JUDICIARY OF ENGLAND AND WALES

LORD JUSTICE JACKSON

THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION IN FURTHERING THE AIMS OF THE CIVIL LITIGATION COSTS REVIEW

ELEVENTH LECTURE IN THE IMPLEMENTATION PROGRAMME

RICS EXPERT WITNESS CONFERENCE

8 MARCH 2012

"I can try a lawsuit as well as other men, but surely the great thing is to bring about that there be no going to law."[1]

1. INTRODUCTION

1.1 I have taken this opportunity to speak to this RICS conference on Alternative Dispute Resolution ("ADR"), an aspect which forms an important part of the Cost Review[2]. The text of this lecture is being distributed as part of the documentation for this conference. Although this conference is concerned with expert evidence, with the agreement of the organisers, I am taking this opportunity to explain the court's approach to ADR.

1.2 Terms of reference. My terms of reference for the Costs Review included a requirement to:
"to make recommendations in order to promote access to justice at proportionate cost" and "to review case management procedures".

1.3 Role in implementation. I have subsequently been asked to take a proactive role[3] in relation to the implementation of the Costs Review recommendations, following their endorsement by the Judicial Executive Board and their broad acceptance by the Government. This role includes (a) assisting with the drafting of rule amendments and (b) helping to explain the forthcoming reforms to court users.

1.4 Current reform programme. Some recommendations in the Civil Litigation Costs Review

---

[1] Confucius, *Analects* 12, chapter 13
[2] Review of Civil Litigation Costs: Final Report
[3] This is subject to the supervision of the Judicial Steering Group, which meets fortnightly and to which I report. The Judicial Steering Group comprises the Master of the Rolls (Head of Civil Justice), Maurice Kay LJ (Vice-President of the Civil Division of the Court of Appeal), Moore-Bick LJ (Deputy Head of Civil Justice) and myself.

Final Report ("FR") require primary legislation. The necessary Bill is now before Parliament. If approved by Parliament, it is expected to come into force in April 2013. Other recommendations in the FR require rule changes, rather than primary legislation. It is intended that these rule changes will come into force on the same date as the Act. The rule amendments are currently being drafted, then presented to the Rule Committee for approval and then held in escrow until the "big bang" date.

1.5 It is not possible to address the entire reform programme in a single lecture. I am therefore choosing specific topics to focus on in individual lectures. I have chosen ADR as the subject for today's lecture, because ADR is has a wide impact upon the work of all professionals in this audience.

2. COSTS REVIEW RECOMMENDATIONS ON ADR

2.1 Relevant chapters in Final Report. ADR is dealt with in chapter 36.

2.2 The problem. ADR, particularly mediation, has a vital role to play in reducing the costs of civil disputes, by fomenting the early settlement of cases. ADR is, however, under-used and its potential benefits are not as widely known as they should be.

2.3 Recommendations in the Final Report. Two recommendations are made at the end of chapter 36, which become recommendations 75 and 76 in the list at the end of the report:

"(i) There should be a serious campaign (a) to ensure that all litigation lawyers and judges are properly informed about the benefits which ADR can bring and (b) to alert the public and small businesses to the benefits of ADR.

(ii) An authoritative handbook should be prepared, explaining clearly and concisely what ADR is and giving details of all reputable providers of mediation. This should be the standard handbook for use at all JSB seminars and CPD training sessions concerning mediation."

3. THE ROLE OF THE COURTS IN ADR

3.1 The use of ADR is relevant in two ways to the costs of litigation. First, ADR (and in particular mediation) is a tool which can be used to reduce costs. At the present time disputing parties do not always make sufficient use of that tool. Secondly, an appropriately structured costs regime will encourage the use of ADR. It is a sad fact at the moment that many cases settle at a late stage, when substantial costs have been run up. Indeed some cases which ought to settle (because sufficient common ground exists between the parties) become incapable of settlement as a result of the high costs incurred. One important aim of the Costs Review is to encourage parties to resolve such disputes.

3.2 The case management role of the courts. The courts have been instrumental in promoting ADR as a method of resolving disputes, particularly in the Technology and Construction Court ("TCC") in the context of engineering and construction disputes. The pre-action protocols draw attention appropriately to ADR and the courts have adopted and, under the Cost review will be encouraged to take, a pro-active approach to case management of claims. For instance, in the TCC when a claim is commenced and the other party has responded to it, the court holds a first case management conference with both parties so as to set out a timetable for the necessary steps to reach a hearing of the dispute at the earliest practicable

date. At that case management conference the court reviews what steps the parties have taken and propose to take to seek to resolve the dispute by ADR. The court can direct the parties to meet and/or to discuss mediation; (c) to require an explanation from the party which declines to mediate, such explanation not to be revealed to the court until the conclusion of the case; and (d) to penalise in costs parties which have unreasonably refused to mediate.

3.3 Whilst the main role of the court is to deal with and finally determine disputes in accordance with the Civil Procedure Rules, the court also has an important role in ensuring that the parties consider ADR and are kept to any contractual regime of ADR. This means that the court might stay proceedings in order to allow the parties to undertake an agreed form of ADR or it might make declarations as to rights and obligations in relation to ADR provisions or, in the end, it may assist by enforcing any result of the ADR process.

3.4 The role in encouraging ADR by making costs orders. The courts also give practical encouragement to parties to use ADR by imposing adverse costs rulings if a party unreasonably refuses to undertake ADR. Whilst a party may have good reason for not pursuing ADR, the general principle is that the parties should attempt to resolve their dispute by ADR. The courts have thus chosen encouragement to persuade parties to use mediation rather than forcing parties to do so by making an order that the parties should mediate.

3.5 The route taken in the courts was one of imposing cost sanctions on parties who unreasonably refused to mediate. The form of any costs penalty must be in the discretion of the court. However, such penalties might include (a) reduced costs recovery for a winning party; (b) indemnity costs against a losing party, alternatively reduced costs protection for a losing party which has the benefit of qualified one way costs shifting. This approach was given effect by decisions of the Court of Appeal, in particular in Halsey[4].

3.6 The effect of this encouragement compared to a system where mediation was merely made available and optional has been summarised as follows based on published experience in this jurisdiction:

"*In many jurisdictions, the rates of voluntary usage of mediation have been low. For instance, in England's Central London County Court system in which mediation occurred only with the parties' consent, only 160 mediations took place out of the 4,500 cases in which mediation was offered. In contrast, after England introduced the Civil Procedure Rules, which empowered the courts to encourage the use of ADR (with cost sanctions), the number of commercial disputes referred for mediation increased by 141 percent.*" [5]

3.7 There may have been some criticism of the approach in Halsey from practitioners in mediation. First, whether a party acts unreasonably in refusing to mediate is only one aspect of conduct. There are parties who may decide to mediate but do so unreasonably. They might mediate merely to tick the Halsey box but abandon the mediation at an early stage, act unreasonably in the mediation or seek to mediate to obtain some tactical advantage in terms of information. Those matters cannot be referred to because they are covered by the blanket of without prejudice privilege and confidentiality.

3.8 Secondly, experienced mediators might say that the Halsey factors would not justify a refusal to mediate:

---

[4] *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002.

[5] See Dorcas Quek, Mandatory mediation: an oxymoron? Examining the feasibility of implementing a court-mandated mediation program: HYPERLINK "http://cojcr.org/vol11no2/479-510.pdf" http://cojcr.org/vol11no2/479-510.pdf .

(i)The nature of the dispute: There are no categories of case which are not capable of mediation, although there are some cases where it is reasonable not to settle in mediation.

(ii)The merits of the case: There are many cases where a party may reasonably believe that it has a watertight case but where they are settled at mediation.

(iii) Other settlement methods have been attempted: In principle this should allow the parties to refer to without prejudice negotiations to take account of settlement offers made and rejected.

(iv) The costs of the mediation would be disproportionately high: The costs of mediation are significantly less than litigation, although it must be accepted that those costs may be wasted if the mediation fails.

(v) Delay: Whilst late mediation is to be avoided, it should not delay any trial.

(vi) Whether mediation has a reasonable prospect: Experience shows that many mediations have a reasonable prospect of settling, regardless of the initial attitude of the parties, but whether they will settle is a matter for agreement between the parties.

3.9 Whilst those criticisms may be made they have proved irrelevant. In the event Halsey was considered in a decreasing number of cases after 2005 because, together with a changing climate where an offer to mediate was no longer seen as a weakness, it changed the attitude of litigators. Once an offer to mediate was made, if the other side did not respond with a Halsey letter setting out why, by reference to each heading it declined to mediate, it was met by a Halsey letter pointing out, again by reference to each heading, that it was unreasonably refusing to mediate. As a result, there are now few cases where the Halsey argument needs to be dealt with when costs are dealt with. One recent such case, however, which merits careful study is *PGF II SA v OMFS Company* [2012] EWHC 83 (TCC). In that case the defendant unreasonably rejected an offer to mediate and was penalised in costs. Although the defendant had made a Part 36 offer which the claimant failed to beat, the defendant did not recover any costs in respect of the period after the expiry of that offer.

3.10 The courts as providers of ADR. The courts not only encourage parties to seek to resolve their disputes outside the courts by ADR, but also provide means of ADR within the context of litigation. The Commercial Court and the TCC both provide forms of Early Neutral Evaluation by which parties may seek an evaluation by a judge which is confidential and not disclosed outside the parties. The evaluation may be on the whole dispute or on the meaning of a term of a contract or on rival contentions in the expert evidence. In the context of family, employment, construction and other disputes, a judge may become involved in the role of a neutral or mediator. For instance in the TCC there is a process known as the Court Settlement Process under which a judge is appointed to conduct what is, in effect, a mediation.

3.11 Court of Appeal Mediation Scheme. One mediation scheme which should be specifically mentioned is the Court of Appeal Mediation Scheme ("CAMS"). It is sometimes suggested that mediation has no place once a case is going to the Court of Appeal, but this is not correct. If permission to appeal ("PTA") has been given, that implies that the appeal has a reasonable prospect of success. This means that all parties (including the successful party below) face a degree of risk. The judge granting PTA may recommend that the parties use CAMS or the parties may do so of their own volition. Requests to use CAMS should be made through the Civil Appeals Office, but the administration of CAMS is handled by CEDR Solve.

3.12 CAMS pilot. From April this year a pilot scheme is due to be operated, under which all appeals (for which PTA has been granted) in personal injury, clinical negligence and contractual claims where no more than £100,000 is at stake will automatically be referred to

CAMS. The only exception will be where the judge granting PTA notifies the Court of Appeal Office that the appeal is not suitable for CAMS. Once the appeal has been referred to CAMS, CEDR Solve will contact the parties and invite them to participate in a mediation.

4. METHODS OF RESOLVING DISPUTES

4.1 The construction industry has been in the forefront of resolving disputes by ADR and I shall consider seven methods, other than the courts or arbitration, which reflect the breadth of such methods.

4.2 Dispute Avoidance. There has been a general realisation that disputes should be resolved before they escalate. This has led to parties using forms of contract which place greater emphasis on the proper management of contracts and the early identification of issues which arise. An example is the New Engineering and Construction Contract, NEC3. Essentially, these contracts have an early warning system, leading to discussions and shared information which can then allow the "issue" to be dealt with so that no dispute arises. Currently a good example of this approach is the 2012 Independent Dispute Avoidance Panel which is in place to avoid disputes occurring on the project for the Olympic Games in London in 2012. The TCC judges have agreed to assist in this process. It has been observed that the cost of managing projects on this basis can be large but this has to be balanced against the cost incurred by disputes.

4.3 Negotiation. In the financial crisis parties have shown themselves more willing to enter into negotiations to try to agree a common approach. For instance owners in financial difficulty are now often able to negotiate rescheduled payments or rescheduled projects with contractors to cover periods of financial difficulty in the recession, thereby avoiding an escalation of any dispute. The importance of negotiation as a means of resolving disputes has been recognised in the survey carried out by King's College London in conjunction with the TCC ("the KCL/TCC Survey").[6] This has shown that negotiation is still the most common method of dispute resolution. It enables the parties to resolve problems between the parties' decision makers. One of the important aspects of negotiated settlements is the need to record the outcome and ensure that the result is enforceable.

4.4 Early Neutral Evaluation. As stated above, this is a method which allows a third party to make a non-binding decision on the whole or part of a dispute based on information provided by the parties. The use which the parties make of it will depend on what is agreed. It is very often used in conjunction with dispute avoidance or a negotiated settlement. The main decision is the choice of the person to give the evaluation. It is also necessary to decide an ad-hoc procedure and whether the decision can be referred to in subsequent dispute resolution in adjudication, court or arbitration. Some evaluations take the form of a written document based on written submissions; others provide for a hearing.

4.5 Mediation. As shown by the KCL/TCC Survey, this is the most popular method where the parties are not able to resolve the dispute by negotiation. There is a need to choose the mediator carefully and decide whether a facilitative or evaluative approach is required although experience shows that the end result is often a mixture of the two.

4.6 Conciliation. This term is often referred to as mediation with a result. In other words the mediator or conciliator provides a decision if the parties are unable to resolve the matter. It

[6] See Costs Review Preliminary Report, chapter 34, section 2. This report is on the Judiciary website http://www.judiciary.gov.uk/

has to be decided whether the decision is non-binding or conditionally binding and whether the decision can be referred to in adjudication, court or arbitration.

4.7 Dispute Review or Dispute Adjudication Boards. This may be a combination of dispute avoidance, conciliation, neutral evaluation and adjudication, as described here, but with the involvement of a project panel. The panel are appointed at the beginning of the project and visit site and hold discussions to seek to resolve disputes and give a decision. The main question is whether the decision of the board is binding, conditionally binding or temporarily binding. The cost of providing for and maintaining the board can often be a factor in deciding whether to have a board and this method is usually chosen for larger projects.

4.8 Adjudication. Many countries have now adopted or are considering adopting some form of rapid decision on disputes arising out of construction contracts, with that decision being temporarily binding, there being a later final decision by the courts or arbitration if the parties do not come to an agreement. The concept was introduced in the UK through the Housing Grants, Construction and Regeneration Act 1996. It provides for a process where the adjudicator is appointed in 7 days and he then gives a decision on the dispute, generally within 28 days.

5. THE NEED FOR ADR EDUCATION

5.1 General appreciation of the benefits of ADR. Having considered the feedback and evidence received as part of Phase 2 of the Costs Review, I accepted the following propositions:

(i) Both mediation and joint settlement meetings are highly efficacious means of achieving a satisfactory resolution of many disputes.
(ii) The benefits of mediation are not appreciated by many smaller businesses. Nor are they appreciated by the general public.
...
(iv) Although many judges, solicitors and counsel are well aware of the benefits of mediation, some are not."

5.2 Not a universal panacea. I accept that mediation is not, of course, a universal panacea. The process can be expensive and can on occasions result in failure. Whilst I accept that mediation should be undertaken in every case, mediation has a significantly greater role to play in the civil justice system than is currently recognised.

5.3 Timing of mediation. It is important that mediation is undertaken at the right time. If mediation is undertaken too early, it may be thwarted because the parties do not know enough about each other's cases. If mediation is undertaken too late, substantial costs may already have been incurred. Identifying the best stage at which to mediate is a matter upon which experienced practitioners should advise by reference to the circumstances of the individual case.

5.4 Need for culture change, not rule change. I consider that what is needed is not rule change, but culture change. I do not agree with the proposals made for sanctions, including sanctions against all parties. Nor do I agree with a proposal for "compulsion" to be exercised over judges. Judges must have discretion to give such case management directions as they deem appropriate in the circumstances of the individual case.

5.5 An ADR campaign. What is now needed is a serious campaign (a) to ensure that all litigation lawyers and judges (not just some litigation lawyers and judges) are properly

informed about the benefits which ADR can bring and (b) to alert the public and small businesses to the benefits of ADR.

5.6 Need for a single authoritative handbook. I concluded that one of the problems at the moment is that information about ADR is fragmented. Whilst the MoJ and HMCTS provide useful information, in my view, there needed to be a single authoritative handbook, explaining clearly and concisely what ADR is (without either "hype" or jargon) and giving details of all reputable providers of mediation. Because of the competing commercial interests in play, it would be helpful if such a handbook were published by a neutral body. I am pleased to say that under the editorial guidance of Lord Clarke of Stone-cum-Ebony, steps are now being taken by an editorial team to publish a book in April 2013 under the aegis of OUP. The book will become, I have no doubt, the respected handbook of ADR and, in due course, most judges and litigators would have on their bookshelves.
