LORD CHIEF JUSTICE
OF ENGLAND AND WALES

THE RT HON THE LORD JUDGE

CIVIL MEDIATION COUNCIL CONFERENCE

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I first shared a platform with Sir Henry Brooke on an issue of considerable importance some 15 or so years ago when I invited him to speak at a Judicial Studies Board seminar on the problem of how the administration of justice should address some of the difficulties faced by members of our minority ethnic communities when they were attending court. He has said that I am never able to refuse him – I've written down that this is payback time.

When he invited me to speak here today, how could I refuse his invitation to do so? So here I am. And flattered to be here.

I'm perfectly well aware that the group I am addressing largely, overwhelmingly, consists of the converted. I can't imagine, if you did not believe in the value of mediation, and its advancement as a method of resolving disputes that you would be here. So we take as a given that mediation is itself a given.

Can I go back to the beginning? Let us take a blank sheet of paper and imagine that we are trying to create a system which would provide a satisfactory means of resolving civil disputes, bearing in mind, without being over dramatic, that in the end, it becomes almost inevitable that some civil disputes will end up in criminal activity. I do not think I am exaggerating. A few years ago I was taught a lesson by a very intelligent young woman in one of our County Courts. We were talking of the cost – the exorbitant cost as it was then - of taking proceedings for very small sums of money. She explained to me that the cost of just starting the proceedings would represent her children's shoes – she thought this a disproportionate cost. She knew areas of the City where her husband could go and find someone who would throw a few bricks through a window for £50 – no doubt she was right. And, perhaps, that would be more effective, she suggested than a judgment and getting back the compensation. A little self-help could end up with a brick being used against an individual and a few bricks being thrown back in return.

In short, a civilised community has to provide a system which means that those in dispute can refer to an independent tribunal for a decision. It is a further requirement that the system should actually exist and be capable of being used. If court fees are disproportionate or if legal fees are disproportionate the system is not open to those who cannot afford its processes.

So back to the blank sheet of paper. My experience in practice at the bar was that some of my clients wanted their disputes sorted out. They had tried to sort them out before they got to the stage of seeing a solicitor and going to counsel. Others of my clients, or should I say, it

was always my opponent's clients who were unreasonable, didn't want to sort the dispute out at all. There were all sorts of reasons. One is that very human characteristic sometimes but not always an attribute, the indomitable bloody mindedness of the bull dog. So that on your sheet of paper the system which we are creating has to cater for both those who wish to settle and those who do not. If both sides want to sort out their dispute, and they have tried and failed, being sensible people, their next step would not be to come to lawyers, but to go and ask someone they trust to try and sort out their dispute, to see where there are points of disagreement and points of agreement. Let's give it a name. Why not call it "mediation"? A successful mediation is a wonderful outcome. But with the best will in the world, it may not always happen. So you have to have a formal system.

You also have to have a formal system when one side or other to the dispute simply has no intention of sorting it out save in court and at the end of a protracted and expensive court proceeding. That is more troublesome. That may be the party with pots of money trying to squeeze the party with modest means away from the court process. That may mean that the party with real merit in his or her case is deprived of the proceeds of litigation for many years to the advantage of the intransigent party. It may be that the intransigent party is entirely justified and believes that there is no form of mediation which would be acceptable either to it or indeed in the end to the other side.

Now time and time again, in practice as a barrister and now as a judge, I have been perfectly well aware that if only the parties had come together at an early stage, long before they saw their counsel, long before they got to the door of the court, they could have resolved their dispute at a fraction of the cost and without the emotional expenditure and commitment of time and energy required by the litigation. One of the ways I used to try to persuade clients to settle was to remind them of a Chinese curse – "may you be involved in a litigation in which you are in the right."

One vivid memory is a boundary dispute, or rather a dispute over a garden. My opponent and I turned up at the County Court armed with an abundance of authorities because we had to address limitation periods, laches, injunctive relief, indeed just about every facet of civil justice. In the end we negotiated a settlement in which he and I, not the judge, went to the land and armed not with books but with hammers and stakes literally pegged out the property into equal halves. The case was settled. In truth my opponent and I had acted as mediators. How much better for everyone if the mediation had happened much earlier.

If I were to enter into the debate on whether the court process could or should have the power to compel mediation, in effect as part of its own process, I should have to speak for a very long time, and both my predecessor as Lord Chief Justice and the current Master of the Rolls have expressed their views on this subject. So I am just going to add this as a philosophical principles about whether it should be an automatic pre-condition to resort to the court process that mediation should have been tried, or that as an inherent part of the court process to which you have resorted, you should be deprived of the court process if you do not wish to be involved in mediation. On this I have to confess to an underlying concern not so much directed at the mediation issue, which is about too many people telling too many other people what they must do and thus compel an additional step in the process of litigation. In any event, as I say, there is no time to address these issues.

Some of you will have had a chance to look at Lord Justice Jackson's preliminary report in relation to his review of the costs of civil litigation. Chapter 43 of his preliminary report addresses alternative dispute procedures. It is out for the purposes of consultation. You may wish to reply to it individually, or for that matter as a group or as a body. Rupert identifies the relevant practice direction consequent on Lord Woolf's reforms and some of the concerns raised about it. He then identifies some of the benefits of alternative dispute resolution. The

arguments are there. But it is interesting, and may be part of your debate today, that he has thus far found that research has shown that –

(a) Very few cases go to mediation without judicial encouragement.

(b) Judges are reluctant to order alternative dispute resolution because there are often inadequate court facilities for the purpose.

(c) Research in 2007 found that there had been no increase in the number of lawyers who reported having recommended mediation to their clients in the previous ten years.

(d) In general it was thought that mediation was more effective in commercial disputes than in personal injury or clinical negligence, and further, that parties involved in high value disputes were less likely to object to going to mediation.

These are important issues. You can read for yourselves Rupert Jackson's tentative opinions in Chapter 43 of his preliminary report.

May I suggest one further subject for thought?

Can we just take a long term view? Every few years, or about every ten years, there is a great hullabaloo about the cost of civil litigation. Arbitration, after all, is a system of avoiding the court process. Do you remember when employment tribunals began? These were to be informal meetings at which the opposing parties would put their cases to a tribunal, almost a form of palm tree justice. Consider now how much more complicated and expensive the processes have become.

I do urge the Council to recognise this danger. The mediation process, could, unless danger is recognised and addressed, particularly if it is part of the court process, may eventually, and quite unintentionally, and by unforeseen accretion become increasingly formalised and procedural. It really must not eventually become just one more part of the expensive process that all of us are trying to avoid.
