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Commentary on mediation

Is mediation getting on the nose? Are the judges killing mediation?

Geoffrey Gibson

For the last 10 years or so mediation has been embraced by the courts. Has the absorption of mediation into the court process put mediation itself in peril?

There are at least two ways in which this could happen.

First, conflicts are to be determined either by an order of the court or by the agreement of the parties. It is obvious that a court cannot order the parties to agree. But the courts are increasingly giving the impression that they control the mediation process. Having embraced mediation, the courts now order parties to go to it. A court ordered mediation is, for some, a contradiction in terms. If a partner approaches you for the first dance at a ball, it is likely to take some of the romance out of the meeting if you are told that they are doing so in response to an

in a vastly complicated and expensive process; a phase to be endured, like the rest – pleadings, discovery, interrogation, witness statements and the whole disaster. It is another thing that we have to undergo to humour the court and get a trial date, because we will not get a trial date until we are seen to have exhausted this process.

It may be that we find it increasingly difficult to get the parties in a simple business-like frame of mind – I am for the most part talking of commercial litigation in the County Court or Supreme Court – when the meeting is held under the aegis of the court, and where the lawyers far outnumber the business people. You almost never have any confidence that the real message is getting through to the real source of power, although you are quite confident that the legal

issues being discussed by the lawyers have almost nothing to do with the matters that count for those who run the business.

Trying to run a voluntary mediation in the context of an imperative order of the court is a little like trying to sustain the teachings of an anti-establishment religious figure in a church which is, if nothing else, profoundly establishment. It gets worse when the court orders the mediator to report back to

the court. Putting to one side issues of privity, it is not appropriate for a mediator to be seen as a functionary of the court. The reporting, which should never be more than that the case is proceeding or not proceeding, should be left to the parties. You cannot be the answer that comes from above – the *deus ex machina* – if you are just another cog in the machine

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order from a superior.

Nowadays it is common to see in either the County Court or the Supreme Court – and it will be just a matter of time before the Magistrates' Court catches up – orders for directions that run for pages. Two or three of perhaps 20 or 30 directions may relate to the mediation. Mediation is seen as just another step

down here, or, to change the metaphor, if you are a puppet dancing to different strings.

There is another problem deriving from the place in the sequence in which the court puts the mediation. Most cases settle, as they always have. Previously they generally settled at the door of the court — that is, when people were looking at bare steel, a demand for more costs for the trial, and where their minds were well and truly focused for the reasons given long ago by Dr Johnson. Although the parties have already spent a fortune to get to the point of mediation now, they are not yet facing execution the next morning. There is not the same threat or pressure upon them. I am increasingly given the impression that people are, consciously or otherwise, arriving at mediation on the footing that they need not be terribly worried about settling now, because there will be a chance later on closer to the trial, and in the meantime the pressure will increase on the other side (who are weaker than us). I have noticed a small pattern in commercial cases recently where the defendants have turned up (and I am not talking about professional litigants like insurers) saying there is no money for the plaintiff, and maintaining that position throughout a mediation which was therefore little more than a formality, when it was obvious to anyone involved in the mediation that the probabilities were overwhelmingly that for good commercial reasons the matter would never proceed through to judgment. Parties do not have the luxury of that kind of brinkmanship, or perhaps just laziness, if the trial is starting the next day.

On the other hand, if mediations are going to be set down when most of the interlocutory steps have been taken under the direction of the court, the parties have already spent a fortune. There may of course be an unconscious need on the part of some lawyers not to derail the gravy train

too early, but do we really believe that business people in a dispute need to go through all of the hoops that we set up for them by way of pleadings and discovery and so forth before they can be in a position to come to a commercial resolution of their dispute?

The issue is revealed in the practice of some mediators charging reading

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fees. Just how much of the legal minutiae of a case do you have to know before you can try to help the parties come to a commercial resolution? At the other end, there are position statements. Why borrow from the adversarial system to get the parties to dig their own trenches as if they were settling in for a battle rather than peace talks?

These things need to be observed and discussed lest the alternatives to dispute resolution by the courts become nothing more than just another formal part of dispute resolution by the courts. Just as the court cannot order parties to settle, so the mediator cannot satisfactorily determine the authority of representatives to settle. It follows that the courts can neither dictate nor control the process and should, so far as possible, stay out of it. ●

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