proceedings requires some examination.

The progress of the case

28. The defences to the litigation were delivered on the 18th September, 2009. On the 8th August, 2011, the plaintiff served notice of trial and set the consolidated action down for hearing on the 4th October, 2011. The hearing did not take place then because there was ongoing correspondence in respect of discovery. The plaintiff refused to make discovery of a number of documents in respect of his personal injuries and medical history. This necessitated the defendant bringing an application for discovery which was heard by Birmingham J. on the 15th April, 2013. He ordered the plaintiff to make the discovery. That order was not complied with fully until July, 2013. It should also be pointed out that the lack of any activity on the part of the plaintiff necessitated the service of a notice of intention to proceed on the 26th July, 2012.
29. On the 8th July, 2013, the plaintiff's solicitor wrote to his opposite number pointing out that there was now complete compliance with the discovery order made by Birmingham J. The letter went on to suggest that this was an appropriate time to consider an alternative dispute resolution process. The letter went on:

> *"Considering the complexities that exist in terms of the medical history, the injuries sustained by the plaintiff and the undoubted consequences that had befallen his unfortunate life during the intervening time period, it is clear that the court proceedings are eminently suitable for mediation in accordance with O. 86(a) of the Rules of the Superior Courts, Statute* (sic) *(Mediation and Conciliations)* (sic) *502/10. However, you might consider the foregoing for the following reasons:*
> 1. *A mediation process will be much more expeditious than a protracted hearing of two separate High Court actions.*
> 2. *Costs incurred will be significantly reduced in circumstances where the accidents, the subject matter of these proceedings, are indicative of serious injury consequences.*
> 3. *The mediation processes could narrow the issues for the parties for the purpose of ensuring that a more effective and efficient conduct of the hearings would occur.*
> 4. *A mediation process would have the benefit of ensuring that certain aspects of the evidence could be agreed in advance of the delivery of any evidence for the purpose of minimising the time period at hearing.*
> 5. *Mediation is in accordance with the recommendation of the Law Reform Commission for the purpose of resolving intractable disputes in circumstances where either sides costs are minimised and the process ensures a more effective and efficient economic outcome."*

30. The letter went on to invite the defendant to indicate its attitude to this proposal within a period of fourteen days. It indicated that in the absence of agreement to mediate an application would be made pursuant to the relevant rule of court. The letter did not mention the utilisation of s. 15 of the Act.

31. No response was received to that letter. A further letter dated the 15th August, 2013, was sent reiterating the perceived advantages of mediation and indicating that an application would be made to court pursuant to O. 56A if mediation was not agreed to. Again, no mention was made of s. 15 and no response was received to this letter either.

32. A further letter was sent on the 13th September, 2013, pointing out that in default of an answer an application would be made to court. This letter was responded to on the 2nd October, 2013. The defendants solicitors wrote:-

> *"We refer to the above and to yours of the 14th and 15th August and the 13th September last and apologise for the delay in getting back to you due to holidays and so forth.*
> *First of all dealing with your request for mediation, we do not consider that this is an appropriate form* (sic) *for mediation.*
> *In relation to applying for a hearing date you might let us know what dates you propose and we will check with our witnesses and revert to you without delay."*

That refusal brought about the application to Cooke J.

33. The defendants' solicitors' letter of the 2nd October, 2013 gives no reasons as to why mediation is not considered appropriate. In the course of argument on this appeal those reasons were identified and advanced.

The defendant/appellant's submissions

34. The defendant contends that as of July 2013, no recourse had been sought to the normal method of attempting to dispose of personal injury litigation namely a settlement meeting. That point is also reflected in the written submissions, but then is contradicted later on where it is contended that a settlement meeting had been proposed by the plaintiff in July 2011. However, it is clear that no settlement meeting has in fact taken place.

35. The second argument made by the defendant is that the first accident is not of any significance and no long term sequelae have been suffered.

36. Third, it is said that the plaintiff has not delivered a schedule of special damages or any vouchers in support of them. Fourth, reliance is placed on the continuing default in the plaintiff's compliance with S.I. 391/998. Fifth, the defendant says that it does not intend to make an offer to settle the plaintiff's claim in respect of the second accident. Sixth, it is argued that the mediation will add an unnecessary layer of costs. Seventh, it is said there is no agreement as to who should bear the costs of the mediation or the mediator.

37. The defendant contends that the request to have a settlement meeting in July 2011 was a worthless exercise because at that time the discovery process was incomplete and the defendant was not in a position to place a value on the plaintiff's claim. However, it is pointed out that at any time after July 2013, a settlement meeting might have been suggested, but it is said it would have been unsuccessful unless the plaintiff was willing to drop his claim in respect of the second accident.

38. The defendant also contends that a mediation is futile in circumstances where it is not possible for the defendant to place a value on the plaintiff's case. A mediation will require both parties to value the claim and establish what deductions should be made in respect of contributory negligence and liability issues. It is said that the defendant is not in a position to do so at present. In any event the defendant will be contending that it has no responsibility in respect of the second accident. It does not propose to make any offer in respect of it. It says that it is entitled to have liability in that matter fully aired in the High Court.

39. Finally, it is pointed out that insofar as the provisions of s. 15 of the Act are concerned, a mediation conference can only be ordered if the court is satisfied that it would assist in reaching a settlement of the action. In circumstances where the defendant has set its face against making any offer in respect of the second accident, a mediation conference is not justified and will only lead to the incurring of extra and unnecessary costs.

The plaintiff's argument

40. The plaintiff correctly contrasts the jurisdiction which the court is given under O. 56A with that conferred under s. 15 of the Act.

41. Whilst the court can embark upon the O. 56A procedure of its own motion (something which is not open to it under s. 15 of the Act), its power is limited to inviting the parties to consider the use of an alternative dispute resolution process. The use of such a process requires the consent of both parties.

42. Section 15 is quite different. Whilst it does not empower the court to act of its own motion, it does entitle it to direct the parties to meet for the purposes of a mediation conference. No consent is required. Thus, there is clearly jurisdiction to make such an order even where one party is opposed to it.

43. The legislature has opted for compulsory mediation by the enactment of section 15. Having framed the section in the way in which it is, it necessarily involves a jurisdiction being invested in the court to give a direction under it, even where one party is opposed to it. If it were not so, the section could only be operated on the basis of consent being forthcoming. That is not what is envisaged and any such construction would render the section redundant.

44. Reliance is placed upon the unreported decision of Feeney J. given on the 4th December, 2006, in *McManus v. Duffy*. The plaintiff relies upon the treatment of that decision in the 3rd Edition of Delaney and McGrath *Civil Procedure in the Superior Courts* at 28-45, where the following is said:

"The provisions of s. 15 of the Civil Liability and Courts Act 2004 were considered by Feeney J. in McManus v. Duffy, where the plaintiff brought an application for an order directing the parties to attend mediation in a medical negligence action which was resisted by the defendants. Feeney J. noted that the wording of the section requires the court to consider whether the holding of the mediation conference 'would assist in reaching a settlement in the action' and said that this is not the same thing as requiring that it is 'likely' to achieve success. Feeney J. referred to the decision of the Court of Appeal in Halsey v. Milton Keynes General NHS Trust Steel where it had held, in the context of deciding on the awarding of costs, that the burden of satisfying the court that mediation had no reasonable prospect of success should not be on the objecting party. Dyson L.J. had also stated in that case that it was not appropriate for the court to confine itself to a consideration of whether, viewed objectively, mediation would have had a reasonable prospect of success. In his view, this was an unduly narrow approach which focused on the nature of the dispute and did not take account of the parties 'willingness to compromise and the reasonableness of their attitudes'. In Halsey, the Court of Appeal concluded that it was unlikely that mediation would have been successful and that it had not been proved that the second defendant had acted unreasonably in refusing to agree to mediation in this case. However, the approach taken by Feeney J. in McManus, albeit in the different context of considering an application pursuant to s. 15, had set the bar much lower and simply involved asking whether mediation would 'assist' in reaching a settlement. In the circumstances of the case before him, where the costs of mediation were not disproportionately high and there was a potential cap on damages in that it was an action brought pursuant to Part IV of the Civil Liability Act 1961, he was satisfied that mediation was likely to assist in achieving a settlement of the action and he made the order sought by the plaintiff. If the approach adopted by Feeney J. in McManus is followed, it is likely that orders pursuant to s. 15 may be fairly readily obtained, even where one party is unwilling to participate in mediation, particularly where the costs of such a process would not be disproportionately high when compared to the costs of allowing potentially lengthy litigation to run its course."

45. The plaintiff contends that Cooke J. was correct in, in effect, following the approach of Feeney J. The plaintiff furthermore submits that none of the reasons as to why a mediation conference should not be directed are valid since none of them go to the issue of whether mediation would assist in reaching a settlement of the action.
46. The plaintiff identifies the defendant's foremost reason opposing mediation as its stated intention not to make an offer to settle the plaintiff's claim in respect of the second accident. However, it is correctly pointed out, both claims are now consolidated in a single set of proceedings. The first claim is undoubtedly nothing more than an assessment of damages. It is not suggested that there is no intention to make an offer to settle that claim. By implication, it is argued, the defendant intends to make an offer to settle that claim, thus there is no reason why a mediation conference should not take place at the earliest opportunity rather than waiting until the morning of the hearing of the trial, by which time additional costs will have been incurred.
47. Insofar as it is said that the mediation is bound to fail in the absence of a schedule of the plaintiff's special damages, the plaintiff is prepared to furnish such a schedule forthwith. Insofar as the defendant submits that the denial of liability in respect of the second accident militates against mediation, that submission ignores the wording of s. 15 of the Act which is clearly not limited to cases in which liability is admitted.
48. Even if the mediation conference did not succeed in full, it might well narrow the issues to be determined at trial, for example by settling the claim in respect of the first accident, thus saving some court time and legal costs in the process.
49. The plaintiff says that far from evincing a business like attitude in endeavouring to have this litigation disposed of, this appeal has done nothing but delay matters. Finally, it is contended that there is no reason in principle or as a matter of discretion for overturning the order of Cooke J.

Section 15
50. Section 15 of the Act reads:-

"(1) Upon the request of any party to a personal injuries action, the court may-
(a) at any time before the trial of such action, and
(b) if it considers that the holding of a meeting pursuant to a direction under this subsection would assist in reaching a settlement in the action, direct that the parties to the action meet to discuss and attempt to settle the action, and a meeting held pursuant to a direction under this subsection is in this Act referred to as a 'mediation conference'.
(2) Where the court gives a direction under subs. (1), each party to the personal injuries action concerned shall comply with that direction.
(3) A mediation conference shall take place –
(a) at a time and place agreed by the parties to the personal injuries action concerned, or
(b) where the parties do not agree a time and place, at a time and place specified by the court.
(4) There shall be a chairperson of a mediation conference who shall-
(a) be a person appointed by agreement of all the parties to the personal injuries action concerned, or
(b) where no such agreement is reached –
(i) be a person appointed by the court, and
(ii) (I) be a practising barrister or practising solicitor of not less than 5 years standing, or
(II) a person nominated by a body prescribed, for the purpose of this section, by order of the Minister.
(5) The notes of the chairperson of a mediation conference and all communications during a mediation conference or any records or other evidence thereof shall be confidential and shall not be used in evidence in any proceedings whether civil or criminal.
(6) The costs incurred in the holding and conducting of a mediation conference shall be paid by such party to the personal injuries action concerned as the court hearing the action shall direct."

51. The wording of the section makes it clear that parties to a personal injuries action may be compelled to attend a mediation conference whether they wish to do so or not.
52. In deciding to make an order under the section the court doing so has to consider that the holding of a mediation conference would assist in reaching a settlement in the action. It does not assist in reaching a settlement if an order is made under the section with little prospect of a successful outcome and a likelihood that all that will be achieved will be the incurring of further costs and delay.

Decision
53. As already pointed out mediation is now firmly established as a well respected alternative dispute resolution process. Whilst it is not a panacea, it has proven to be very beneficial and it has succeeded bringing about settlements of seemingly intractable disputes. Experience teaches that even if the mediation itself is unsuccessful it frequently succeeds in dealing with some of the issues in dispute or creates a climate for continued negotiation.

54. The legislature obviously recognised the value of mediation as a dispute resolution process. It decided to extend it to personal injuries litigation, hence the enactment of s. 15 of the Act. But the legislature did so with one important difference. Whilst the Commercial Court rules and O. 56A confer powers on the court, they do not entitle it to order a mediation to take place. They merely require the court to direct parties to consider mediation. That is in recognition of the fact that mediation is essentially a voluntary process. The legislature however, has gone further. It is clear from the wording of s. 15 that the court is empowered to direct a mediation conference regardless of whether the parties consent or not. Whether that is a wise policy or not is not for me to judge. Be that as it may, the legislature has made its choice and the court must give effect to it. It follows therefore, that no side to a litigation dispute may exercise any form of veto to prevent the court from making an order under s. 15 by indicating that they will not participate or do not intend to cooperate in a mediation conference directed by the court.
55. That said, care must be taken so as to ensure that by making an order under s. 15 the court is doing no more than adding a further layer of delay and costs to proceedings. Such a course will not assist in reaching a settlement of the litigation.
56. In order to minimise the prospect of such an undesirable result, I believe it appropriate to make some general observations pertinent to the s. 15 jurisdiction.
57. The normal method of settling personal injury litigation is by face to face negotiation. That has not occurred in this case. The court should be slow to invoke a compulsory mediation procedure where the parties have not themselves endeavoured to bring about a settlement of the litigation in the normal way.
58. Little is achieved by way of settlement or saved by way of costs if a mediation is sought at too late a stage in proceedings. In this case the expensive process of discovery had been completed, notice of trial had been served and the action was ready to be given a hearing date.
59. Whilst, as I have already pointed out, no side to an action can veto the making of an order under s. 15, nonetheless the court should consider whether in the case of a definitive and reasoned refusal to consider settlement of an action the making of an order under s. 15 would have any realistic prospect of assisting in reaching a settlement. Whilst I accept that Feeney J. pointed out that the wording of the section requires the court to consider whether the holding of a mediation conference would assist in reaching a settlement of the action and that that was not the same thing as requiring that it is likely to achieve success, nonetheless the court should be astute to ensure that by making the order sought, it is not simply adding costs and delay. This might well be the result where there is too great a judicial willingness to make orders under s. 15. A court is entitled to bear in mind the poorer chance of success in a mediation which is not undertaken on a voluntary basis.
60. In general, therefore, I am of the view that a court should not countenance the making of an order under s. 15 in circumstances such as the present case where no realistic attempt at settlement on a face to face basis had been attempted, where the discovery process has been completed in its entirety and where the case was on the threshold of a hearing. As this appeal has shown, the making of an order for mediation against an unwilling party at such a late stage in the proceedings is only more likely to contribute to further expense and delay. The experience in the Commercial Court has been that mediation had the greatest prospect of success if it was sought immediately *after* the pleadings were closed and when the issues had therefore been defined, but *prior* to the commencement of the expensive and time consuming discovery process. I see no reason why the same approach ought not to apply in the context of personal injury litigation.
61. In my view the order of the High Court in the present case cannot stand. I believe that the judge made an error in deciding to make the order. In part of course, he was persuaded to do so by the misrepresentation of the true position concerning the liability question by counsel for the defence. But even excluding that from consideration, I am not satisfied that it can be said that given the circumstances in the present case the making of an order would actually assist in reaching a settlement in the action. This, after all, is the statutory pre-condition for the making of the s. 15 order directing mediation.
62. I would therefore allow this appeal and discharge the order for mediation which was made. I would also add that there has been delay on the part of both the plaintiff and defendant in these proceedings. The accidents in question occurred in August 2005 and January 2006. The defences were delivered in September 2009, yet it took until July 2013, for the plaintiff to complete discovery. This unconscionable delay in prosecuting these claims does not reflect well on either the lawyers who are responsible for it or a legal system which permits of it.