MASTER OF THE ROLLS

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THE FUTURE OF CIVIL MEDIATION

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[CHECK AGAINST DELIVERY]

Introduction

1. Good afternoon. It gives me great pleasure to be here at this the Civil Mediation Council's second national conference. It is perhaps always a worry for nascent organisations when they hold their first conference as to whether it will be the first of many or the one and only. Today's proceedings put any such worries to rest. And rightly so. It is plain to me that, as the importance of mediation grows in the years to come, conferences such as this will grow both in stature and importance. They will help to shape the development of mediation, explore the issues it raises and how best it can be implemented for the benefit of all those who have the misfortune to become entwined in civil disputes.

2. This afternoon's session is entitled 'The Future of Civil Mediation'. Its focus is how the quality and standards of mediation, and mediators, can be improved over the coming years. Karl Markie is going to look at the issue from the perspective of accreditation, before David Richbell, Mark Jackson-Stops and Richard Schiffer look at whether the use of Codes of Good Practice is the answer. Before placing you in their capable and very knowledgeable hands I thought I might take this opportunity to make some general comments, some of which you may well wish to revisit in the Open debate session which is to follow this one.

3. Alternative Dispute Resolution – ADR as it is more commonly known – has been around now in one form or another for a number of years. Since its effective rebirth in America in the 1970s it has steadily grown in importance. That importance was recognised in England (or I should say England and Wales) in the Heilbron/Hodge Report which preceded and informed the two Woolf Reports and through them the CPR. Lord Woolf saw it as playing a crucial role in shaping our civil justice system's future. He put it this way:

> "*[In future] . . . parties should:*
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> *i) whenever it is reasonable for them to do so settle their disputes (either the whole dispute or individual issues comprised in the dispute) before resorting to the courts;*
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> *ii) where it is not possible to resolve a dispute or an issue prior to proceedings, then they should do so at as early a stage in the proceedings as is possible.*
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> *Where there exists an appropriate alternative dispute resolution mechanism which is capable of resolving a dispute more economically and efficiently than court proceedings, then the parties should be encouraged not to commence or pursue proceedings in court until after they have made use of that mechanism.*"[1]

4. The CPR introduced a number of mechanisms to give effect to this. Pre-action Protocols, for instance, were introduced so as to facilitate the settlement of disputes before the parties resorted to the courts. They all now stress the importance that is placed on parties considering whether '*some form of alternative dispute resolution would be more suitable than litigation and, if so, endeavour to agree which form to adopt.*' Once litigation has been commenced the court and the parties place themselves in the hands of the overriding objective. They are both encouraged to utilise ADR, of which mediation is a key part, under the duty imposed on the court to actively manage cases in order to further the overriding objective (CPR 1.4 (1) (e) and (f) and 3.1) and the duty imposed on parties and their lawyers to assist the court in so doing (CPR 1.3 and 26.4). Active pursuit of ADR is further encouraged by CPR 26.4 (1) which enables parties to make a written request with their allocation questionnaire for, or the court of its own initiative to order, a stay of proceedings while settlement via ADR is attempted and by CPR 44.5 (3) (a) (ii) and the guidance given by the Court of Appeal in *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002. I wish to return to *Halsey* in a moment. ADR is further encouraged by a number of court-based mediation schemes, such as the one operated by the Court of Appeal.

[1] Woolf (1995) at Chapter 4.7.

5. With all the support ADR in all its many forms has had, from Heilbron/Hodge to Woolf to the CPR and in recent times its tireless support by Mr Justice Lightman, it came as a real surprise to me to hear at a recent joint meeting in Surrey between HMCS, CMC ,and the CJC that so few solicitors had been asked to or had taken take part in a mediation.[2] I also very recently went to APIL's annual conference and people there were saying the same thing. Experience thus shows even now that far too many people know far too little about mediation. I think we can all agree that this has to change. ADR in general and mediation in particular, where it is the appropriate ADR mechanism, must become an integral part of our litigation culture. It must become such a well established part of it that when considering the proper management of litigation it forms as intrinsic and as instinctive a part of our lexicon and of our thought processes, as standard considerations like what, if any expert evidence is required and whether a Part 36 Offer ought to made and at what level.

6. This will require education; education on the part of litigants, lawyers and the judiciary. Lawyers and judges will need educating so that mediation becomes part of the culture; so that it becomes second nature to us all. The onus lies on you and me to ensure that litigants appreciate mediation's many benefits: its informality, its confidentiality, the possibility it holds of enabling the parties to reach a consensual resolution to their dispute and to do so more quickly and at lower cost than might well be possible in the zero-sum game which is litigation. Equally, the onus lies on us to highlight its drawbacks as well as its benefits. There are to my mind few disadvantages but they may include the fact that, for example, it does not produce a judgment of the court setting out the individual litigant's rights. Education is the key to this. Training, accreditation and the creation of Codes of Good Practice are all I think useful tools to that end.

7. Over and above education what can the judiciary do? What we certainly cannot do is sit back and do nothing. Those days are now long gone. Active case management and the overriding objective very properly put paid to the days of the passive judge. One thing we can do is to render mediation part of the normal pre-trial case management process. There is of course a potential problem here, of which you are all well aware. I refer to the Court of Appeal's decision in *Halsey*, although it is to my mind much maligned. Lord Justice Dyson, giving the judgment of the court, in that case held that compulsory ADR would breach the right to fair trial as it would amount to an unacceptable constraint on the right of access to the court. He concluded that while the court could and should encourage ADR robustly it could not compel the parties to engage in it.[3]

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[2] Lightman J, *Mediation: Approximation to Justice*, (28 June 2007) (Speech given to SJ Berwin); *Access to Justice* (05 December 2007) (Speech given to The Law Society).
[3] [2004] 1 WLR 3002 at [9] – [11]

8. This decision has been understood to rule out the possibility that the court can require parties to proceed to mediation unless they wish to do so. That is certainly the view taken by many to the effect of this aspect of the *Halsey* judgment. Lightman J for one has taken this view of its effect. He has criticised it on a number of grounds: first, that the Court of Appeal's judgment failed properly to appreciate the difference between arbitration, which places a permanent stay on proceedings, and mediation which does not interfere with the right to fair trial but simply imposes a short delay on the trial process; and second that a number of other jurisdictions have compulsory mediation processes.[4]

9. On the second point he is clearly right. A number of European states such as Belgium and Greece, both signatories to the Human Rights Convention, have introduced compulsory ADR schemes without, as far as I am aware, any successful Article 6 challenges.[5] Equally, Germany's federal states can legislate to require litigants to either engage in court-based or court-approved conciliation prior to the formal commencement of litigation. The European Union itself acknowledges in Article 3.2 of its Directive on Mediation that the encouragement it offers to mediation is made '*without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not impede the right of access to the judicial system. . .*' Equally, compulsory ADR schemes have been introduced in a number of US jurisdictions. For instance, New York has established mandatory arbitration in claims coming before a trial court where an official arbitration programme has been established for claims of a certain value. Similar schemes have been introduced in other states, for instance California. The federal district courts can also require parties to mediate disputes under a power granted by section 652 of the Alternative Dispute Resolution Act (28 USC).

10. Taken together, what could be described as the European and US approach to ADR, appears to demonstrate that compulsory ADR does not in and of itself give rise to a violation of Article 6 or of the equivalent US constitutional right of due process. This suggests, admittedly without hearing argument, that the *Halsey* approach may have been overly cautious. This was not a point that was investigated in detail in *Halsey* and (who knows) may be open to review – either by judicial decision or in any event by rule change.

11. Turning to Lightman J's first point, is there any support for the view that the Court mistakenly confused mediation with arbitration? The Court relied on the decision of the European Court of Human Rights in *Deweer v Belguim* (1980) 2 EHRR 439 in arriving at its decision. That case was reported in *Halsey* has having established that 'that the right of access to a court may be

[4] Lightman J, *Mediation: Approximation to Justice*, (28 June 2007) at [8].
[5] See Article 214 of the Greek Civil Code.

waived, or example by means of an arbitration agreement, but such waiver should be subjected to a '*particularly careful review*' to ensure that the claimant is not subject to '*constraint.*' What was the context of *Deweer*?

12. The claim arose out of an alleged infringement of a Belgian Ministerial Decree which required butchers to reduce the price of retail pork and beef in accordance with the terms of the decree. As a consequence of the breach the butcher's shop was closed and he became liable to imprisonment. The butcher was however given the option of paying a fine fixed at 10,000 Francs by way of what was described as a 'friendly settlement'. If he paid, his shop could reopen and the criminal proceedings against him would be barred. On the face of it this is far away from mediation, which both parties enter as equals. What did the Strasbourg Court have to say about this? It said this at paragraph 49 of its judgment:

> "*. . . By paying the 10,000 BF which the Louvain procureur de Roi "required" by way of settlement . . . Mr Deweer waived his right to have his case dealt with by a tribunal.*
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> *In the Contracting States' domestic legal systems a waiver of this kind is frequently encountered both in civil matters, notably in the shape of arbitration clauses in contracts, and in criminal matters in the shape, inter alia, of fines paid by way of composition. The waiver, which had undeniable advantages, does not in principle offend against the Convention . . .*
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> *Nevertheless, in a democratic society too great an importance attaches to the "right to a court" . . . for its benefit to be forfeited solely by reason of the fact that an individual is party to a settlement reached in the course of a procedure ancillary to court proceedings. In an area concerning the public order . . .of the member States of the Council of Europe, any measure or decision alleged to be in breach of Article 6 calls for careful review*."

13. This statement is a long way away from declaring that mediation is contrary to Article 6 ECHR. It acknowledges that agreements waiving the right to fair trial are compatible in principle with Article 6. It does however call for caution where that right is waived in proceedings ancillary to court proceedings, such as where parties enter into arbitration agreements. Such caution is clearly justified in the situation identified in *Deweer*. Is it as clearly called for in mediation proceedings? Does mediation require parties to waive their right to a fair trial?

14. The answer is surely no. Mediation and ADR form part of the civil procedure process. They are not simply ancillary to court proceedings but form part of them. They do not preclude parties from entering into court proceedings in the same way that an arbitration agreement does. In fact all a mediation does

is at worst delay trial if it is unsuccessful and it need not do that if it is properly factored into the pre-trial timetable. If the mediation is successful it does obviate the need to continue to trial, but that is not the same as to waive the right to fair trial. If it were any consensual settlement reached either before or during civil process could arguably amount to a breach of Article 6, which clearly cannot be the case.

15. The arguments can of course be developed much further than this and it is not my place today to do that. That will have to await a future occasion when the Court of Appeal may have to grapple with this issue and do so after full argument rather than the sketch I have given here. What I think we can safely say though, without prejudicing any future case, is that there may well be grounds for suggesting that *Halsey* was wrong on the Article 6 point.

16. But what of the present time? Lightman J expressed the view that District Judge's are at present bound to follow *Halsey* on this point. It seems to me that that is a pessimistic reading. The substantive issue in *Halsey* had nothing to do with compulsory mediation. The issue before the court then was '*when should a court impose costs sanctions against a successful litigant on the grounds that he has refused to take part in an alternative dispute resolution ('ADR')?*' Whatever the Court of Appeal held in *Halsey* in answer to that question its comments regarding compulsory ADR were surely what we used to call *obiter dicta*, although I note that they have subsequently been summarised in, for instance, *Hickman v Blake Lapthorn* [2006] EWHC 12 (QB) as establishing that compulsory ADR is contrary to Article 6 ECHR.[6] But again that summary contained no more than *obiter dicta*. With that in mind it seems to me at any rate, that despite the *Halsey* decision it is at least strongly arguable that the court retains a jurisdiction to require parties to enter into mediation. How might this happen?

17. It seems to me that the court has sufficient powers at present routinely to direct the parties to take part in a mediation process or attend a mediation hearing during the course of the pre-trial stage of any proceedings. I think of it like this. It could not be seriously argued that the case management judge could not direct the parties, say, to meet in the first week in June in order to discuss settlement. I would like to see such a direction as routine, if it is not already routine. No-one could sensibly refuse to meet the other side to discuss settlement in almost any kind of case. The great advantage of directing such a meeting would be to ensure that both parties prepare for a discussion on the case at the same time. One of the bugbears of any system is cases which settle at the door of the court. The reason they do so is partly (as it were) the clang of the prison gates but partly the fact that it may well not be until then that both parties are thinking about the case at the same time.

[6] [2006] EWHC 12 at [21].

18. It seems to me to be but a small step from an order that the parties meet to an order that they meet in the presence of a mediator. Such orders could surely be made either routinely on allocation as anticipated by CPR 26.4 (1) or at the first case management conference. They could easily be factored into and become an integral part of standard directions. To my mind the power exists under a combination of the court's case management powers under CPR 1.4 (2) (e) which specifies that '*encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure*' and CPR 3.1 (2) (m), which enables the court to take any step in managing a case to further the overriding objective. It seems to me that furthering the overriding objective in this sense calls for the case management power to be applied consistently with the duty under CPR 1.1 (2) (e) which requires the court to take account of the needs of all litigants and the court in furthering the overriding objective; to further access to justice for all. Equally, it is surely part of the parties' duty to assist the court in the furtherance of the overriding objective that they should take active steps to take part in mediation (CPR 1.3).

19. This is not to say that the courts should penalise parties for not taking part in mediation, save perhaps in exceptional circumstances. The bane of civil litigation is what I call satellite litigation, that is disputes which are not about the underlying merits. I would certainly not like to see a new type of satellite litigation in which complaints about the parties' approach to mediation are investigated in detail and at great expense. I note that in a case which rejoices in the title *Carleton, Seventh Earl of Malmesbury v Strutt & Parker* [2008] EWHC 424 Jack J extended the *Halsey* principle that if parties unreasonably refuse to mediate that may sound in costs against them to the situation where a party acted unreasonably in a mediation. The actual decision in Halsey was that a successful party should only be penalised in costs on grounds of his refusal to take part in mediation if that refusal was unreasonable. Moreover the burden of showing unreasonableness is on the losing party. I see nothing wrong with that approach. Such cases should be very few and far between. All depends upon the circumstances of the particular case. One can understand the position of a party who says: 'I have a cast iron case and I decline to mediate because there is no point' and who subsequently wins at trial and is appalled when it is suggested that he should be penalised in costs for refusing to mediate.

20. However, such cases must be very rare indeed. We all know that a cast iron case is a very rare bird indeed; so that for the most part only a madman does not want to settle. None of this is to say that parties must settle claims through mediation. It is simply to say that parties must assist the court in furthering the overriding objective by taking proper part in the mediation process.

21. Some complain about the costs of mediation but why not have a general principle that the costs of a mediation will ordinarily be treated as costs in the

case. The person with the strong case will then be protected against the costs of a failed mediation if the action subsequently succeeds. Is this a good idea and, if not, why not?

22. In conclusion, it seems to me then the power exists for the courts to regularise mediation and to make it an integral part of the litigation process. That is not to say that in every case it will be desirable. The court must be sensitive to this when assessing whether to make a standard direction with a mediation order in it. There is no reason why it cannot do this. Equally it is not to say that it will or ought to succeed in every case. It is of course a cliché that you can take a horse to water but whether it drinks is another thing entirely. That it is a cliché does not render it the less true. But what can perhaps be said is that a horse (even a very obstinate horse) is more likely to drink if taken to water. We should be doing more to encourage (and perhaps direct) the horse to go to the trough. The more horses approach the trough the more will drink from it. Litigants being like horses we should give them every assistance to settle their disputes in this way. We do them, and the justice system, a disservice if we do not.
