



MASTER OF
THE ROLLS

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MEDIATION AND DISPUTE RESOLUTION

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1. Many thanks to Martyn Bradish for your kind invitation to deliver this lecture.
2. As some of you may have seen, I have been quite vocal recently about the digital justice system that is being created in England and Wales. I will return to that in a moment. You have asked that I consider mediation in this lecture. And I know that many in the audience are in fact professional mediators.
3. Let me say first that I have considerable admiration for those who provide mediation services in England and Wales – they offer a service that is very valuable and far more difficult than many lawyers would like to acknowledge. Despite that, I want in this lecture to put mediation in context.
4. You may also be aware that I have been the victim of my own success in that I suggested last year that alternative dispute resolution should not be so described because it should not, in any sense, be alternative. It should be a mainstream part of the court-based and non-court-based dispute resolution process. This point caught on with Government, and the Ministry of Justice issued a consultation process on what is now called “dispute resolution” rather than “alternative dispute resolution”. Whilst applauding the sentiment, which I started, it is still important to distinguish between court-based and non-court-based dispute resolution.
5. That distinction was central to a report that a joint project group that I chaired back in 2018, produced. The joint project group brought the European Law Institute and the European Network of Councils for the Judiciary together. It produced a report with the catchy title: the relationship between formal and informal justice: the courts and

alternative dispute resolution. The joint project group also produced a statement of European best practice in relation to the approach that courts and judges should adopt in interacting with all types of ADR (as it was then called) processes.

6. It is interesting to review the terms of that Statement, because it indicates first how the issues affecting mediation vary across different European countries, and secondly the derivation of many of the current developments.
7. The first part of the Statement assumed that judges should encourage (A)DR but said only that “[t]o the extent permissible under the law of the [s]tate, ... judges should seek to integrate [A]DR processes into the justice system, treating them as complementary systems”, and that they should “make best efforts to extend an appropriate degree of institutional comity and respect towards (A)DR processes, entities and practitioners”. The remainder of the first part was about the need for training of judges and information that judges should provide to parties about the possibility of mediation.
8. The Statement continued by indicating that judges should consider whether to require the parties or their legal representatives to assess the relative costs and incentives of (A)DR and litigation, or should do so themselves, so as to compare the benefits of each in light of the parties’ wishes and interests.
9. The Statement then moved on to address the circumstances in which judges should require parties to mediate rather than to continue the court-based dispute resolution process: it said that “judges should consider the parties’ concerns about speed, cost, and the fair determination of their legal rights as well as non-financial considerations such as the provision of apologies and the preservation of business, familial and other relationships” and the availability of legal advice and “power and informational imbalance”.
10. The next section of the Statement concerned the standards of the mediation process itself, starting with the central Eastern European concern which is and was the “general level of public confidence in the suitability and quality of (A)DR processes outside the court structure and their state of development in the relevant [s]tate”, emphasising the need for training of “(A)DR neutrals”, the “existence of written ethical principles” covering their conduct, the predictability of the cost of the process and the need for a complaints procedure for the neutrals concerned. But perhaps the most important paragraph requires the judge to have regard to “the quality and independence of [the] process

and its suitability to the particular dispute and to the parties” and to ensure the confidentiality of the process.

11. There was then a third section about how the judges must preserve the parties’ access to court-based justice and compliance with article 6 of the ECHR. The key to that section was that judges have to ensure that parties understand whether the process is mandatory or voluntary and that consent to a voluntary process is fully informed and freely given.
12. The commentary considered the relationship between formal and informal justice – between courts and mediation processes, and the way in which they could be “combined, utilised or made to function effectively alongside one another”. It concluded that the possibilities were not limitless, as they were constrained by culture, consumer confidence and technology. It gave a boost to the online ‘multi-door court model’ where “any disputant can arrive at the portal or the court-house and expect to be directed to the appropriate DRP [dispute resolution provider] after a triage process that determines the most effective approach to the solution of the complaint”.
13. It was interesting for me to look back at the Statement, because I now realise that much of my thinking in relation to the development of the digital justice system I mentioned at the beginning has been conditioned by the work we did in producing that report now 4 years ago.
14. First, the so-called “multi-door court-house model”, or more accurately the “multi-door court model” bears a distinct similarity to the front-end of the digital justice system for which I hope the new Online Procedure Rules Committee will have responsibility, once it is created by the forthcoming Judicial Review and Courts Bill.
15. Secondly, the second layer of the digital justice system with its range of pre-court pre-action portals is presaged in the Statement, such as when it said that “[s]ome [s]tates are developing ODR platforms that will aim to solve disputes that arrive on their portal by any available means including ombudsperson suggested solutions, mediation and court determination”, and “[o]ther [s]tates have adopted purely private web-based solutions that have the same effect”.
16. So, let me come to what I really want to talk about tonight, which is the place of mediation in the brave new world that I call the digital justice system we are creating in England and Wales.

17. This has three aspects: First, the need to see the process of mediation far more broadly than even an in-person, telephone or video attendance by the parties and the mediator aimed at reaching a consensual solution. Secondly, the need to make far greater use of mandatory mediation, and thirdly, ways in which public and consumer confidence in the mediation process can be enhanced beyond even where it has reached in England and Wales, which I might say is far higher than in many other European countries.
18. Let me take each of these in turn.

Seeing the process of mediation far more broadly than even an in-person, telephone or video attendance by the parties and the mediator aimed at reaching a consensual solution

19. Dispute resolution is probably better regarded as an art rather than a science. In every dispute there are times when resolution is close to impossible and times when the dispute is actually ripe for resolution. The best mediators will be able to resolve disputes even when the prospects for resolution are objectively poor.
20. Secondly, different types of dispute require different approaches at resolution. There is no one-size-fits-all. The first quality for mediators is flexibility. But even that is not enough – it is the interventions deployed that need to be flexible in addition to those delivering them.
21. Let me give some examples. The standard approach to dispute resolution has, for many years, been to develop systems in relation to large commercial claims going on in the Business and Property Courts – or at least in the High Court – and to try to adapt them to other parts of the system. That is quite the wrong way round. The costly grandstand mediation recommended by the Commercial Judge hearing a corporate dispute between multi-national corporations is neither affordable nor useful to resolve a small claim in the County Court or a family dispute as to which week-ends a father is to be permitted to see his children.
22. Don't get me wrong - grandstand mediations are marvellous for the right kind of disputes, but those disputes are few and far between, and something different is required elsewhere.
23. In the online space of pre-action portals and pre-litigation ombuds processes, mediation should first mean a series of bots that pop up online suggesting resolution in a simple case based on the parties' positions. A claim for £1,000 defended on the basis that only half the

goods were delivered may be settled instantly if a bot pops up and suggests that the defendant should pay for what it accepts was actually delivered. The bots should not just appear once, but they should continue in different forms just as online marketing makes repeated attempts to remind internet users of the possibilities.

24. The objective of the pre-action portal is quickly to identify the issues that truly divide the parties. Once those issues are identified, attempts must be made to resolve them consensually. In this context, formal mediation can be the exception rather than the rule. The ombuds process is, of course, itself directed towards repeated suggested solutions at each level. The pre-action RTA portal and the Whiplash portal are both directed towards putting the evidence together that is required before an insurer can make a sensible offer to settle.
25. In the family context, the MIAM (Mediation Information and Assessment Meeting) is designed to resolve private family disputes before they can begin in court. It is not perhaps as successful as it will need to be in the future for a number of reasons that are outside the scope of this lecture.
26. In small claims, employment claims, possession and other property disputes, and disputes between SMEs, telephone mediations without the need for face-to-face encounters can be incredibly effective. That is certainly the experience now that HMCTS have provided such mediations for almost every small claim before it is listed for hearing.
27. I take the view that we should not be satisfied with simply going through a list of possible interventions and suggesting them in a set order. If one intervention does not work, we should be considering another, and on and on. Every aspect of the process ought to be directed towards resolution rather than dispute.
28. If cases emerge from the pre-action portal and protocol space into court, we all know how entrenched the parties can become. The very act of pleading one's case at great length and being required to file lengthy witness statements explaining the case in even greater detail often actually has the effect of drawing focus onto the grievance making the parties more, rather than less, intransigent. Repeating the case their lawyers have written down, again and again, in pleadings, witness statements, experts' reports and written and oral argument serves to persuade the parties, but rarely the opposing party, how right they are.

29. Other interventions that can be suggested in more complicated cases, include early neutral evaluation either by a judge or by an independent lawyer. That has been used very successfully in the Business and Property Courts. Moreover, every judge looking at a case ought to be considering what preliminary issue needs to be resolved in order to set an appropriate stage for consensual resolution. It is no longer enough for judges to think that their role begins and ends with hearing the evidence, the legal argument and delivering judgment.
30. As I have said before, we are not just there to referee a fight, we are there to break it up. Lord Woolf shifted the paradigm of the courts from seeing their role as searching for perfect justice, to one where they had to seek expedient and proportionate justice. I hope to shift the paradigm again towards a focus on resolution rather than dispute.

The need to make far greater use of mandatory mediation

31. The next critical question is whether the court can or should require parties to engage in external dispute resolution processes, as was underlined in the European Statement I have mentioned.
32. In January 2021, I asked the Civil Justice Council to report on the legality and desirability of compulsory ADR. Its report was published on 12 July 2021. It concluded that mandatory (alternative) dispute resolution was compatible with Article 6 of the European Human Rights Convention and was, therefore, lawful.
33. In *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002, Lord Dyson MR said at [9] that “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”, relying on ECHR authority saying that the right of access to a court could be waived but that such waiver should be subjected to “particularly careful review” to ensure that the claimant is not subject to “constraint” (see *Deweert v. Belgium* (1980) 2 EHRR 439 at [49]).
34. At [58-9] of the CJC report, it was concluded that “any form of (A)DR which is not disproportionately onerous and does not foreclose the parties’ effective access to the court will be compatible with the parties’ Article 6 rights”. If there is no obligation on the parties to settle and they remain free to choose between settlement and continuing the litigation then there is not “an unacceptable constraint” on the right of access to the court. The logic, they thought, applied to ADR as well as Early Neutral Evaluation. In *Rosalba Alassini* [2010] 3 CMLR 17, the Court of Justice of the European Union had attached importance to the

fact not only that the parties retained a free choice as to whether to settle or not but also that the (A)DR process was free and caused no delay to the ultimate resolution. The CJC thought that what mattered was that any cost and delay was proportionate. It concluded that more work was necessary to determine the types of claim and the situations in which compulsory (A)DR would be appropriate and most effective in analogue and online justice. They commented that their conclusions “placed another ... powerful tool in the box [and] the opportunity to initiate a change of culture in relation to dispute resolution which will benefit all concerned”.

35. I have endorsed the CJC report. It would be out of step with the objectives of justice systems across the world for it to be impermissible to require parties to participate proportionately in attempts to resolve their disputes consensually.
36. It is also worth mentioning in the European context that the ELI/UNIDROIT civil procedure rule 9(1) approved by ELI and Unidroit in September 2020 provides under the heading “Role of the parties and their lawyers” that “Parties **must** co-operate in seeking to resolve their dispute consensually, both before and after proceedings begin”. In the preamble at [40], the rules provide that: “It is a fundamental principle of the Rules that lawyers and courts must encourage parties, on a properly informed basis in appropriate cases, to make use of out-of-court ADR methods”. “The Rules also provide for in-court-Court settlements, in respect of which the court’s role is not restricted to rendering a decision that gives effect to an agreement reached by the parties, but rather enables the court to actively participate in the process that seeks to assist the parties to reach a consensual resolution of their dispute”.
37. I am sure that it should be possible, particularly in small claims, for judges to direct parties to attempt to reach a consensual resolution through mediated interventions. The mandated process should not, of course, be costly or cause delay in judicial resolution. But none of that should mean that parties can, as they sometimes do, resolutely refuse to consider mediation. Being entitled to one’s day in court is not the same thing as being entitled to turn down appropriate and proportionate attempts to reach consensual solutions.
38. The Civil Justice Council’s excellent recent report on small claims has recently recommended that small claims worth less than £500 should be subject to mandatory mediation, and that proposal will soon be piloted in the County Court.

Ways in which public and consumer confidence in the mediation process can be enhanced

39. Public and consumer confidence is key both to the justice system itself and to any attempt to mediate or resolve disputes of any kind. There are two main reasons why many countries in Europe have huge court backlogs. First, they often have no system requiring parties to obtain permission to appeal, and secondly, there is little public confidence in the 'neutrals' providing third party mediation and other dispute resolution services.
40. We are fortunate in the UK in general and in England and Wales in particular that our mediation community is generally well regarded. Parties to whom mediation is suggested rarely refuse on the basis that a sufficiently neutral mediator cannot be found. There is, however, a range of measures that could be taken further to enhance public confidence in the non-court-based dispute resolution process.
41. The first way to grow confidence is by publicising the work of mediators and dispute resolution. Mediation tends at the moment to be a niche area about which little is said publicly. This means that the first most people hear about mediation is when it is suggested to them as an alternative to going ahead towards a court hearing. That is far too late. By that time the entrenchment that I have spoken about has normally taken a firm hold and the parties set about trying to find excuses for refusing attempts at mediated interventions.
42. I think that mediators and the entire resolution sector needs to do far more to educate the public about the methods and benefits of resolution, and the areas in which it can be usefully employed. To return to the private family situation, it is often too late to wait until one parent is about to issue proceedings before resolution processes or mediation are suggested. Intervention should be publicised and attempted far earlier.
43. That brings me to my second proposal to enhance public confidence in (A)DR. I would bring forward the time at which mediated interventions are offered in almost every kind of dispute situation. The earlier that resolution is attempted, the more likely it is to succeed for many of the reasons I have already mentioned and simply because the parties have less invested in the dispute and can still see clearly the benefits of not having to be bothered with it.
44. Finally, in this connection, I would urge the mediation community to embrace the flexibility of approach to resolution that I have advocated

in this lecture. Greater flexibility will enhance public confidence, because it will be seen that mediation is not just about staging another expensive forum for lawyers to ply their trade. It is all genuinely directed towards finding solutions.

Conclusions

45. I want to end if I may by returning to the ELI/ENCJ Statement with which I began. At the end of that statement, the reporters suggested 5 pieces of work for the future, none of which has yet been taken forward.
46. The first was the suggestion that there should be a recognised set of parameters that should be taken into account when (A)DR processes are being imposed as a mandatory pre-requisite to court-based dispute resolution. This work is still important, since, as I have pointed out already, there remains significant opposition to making mediation compulsory.
47. The second suggestion was to consider the ways in which (A)DR processes could be successfully integrated with court-based dispute resolution. Much is being done in England and Wales to make this proposal reality. The funnel of digital dispute resolution that will result from the HMCTS reform project achieves much of the integration that this second recommendation suggests.
48. The third recommendation was for a statement of European best practice in relation to the approach that those responsible for all types of (A)DR processes should adopt in interacting with courts and judges. I still think that this would be useful, since the providers of neutral mediated interventions cover a broad church. A statement of best practice at supra-national level would be a further step towards enhancing public confidence in the non-court-based process.
49. The fourth recommendation was to map the models for interaction between (A)DR processes in consumer, government and business fields so as to produce a vision of the ideal European dispute resolution systems for in-country and cross-border disputes, based on developing European jurisprudence and private international law. I don't want to be presumptuous, but I hope what we are doing in the UK will provide the map or blueprint that this recommendation envisages.
50. The final recommendation for future work was more wide-ranging and is in some ways an interesting place to end. It was to "consider how digital data generated by public and private dispute resolution systems

might in future be put to beneficial use without infringing necessary confidentiality". Now data is central to everything I have been discussing tonight and to the digital dispute resolution system that is being created in England and Wales. Data is what has been lacking both here and in other parts of Europe. Without reliable data as to the number of disputes that arise in every context, how long they take to resolve and how they are eventually resolved, we are battling very largely in the dark. I hope that what is happening now in England and Wales will create a data base that will allow for far smarter decisions to be taken in the future.

51. I look forward to answering your questions.