THE COURT OF APPEAL

Appeal No. 2015/277

Kelly J.
Irvine J.
Hogan J.

Atlantic Shellfish Limited and David Hugh-Jones.

Plaintiffs/Appellants

- And -

The County Council of the County of Cork, The Minister for the Marine and Natural Resources, Ireland and the Attorney General

Defendants/Respondents

JUDGMENT of Ms. Justice Irvine delivered on the 7th day of December 2015

1. This appeal focuses upon the circumstances in which a court should exercise its discretion in favour of making an order pursuant to Order 56A, rule 2 of the Rules of the Superior Courts, 1986 inviting the parties to litigation to engage in a process of Alternative Dispute Resolution ("ADR"). In this case the High Court, Gilligan J., refused to make such an order at the behest of the plaintiffs on 15th May, 2015. It is that refusal that forms the subject matter of the present appeal.

Background

2. The first named plaintiff, Atlantic Shellfish Limited, ("Atlantic") is the owner of an oyster fishery located in Cork Harbour. The second named plaintiff is a shareholder and director of Atlantic. Atlantic operates its business on foot of certain Oyster Fisheries Orders made in 1963 and 1970 and has been selling its oysters into international restaurants, but particularly into the London market for upwards of thirty years.

3. The factual circumstances that give rise to these proceedings, which were instituted in 2001, focus upon the plaintiffs' contention that their oyster fishery, which is now closed, was from 1988 onwards contaminated by reason of the discharge of untreated or inadequately treated sewage into the harbour in the immediate vicinity of its established oyster beds.

4. According to the plaintiffs, prior to 1988, sewage from the town of Midleton, County Cork, was discharged into the Ballinacurra Estuary which is approximately 4.5 kms from its oyster beds. However, it is asserted that in 1998 a new sewage scheme came into operation as a result of which the sewage was then discharged into the sea less than 1 km from Atlantic's fishery operations. Thereafter, the plaintiffs maintain that there was a dramatic increase in the number of complaints that they received concerning illness experienced by restaurant customers who had eaten their oysters. The plaintiffs allege that the reason so many became ill was because the first named defendant had allowed untreated effluent to be pumped into Cork Harbour with the result that the sewage had caused gross contamination of their oyster farm. These complaints allegedly caused significant damage to Atlantic's business and to the reputation of its oysters.

5. As a result of these events, in 1992 the plaintiffs issued proceedings ("the 1992 proceedings") against Cork County Council and the Minister for the Marine. As against the County Council the plaintiffs claimed that by the manner in which it had operated the waste water treatment scheme for Cork it had been guilty of negligence, breach of duty, breach of statutory duty and nuisance. As against the Minister, the plaintiffs challenged the granting of the Foreshore Licence of 5th March, 1986, which permitted, they maintained, the piping of the sewage from Midleton and its disposal into the harbour approximately 1 km from their oyster beds. Further and in the alternative the plaintiffs sought various injunctions seeking to prevent the continuing discharge of effluent into the harbour at that location.

6. The 1992 proceedings were settled on terms which included a substantial financial payment to the plaintiffs and also an undertaking from the local authority to bring into operation a secondary waste water treatment plant incorporating certain safeguards before the 20th June, 2000. The terms of the settlement of the 1992 proceedings were committed to writing.

7. Regrettably, notwithstanding the installation of a new waste water treatment plant, which the plaintiffs have at all times maintained did not comply with the terms of settlement of the 1992 proceedings, the plaintiffs continued to note very high levels of bacterial matter in their oysters. Further, according to the plaintiffs, very significant numbers of customers continued to report illness as a result of consuming their shellfish.

8. On 20th February, 2002, the plaintiffs were directed by the Minister and the Food Safety Authority to immediately cease harvesting oysters. According to the plaintiffs, in March, 2002 the local authority admitted that between January and March of that year there had been overflows of untreated effluent every day into Cork Harbour. Further, according to the plaintiffs, following the recommencement of operations in April, 2002 Atlantic continued to receive reports that significant numbers of customers had become ill as a result of consuming their oysters. As a result of a combination of these factors Atlantic maintains that it had no option but to close its business on a permanent basis in October, 2002. It is the losses arising from this closure that are at the forefront of these proceedings.

The nature of the present claim

9. The within proceedings were commenced by plenary summons on 16th October, 2001. Whilst I will return to consider in greater detail the plaintiffs' claim against the second, third and fourth named defendants ("The State defendants") it is sufficient at this point to note that the reliefs sought by the plaintiffs include a declaration that by virtue of the failure of the first named defendant to bring into operation on or before 30th June, 2000, a secondary waste water treatment plant, the first and second named defendants repudiated the terms of settlement of the 1992 proceedings. Conditional upon the success of that claim the plaintiffs also seek further relief which includes:-

> (a) A declaration that the Foreshore Licence of 5th March, 1996, was ultra vires the power of the Minister as being unconstitutional and in breach of the Foreshore Act 1933 and is null and void; and

(b) An order directing the second named defendant to secure compliance with the Foreshore Licence so as to prevent the first named defendant from continuing to discharge sewage or other effluent into the harbour such as to constitute a nuisance to the plaintiffs' oyster fishery.

10. In addition to the aforementioned pleas the plaintiffs maintain a claim for damages in respect of all of the losses sustained as a result of the wrongdoing on the part of the defendants.

11. It should be noted that since the hearing of the application in the High Court that Irish Water has been added as a fifth named defendant to the proceedings.

12. Full defences were delivered by the State defendants on 12th February, 2003, and on behalf of the first named defendant on 6th August, 2003. Finally, of relevance to the proceedings and their progress is the fact that the State defendants by notice of motion dated the 5th February, 2010, brought an application to the High Court seeking the trial of a number of preliminary issues. A like application was also brought by the first named defendant. As a result, by Order dated the 9th June 2010 Laffoy J. in *Atlantic Shellfish Ltd. & anor v. Cork County Council & ors* [2010] IEHC294 directed that certain legal issues be determined by way of preliminary issue and further ordered by agreement between the parties "that the issue of liability herein be determined first leaving the issue of quantum over pending a decision on liability".

13. By letters dated 15th May, 2014, the plaintiffs invited the State defendants to participate in a process of mediation and by letter dated 5th June, 2014, made a similar invitation to the first named defendants. It was the State defendant's failure to respond positively to this invitation that led to the issue by the plaintiffs of a notice of motion seeking an order pursuant to Order 56A, rule 2 of the Rules of the Superior Courts, 1986. In his affidavit grounding that application Mr. Ricky Kelly, solicitor acting on behalf of the plaintiffs, advised that it was his opinion that the proceedings were almost ready to be called on for trial and were of a nature that "could substantially benefit from mediation, if only to narrow the issues for trial".

Discussion

Order 56A

14. The relevant provisions of Order 56A of the Rules of the Superior Courts, 1986 are as follows:-

> "1. In this Order:
>
> "an ADR process" means mediation, conciliation or another dispute resolution process approved by the Court, but does not include arbitration;
>
> "party" includes the personal representative of a deceased party.
>
> 2. (1) The Court, on the application of any of the parties or of its own motion, may, when it considers it appropriate and having regard to all the circumstances of the case, order that proceedings or any issue therein be adjourned for such time as the Court considers just and convenient and -
>
> (i) invite the parties to use an ADR process to settle or determine the proceedings or issue, or
>
> (ii) where the parties consent, refer the proceedings or issue to such process,
>
> and may, for the purposes of such invitation or reference, invite the parties to attend such information session on the use of mediation, if any, as the Court may specify.
>
> 2. (2) Where the parties decide to use an ADR process, the Court may make an order extending the time for compliance by any party with any provision of these Rules or any order of the Court in the proceedings, and may make such further or other orders or give such directions as the Court considers will facilitate the effective use of that process.
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> 3. An application by a party for an order under rule 2 shall be made by motion to the Court on notice to the opposing party or parties, and shall, unless the Court otherwise orders, be grounded upon an affidavit sworn by or on behalf of the moving party.
>
> 4. Save where the Court for special reason to be recited in the Court's order allows, an application for an order under rule 2 shall not be made later than 28 days before the date on which the proceedings are first listed for hearing."

15. Also of relevance is Order 99, rule 1B of the Rules of the Superior Courts, 1986 which states:-

> "1B. Notwithstanding sub-rules (3) and (4) of rule 1, the Supreme Court or the High Court, in considering the awarding of the costs of any appeal or of any action, may, where it considers it just, have regard to the refusal or failure without good reason of any party to participate in any ADR process referred to in Order 56A, rule 1, where an order has been made under rule 2 of that Order in the proceedings."

16. It follows from the aforementioned rule that where a court considers it appropriate to invite the parties to use an ADR process and one of those parties objects and insists on the proceedings being determined by the court, that party is thereafter exposed to the risk that even if they successfully pursue their claim or successfully defend a claim made against them, they nonetheless remain at risk of failing to obtain an order to the full extent of the costs incurred by them on the basis that the court at that time may conclude that their refusal to engage in an ADR had been unreasonable.

17. At the time of the plaintiffs' application to the High Court the first named defendant had indicated its general willingness to participate in mediation subject to representatives from Irish Water, since joined as a party to the proceedings, being involved in the process. However, the State defendants urged the court to refuse the relief sought on the grounds that mediation was inappropriate having regard to the issues in dispute between the parties. Further the State defendants argued that the application made by the plaintiffs under O.56A was one which was not brought *bona fide* in the hope that the State defendants would agree to mediate. They argued that the application was in reality a self serving application brought in the knowledge that the State defendants could not reasonably be expected to mediate and that the effect of the application would be to trigger their entitlement to argue that they

should not have to discharge the full costs of the proceedings should they fail in their claim against those defendants.

Judgment of Gilligan J.
18. *In Atlantic Shellfish Ltd & anor v. The County Council of the County of Cork & ors* [2015] IEHC570 the High Court judge refused to exercise his discretion concluding, at para. 24, that the purpose underlying the plaintiffs' application was artificial. He was satisfied that the plaintiffs knew that an invitation to mediate would be rejected in the event of an order to that end being made and that the real purpose of the application was to seek to "copper fasten its position with regard to a future application for costs". The judge indicated that he might have taken a different course had he been satisfied that the State defendant's reasons for declining mediation could be considered to be other than *bona fide* or where there was still some reasonable possibility that the invitation, if so ordered, would be accepted. Absent such circumstances he considered it appropriate to decline the relief sought.

Submissions of the parties.

The plaintiffs' submissions
19. The appellants complain that the High Court judge incorrectly and unfairly characterised their application as "artificial". There was, they maintain, no basis for him drawing the inference that they did not genuinely want to mediate the dispute. Further, the judge should not have assumed that just because the State defendants had refused to accept a pre-application invitation to mediate, it necessarily followed that a similar response would be received to an order of the court to like effect having regard to the potentially "ruinous" cost consequences of refusing such an invitation.

20. Because the court invitation triggers the costs provisions as provided for in O.99, r.1B, it was reasonable to assume that a previously reluctant party might review its position following the making of a court order under O.56. Further, it would neuter the effect of the rule if the court was to exercise its discretion solely by reference to an earlier refusal of the opposing party to an invitation to mediate. While acknowledging the breadth of the claims made in the proceedings, the plaintiffs maintain that the High Court judge failed to have regard to the fact that following a court order it would be open to the parties to agree between themselves precisely what issues would be mediated. Accordingly, even if the court was of the view that all of the claims as pleaded could not be resolved by a mediator, it ought nonetheless to have regard to the fact that mediation offered a significant possibility that the issues between the parties and their experts might be refined and reduced such that a potentially very lengthy and complex trial could be substantially foreshortened thus saving costs and court time.

The defendants' submissions
21. While acknowledging that mediation should be encouraged and explored, the State defendants consider that this is not an appropriate case for mediation. They do so first on the basis that the particular claims made by the plaintiffs against them cannot be resolved by mediation and concern legal issues that can only be determined by a court. They instance, by way of example, the issue as to whether the State is obliged to police and enforce the operation of a Fisheries Licence; whether the Minister owes a duty of care in this regard to a person who may be affected by the operation of that Licence and whether the court can order the revocation of such a Licence at the instigation of third parties such as the plaintiffs. Accordingly, the State defendants argue that the court should not make an order under O.56A, r.2 unless satisfied that the issues between the parties can reasonably be dealt with through a process of mediation.

22. The State defendants also submit that the relief sought by the plaintiffs is inconsistent with the order of Laffoy J. of 9th June, 2010, whereby she directed a split trial, *i.e.* the trial of a number of discrete issues and the postponement of the issue of quantum until the issue of liability had been determined. Thus they maintain that the plaintiffs should focus their energies on bringing these issues to trial as soon as possible.

23. Further, having regard to the aforementioned order of Laffoy J. the State defendants maintain that they should not be invited to consider engaging in a complex mediation process which would potentially involve them in a full analysis of the plaintiffs' claim for damages, a matter that may never arise to be dealt with by them, depending on the outcome of the liability issue.

24. The State defendants point to the fact that while the plaintiffs assert that mediation has the potential to narrow the issues between the parties and the expert witnesses, they have made no effort to identify precisely what these issues are or the nature of the evidence that has the potential for this type of compromise.

Decision
25. There are a number of matters which are not in dispute between the parties.

26. First, there is no dispute as to the jurisdiction of this court when considering an appeal from an order of a High Court judge made in the exercise of discretion. The parties are agreed that while this Court should give significant deference to a decision thus made, it is not essential for the appellant to demonstrate that the judge made some error of principle in order for this Court to displace the High Court order, once satisfied that the interests of justice would warrant such intervention.

27. Secondly, the parties accept that the introduction of O.56A reflects an evolving State and judicial policy which seeks to encourage the increased use of ADR wherever possible with the objective of improving the management and conduct of time-consuming and costly disputes, while at the same time reducing the demands of such litigation on scarce judicial resources.

28. Thirdly, it is not in dispute that the order sought is a discretionary one and the court can do no more than invite a party to engage in the process of mediation.

29. What is not agreed are the principles which should inform the decision to be made by a judge faced with an application under O.56A, r. 2. While the parties have referred the Court to a number of decisions in which judicial pronouncements have been made supporting the greater use of mediation and identifying the very significant benefits that litigants who participate therein may hope to enjoy (see MacMenamin J. in *Fitzpatrick v. The Board of Management of St. Marys Touraneena National School and the Minister for Education and Science* [2013] IESC62 and Hogan J. *in Lyons and Murray v. Financial Services Ombudsman and Bank of Scotland plc* [2011] IEHC454) they have not been in a position to identify any judgment which has addressed the principles that ought to be applied. Accordingly, I will now address what I consider to be the matters which should be addressed by a judge when exercising his/her discretion on an O.56A application.

What are the principles to be applied?
30. The obvious starting point for the purpose of seeking to identify the principles to be applied is to examine the precise language of the rule itself.

31. The first thing that I would observe about this rule is that it is written in fairly neutral language. It does not lean in favour or against granting the relief sought. It does not seek to impose any particular burden of proof on the applicant. Neither does it place any onus upon the respondent who might wish to oppose the relief sought, as is often the case in the Rules of the Superior Courts. The rule does not, for example, provide that the order should be made unless the court is satisfied that there is good and sufficient reason not to do so.

32. It is also clear from the provisions of O.56A, r. 2 (1) that the court should only exercise its discretion if it considers it "appropriate" to do so "having regard to all of the circumstances of the case". That begs the question as to the circumstances in which it is "appropriate" to make the order.

33. To my mind the court could not be satisfied that it would be "appropriate" to make an order unless it was first satisfied that the issues in dispute between the parties were amenable to the type of ADR proposed. That being so I consider that this is the first issue that ought to be addressed by any judge when faced with an application of this type. It is only if satisfied on this particular issue that the judge need move on to consider any other "circumstances of the case" that might weigh in favour or against the granting of the relief sought. It is obvious that it would be a waste of the court's time to consider any such ancillary circumstances unless first satisfied that the process to which its invitation is to be addressed would enjoy a realistic prospect of resolving or substantially narrowing the issues in dispute.

34. I am fortified in my view in this regard having regard to the fact that the invitation which the court is asked to make pursuant to O.56A (1) (i) is to invite the parties to use an ADR process to "settle or determine the proceedings or issue". It is to be inferred from these words that the court, when exercising its discretion, ought to be satisfied that the ADR process proposed is one which is capable of determining the proceedings or the issues between the parties.

35. Assuming that the judge answers the first question in favour of the applicant, the court must then move to consider any other relevant circumstances. In my view these may include a consideration as to whether the application is made bona fide in the belief that the issues in dispute can be disposed of and that the applicant is genuinely willing to engage with proposed ADR rather than one made for the sole purpose of improving the applicant's negotiating position given that the effect of the order will be to trigger the cost provisions of r.1B of O.99 and the apprehension that necessarily follows for the party who for good reason may reject the court's invitation.

36. It follows, that the court should not make the order sought if satisfied that the application is brought by a party who knows that an invitation from the court will for good reason be refused and/or where satisfied that the applicant has no real interest in the ADR proposed but is motivated to make the application knowing that the refusal will allow them proceed to trial while, so to speak, holding the sword of Damocles over their opponent until the very end of the litigation.

37. Without attempting to anticipate the potentially wide range of circumstances that might in any particular case be material to the exercise by the court of its discretion on such an application, it appears likely that the court might, in a particular case, potentially be influenced by factors such as:-

(i) the manner in which the parties had conducted the litigation up to the date of the application,

(ii) the existence of any relevant interlocutory orders,

(iii) the nature and potential expense of the proposed ADR,

(iv) the likely effect of the making of the order sought on the progress of the litigation should the invitation be accepted and the ADR prove unsuccessful,

(v) the potential saving in time and costs that might result from the acceptance of an invitation,

(vi) the extent to which ADR can or might potentially narrow the issues between the parties

(vii) any proposals made by the applicant concerning the issues that might be dealt with in the course of the ADR and

(viii) any proposals as to how the costs of such a process might be borne. I will now address the aforementioned principles having regard to the facts of this case.

Are the issues in dispute between the plaintiffs and the State defendants readily amenable to ADR?

38. To answer this question it is necessary to consider the precise nature of the claim advanced by the plaintiffs as against the State defendants who have resisted the plaintiffs' application for an order under O.56A. These can readily be ascertained from the statement of claim which was delivered on 20th August, 2002, but are perhaps more conveniently summarised at paras. 4 to 8 of the affidavit of Therese Guerin of the 5th of September, 2014. The issues may be summarised as follows:

(a) Was the grant of the first and second Foreshore Licence to the local authority *ultra vires* the powers of the Minister and as a result are those licenses null and void?

(b) Did the Minister owe a duty of care to the plaintiffs to ensure compliance by the local authority with the conditions attached to the Foreshore Licence and was the contamination of the oyster fishery due to the negligence and breach of duty of the Minister?

(c) Does the Minister owe a duty to the plaintiffs to ensure the compliance by the local authority with the undertakings contained in the terms of settlement of the 1992 proceedings referable to the bringing into operation of the secondary wastewater treatment plant by 30 June, 2000?

(d) Was the Minister negligent in failing to take adequate steps to relocate the sewage outfall point from Rathcoursey Point to a location as far away as possible from the plaintiffs' oyster beds?

39. As can be seen from these issues, the plaintiffs raise a particularly novel point of law. They argue that where the State grants a Foreshore Licence it then owes a duty to any person who may be adversely affected by the operation of that licence such that the State is obliged to police and enforce the licence in order to protect such third parties. Further they argue that the court may then

order the revocation of such licences at the instigation of third parties such as the plaintiffs.

40. It can thus be seen that plaintiffs seek to implicate the State defendants in the alleged damage to their oyster beds on the basis that they maintain that the wrongdoing of the local authority was facilitated by the grant of such licenses.

41. Accordingly, while I fully accept the plaintiffs' submission that there is a public interest in exploring whether complex litigation can be resolved outside the confines of the court, a submission with which the State defendants do not disagree, it nonetheless remains the case that there will always be litigation which by reason of the nature of the dispute is not readily amenable to ADR.

42. While the plaintiffs maintain that they are *bona fide* in their belief that the issues pleaded as against the State defendants are capable of resolution through the process of mediation or alternatively that mediation is capable of significantly narrowing the issues between them, the grounding affidavit and written submissions fail to demonstrate that this is so. What are the areas of contention or parts of the claim that I have just outlined that might be narrowed in the context of mediation? What are the areas of expert evidence that might potentially be capable of agreement? The fact that the Court's attention has not been drawn to any such issues or evidence would tend to suggest that the plaintiffs do not, in reality, believe that their claim against the State defendants, whatever about their claim against the first named defendant, is capable of being resolved or narrowed through the process of mediation.

43. For my part I cannot see how mediation could determine any of the legal issues which have been raised by the plaintiffs as against the State defendants unless those defendants were content to abandon their defence to the issues of liability which they delivered as far back as 2003. Further, for my part, I do not believe it is unreasonable for the party against whom complex legal claims have been made, and which may have ramifications that extend well beyond the confines of the proceedings and their parties, to maintain their entitlement to have those issues resolved by the court, as is the position of the State defendants in this case who seek clarification as to the obligations and consequences that flow from the grant of a Foreshore Licence.

44. Accordingly, having considered the issues in dispute between the plaintiffs and the State defendants, I am not satisfied that it would be appropriate to make an order inviting those defendants to use ADR because the legal issues involved are not suited to such a process. It follows that I view the State defendants' opposition to the plaintiffs' application for relief under O.56A as one which is entirely *bona fide*.

Are there other circumstances that would warrant the refusal of the relief sought?

45. Having decided that by reason of the nature of the dispute between the plaintiffs and the State defendants it would be inappropriate for a judge to make an order under O.56A, r.2, it is possibly unnecessary to consider whether there are, in any event, other circumstances which would warrant the refusal of the relief sought. As it happens, I am satisfied that there are a number of other relevant factors which weigh against the granting of the relief sought. This is so regardless of the fact that the order, if made, is one which is confined to an invitation to participate in mediation.

46. The first of these relates to the order made by Laffoy J. on 9th June, 2010, whereby she directed a split trial and postponed, by agreement of the parties, the issue of quantum until the issues of liability had been determined. Thus, as matters stand, the State defendants have not yet had to concern themselves with the potential quantum of the claim which the plaintiffs assert will run to tens of millions of euro.

47. As can be seen from even a cursory examination of the statement of claim, the claim for damages is a complex one and could not readily be met by the State defendants without incurring substantial costs. The losses include claims for the reimbursement of monies paid to restaurants who compensated their customers who had become ill after consuming the plaintiffs' oysters; loss of profits on sales over very many years and the cost of the installation of extra purification systems. Those are all claims which would require significant investigation and most probably the retainer of several expert witnesses.

48. Having regard to the order of Laffoy J. it would seem wholly unreasonable for the plaintiffs to expect the State defendants to accept an invitation to mediate when, depending on the outcome of the liability issues, they might never have to address that claim at all.

49. A second and somewhat related point is that the mediation which the plaintiffs wish to pursue would undoubtedly be complex, time consuming and expensive. That being so I believe that the costs burden likely to be borne by the party who is reluctant to engage with that process is something that the court should take into account when deciding how to exercise its discretion. This is because mediation has the potential to add a very significant additional layer to the costs of the proceedings should it prove unsuccessful in resolving the dispute. The party who ultimately loses the litigation will likely have to bear those additional costs. Further, even the party who is successful in their claim or defence may be adversely affected thereby should their opponent not be a sound mark for the additional costs so incurred.

50. The extent to which the costs of the proposed mediation should weigh on the Court's mind must, I believe, be proportionate to what is at stake in terms of the potential costs of the mediation. What is proposed in this case will not be a mediation that will be short. I hazard the suggestion that, even after the significant preparation to which I have earlier referred and which of itself will involve substantial expenditure, the mediation could take a significant amount of time. The defendants will be expected to lay out substantial sums, not only in respect of their own legal and other costs, but also in respect of the mediator's fees and all at a time when it is anticipated that the liability issues between the plaintiffs and the State defendants are likely, with the benefit of case management, to be determined early in 2016.

Conclusion

51. It is undoubtedly true to say that in very many cases, as was stated by Hogan J. in *Lyons and Murray* at para. 37, "mediation is a thousand times preferable than litigation". There are nonetheless cases in respect of which, because of the legal issues involved, it would not be appropriate for a court to make an order under O.56A, r.2 inviting the parties, in face of the objection from one such party, to participate in ADR.

52. I am all too mindful of the fact that litigation is becoming ever more complex and lengthy such that it places considerable financial strains on the participants. It also places ever increasing demands on scarce judicial resources. For these reasons it behoves the court pro-actively to encourage parties to try, wherever possible, to resolve their disputes through participation in the ADR process.

53. The court's jurisdiction to make an order under O.56A, having regard to its potential costs implications for the party to whom such an order may be directed, is an important tool, in an appropriate case, to encourage litigants who without good reason, simply refuse to co-operate or consider any alternative to having their issues determined before a court to review their decision.

54. However, before making an order under O.56A the court must also be satisfied that the issues in dispute are reasonably suitable to resolution by ADR and that there are not other good reasons for refusing the relief sought.

55. For the reasons already stated in this judgment I am satisfied that in this case the trial judge was correct in refusing the plaintiffs' application for an order under O.56A, r.2 of the Rules of the Superior Courts, 1986. I am satisfied that the making of such an order would not be appropriate because of the particular nature of the legal issues raised by the plaintiffs vis a vis the State Defendants. Further, there are other good reasons on the facts of this case why the order should not be made. These include the fact that the plaintiffs' proposal to mediate runs contrary to the split trial directed by Laffoy J. in her order of the 9th June, 2010, is in conflict with their own agreement as noted in that order to the effect that quantum should be postponed to await the outcome of the liability issues and finally by reason of the potential costs consequences for the State defendants of accepting a court invitation to participate in what would undoubtedly be a complex and lengthy mediation.

56. For the aforementioned reasons I would dismiss the appeal.