ADR Bulletin
ADR Bulletin

Volume 7 | Number 7 Article 2

2-1-2005

The practicalities of mediation in the Supreme Court of Western Australia

Ralph Simmonds

Recommended Citation
Simmonds, Ralph (2005) "The practicalities of mediation in the Supreme Court of Western Australia," *ADR Bulletin*: Vol. 7: No. 7, Article 2.
Available at: http://epublications.bond.edu.au/adr/vol7/iss7/2

This Article is brought to you by ePublications@bond. It has been accepted for inclusion in ADR Bulletin by an authorized administrator of ePublications@bond. For more information, please contact Bond University's Repository Coordinator.

The state of play in WA

The practicalities of mediation in the Supreme Court of Western Australia

Hon Justice Ralph Simmonds

Introduction

An earlier version of this article was prepared for delivery at the 2004 Annual General Meeting of the Western Australian Dispute Resolution Association Incorporated, at Murdoch University, on 6 October 2004, and has benefited from comments made in the discussion and other exchanges that ensued. This article concerns one of the central elements of modern civil procedure, at least in this country. Whether to play a part in the process of modern case management (to ensure that only the real issues take up trial time) or as a way of facilitating resolution of the parties' dispute (to avoid the need for a trial, or to put an end to one), court-annexed pre-judgment mediation is a fixture of courts such as the Supreme Court of Western Australia.

There is an elaborate framework, in legislation and rules, to accommodate the process, and in particular to protect the mediator. There is a significant investment of court resources (in our trained registrars) in this form of mediation. There is an emerging body of practical experience in our Court about how to get the most out of the investment in it. And there is heartening, if not completely incontestable, data pointing to worthwhile returns from it. This article touches on all of these, and seeks to address the practical aspects of mediation that the experience in this Court has shown. It builds on a paper by Chief Justice Malcolm for NADRAC in Perth 2002 and published in the *ADR Bulletin* which provides the history of court-annexed mediation in the Court, and assesses its impact.

But first I should say what this article is not. It is not about mediation for cases where an appeal has been initiated after trial. A number of Australian courts, such as the New South Wales Court of Appeal, do have mediation processes for such cases. However, this Court has no equivalent experience of such mediations, at least at present, although our Court has been encouraging parties to have their appeals mediated for a number of years, with occasional success. It is noteworthy that the judges of appeal in this State's new Court of Appeal have announced in the Court's first Circular to Practitioners on Arrangements in the Court that they 'actively encourage parties to an appeal to consider mediation as a means of achieving a final resolution to their dispute', and that 'any party who is interested in participating in a mediation of that appeal should contact the Court of Appeal Registrar'.

Also, this article is not by someone who conducts mediations. Before joining the Court I did indeed have a strong interest in ADR, stimulated by the rich literature, principally (I must say) of its enthusiasts, and more recently by its not unsympathetic sceptics. A most useful recent publication of the latter sort, in which (before my appointment in February) I would have taken an academic interest, is a rightly praised monograph by Professor Kathy Mack.[1] Now I have the chance to observe the process from a closer vantage point.

Most importantly, I have access to the people who do mediations for the Court, and in this paper I have drawn on discussions of their experience I have had with some of them, and comments on earlier versions of this paper from those and others. I have particularly benefited from a paper by Registrar

Published by ePublications@bond, 2005

Sandra Boyle prepared for a Law Society of Western Australian Continuing Legal Education Seminar.[2]

I must acknowledge, however, that judges in my Court don't do mediations – at least not formally. (I believe some of what we do, such as acceding readily to requests to delay hearing starts, or adjournments, or, by contrast, pressing parties hard to trial, is in fact in a similar vein, consciously calculated to enhance the prospects of settlement. But that is not mediation, and reporting on it is for another day.) I note that there has been recent judicial acknowledgement of the value of referrals to experienced mediators in the judgment of Branson J of the Federal Court in *Hopeshore Pty Limited v Melroad Equipment* (2004) 51 ACSR 259 at [32], which sets out a view I share.

Further, I do not deal to any extent with what happens when the Court refers matters to persons *other than* registrars, under its facility to do so. There may be very good reasons in particular cases for such referrals. I do not explore such reasons here.

This article is also not about forms of ADR other than mediation that courts *might* use. I am thinking here of conciliation, counselling and arbitration. We do of course use something resembling the last under our powers to send matters to assessors, referees and arbitrators, although there are also important differences.[3]

There is, however (so far as I am aware), no significant use of conciliation or counselling in our court: the contrast is of course with the Family Court of Western Australia.

The framework for court referral to mediation

There is an elaborate framework for court referral to mediation. I have set it out as an appendix to this article, which reproduces Part VI of the Act, and O 29 rr 2 and 3 (edited), as well as O 29A rr 3, 6, 7 and 8 and O 43 r 16 (also edited). The Chief Justice's paper provides the history of this framework, of which four aspects are worthy of note.

First, the Act was recently amended to enhance protections for mediators after case-law had revealed some causes for concern.[4] Those causes had to do with the compellability of mediators to give evidence about the conduct of the mediation, with its potential to chill the sort of exchange that mediation typically requires.[5]

Second, as O 29 R 2 clearly indicates, mediation is not restricted to resolution of the parties' dispute, but can include, for example, mediation of the differences between experts with a view to narrowing the points of difference between them.[6]

Third, the Court does not need to refer the matter to mediation before a registrar – but the advantage of one is that the parties do not have to pay fees for them, and there are also some less obvious ones, returned to below.[7] There are indeed referrals to other mediators that the parties consent to pay. The focus here is on mediation through a registrar.

Fourth and finally, as O 29 R 3(1)(b) makes very clear, *both* the parties *and* their legal representatives are to attend the mediation session (subject to any directions). That common attendance is very important, as appears below.

The conduct of mediation by registrars — and the lessons of their experience

Here I want to take you through the process, in the order in which it plays out. I also want to draw out the major lessons our registrars tell me they have learnt.

Referrals

This can be by a registrar, as part of a case management order in one of the conferences that case management involves under O 29A, or it may be by a judge or master, towards the very end of that process, which is when, in our Court, a judge or master becomes involved in case management. It is very rare that a judge will order mediation during a trial, although it seems clear that there is authority to do so.

An example is a referral during a trial, but by a judge of the District Court.[8]

In that case the trial judge had exercised his powers of referral under O 29 R 2(q), after hearing evidence from the plaintiff. Subsequently it appeared that the judge had met with the Deputy Registrar appointed as

mediator. The mediator conveyed his view to the parties at the mediation that the trial judge had formed a view of the case. The Full Court overturned the judgment, on the basis of reasonable apprehension of bias – surely a most unfortunate outcome for an attempted mediation.

An important advantage of referrals from our registrars' experience seems to lie in the fact that (if the matter is done differently from *Ruffles)* neither side has had to propose it, or press for it to occur. This is altogether apart from the relative cheapness and ease of arrangement represented by such mediation. The first mentioned aspect saves any 'loss of face' or bargaining disadvantage. Certainly, the research shows that there is no clear-cut *disadvantage*, in terms of settlement rates, of referrals over voluntary entry into mediation. Rather, there are mixed results shown by the studies so far.[9]

Mediations on referrals after litigation has commenced seem to have another advantage over earlier mediations. They occur against a backdrop of the parties focusing on major points of difference between them and some demonstration of their preparedness to commit resources to a resolution. Mediations by a registrar in such a setting carry with them some of the authority of the Court that parties may have sought through their initiation of proceedings. The experience is that their position appears to assist the registrars in managing the difficult exchanges that can occur in mediations.

Of course, by the time litigation has begun attitudes might have become too entrenched, and investments in an adjudicated outcome too large, to make a successful pre-trial mediation possible. But the very high overall rates of discontinuance of litigation – in most courts, at least 90 per cent of civil cases begun – seem to indicate that in *all* civil litigation settlement is always possible, if only to avoid unnecessary and ultimately fruitless expenditures on litigated outcomes that may never materialise, because the money and the effort run out.

Referrals can occur both shortly after the writ is lodged and served, and much later, as trial looms. Early referrals make sense where extensive case development will only further harden attitudes, and where it is not necessary to a compromise to make finer-grained assessments of the case. Inheritance matters are frequently mentioned in this connection. At the other extreme, late referrals make sense in more complex matters where the parties are less heavily invested, at least attitudinally, in a particular position, but the matters in dispute needed that further development.

However, it also fair to say that referrals make the least sense *at any stage* in cases which combine irreducible limitations on the ability of one party to participate effectively, no authority in another party to settle the matter, a public interest in a binding determination of the issues, intense conflict over what are seen as the case's issues of principle, and unsupportive legal representatives. Yet even here mediated outcomes are not impossible!

Preparing for the mediation

Our registrars' experience is that this is a critical issue. Preparation is too often not done well. It is also peculiarly the responsibility of each party's legal representatives. Preparation has three aspects.

One is the lawyer's sensible assessment of the strengths and weaknesses of the party's case. This is largely, if not entirely, reducible to knowing the file, and in practice it is not where the difficulties tend to lie. Rather, the presentation shortfalls lie in another aspect of preparation for mediation: that of the lawyer preparing the client (and themselves) for the mediation process itself. This involves helping everyone appreciate the possibilities for compromise.

A lawyer heading towards litigation preparing a client for compromise may seem an odd idea. The oddity is more apparent than real. Proper preparation for litigation involves a *changing* assessment, of both the *realistic* prospects for success, and the *practicalities* (cost, time, and fall-out) of the litigation process. In this sense, it is an aspect of knowing the file. But it is a *particular* aspect of it, because preparing a client for mediation should be a matter of the lawyer's *sharp* focus on the *downsides*, and a *sharing* of the fruits of that reflection with the client.

Published by ePublications@bond, 2005

It is not to persuade the client to settle on just about any facially plausible proposal. It is rather to help the client appreciate the need for openness to the possibilities for compromise.

The preparation that is to help the client reach that appreciation cannot be restricted to the issues that are relevant to the litigation. The legal representatives must also undertake a careful and insightful analysis of the client's interests, as well as those of the opponent. Clients (even apparently sophisticated ones) will not necessarily have undertaken that analysis.

Appreciating the need for openness to possibilities for compromise involves the client having thought about what sort of compromise they would be prepared to put forward and testing it as Registrar Sandra Boyle suggests. If the person commending the compromise imagined themselves as the other party receiving it, what would be their reaction? As Registrar Boyle also indicates, that appreciation also requires the client to recognise that a better compromise might in fact come from the other party, or from the mediator.

There is a third aspect to preparation. It stems from the involvement of the legal representative, and is their responsibility. It is to work with the client on a strategy for the mediation that encourages the client to participate, for example, in a joint opening. The opening, it must be stressed, is not for the benefit of the mediator and should not be directed to him or her as if he or she were a judge listening to opening submissions on the first day of trial. Rather, the opening should be directed to the other side. The mediation is not about a contest between or even directed by the legal representatives. It is an exploration of the ground for compromise, if there is such ground, using the particular contributions the legal representatives and the client can bring to that exploration. Overall, this third aspect emphasises that the mediation is about the client's indispensable involvement in the process.

The work on the design of a strategy has a further benefit for the legal representative. It reminds them that the mediation session is as much of a commitment of time and energy as a trial – even if a mediation is much shorter than most trials (at least in the Supreme Court, where the average length of a trial is now five days). Mediations before our Registrars typically begin at 10.30am and often run all day until 4.15pm. Those beginning in the afternoon, at 2.15pm, may well run into the late evening, say until 10pm. Further, the registrars may see the appropriateness of a further conference where a solution is beginning to emerge but requires more time to develop and be accepted.

The mediation itself

Registrar Sandra Boyle reports that she begins each of her mediations by saying:

> This Court takes the view that if a dispute is capable of being settled the Court will make every effort to help you settle it.

This leads into the conduct of the mediation which is in accordance with the well understood 'diamond' model. It has implications for the way mediation conferences are listed and the insistence (captured in the rules) on the personal attendances of the parties.

According to the 'diamond' model the parties present their opening statements (through their legal representatives, and themselves) at the apex of the diamond. This is followed by the discussion of the issues and the possibilities for compromise. The model's process concludes with a convergence on the strongest possibilities for compromise.

The broad plane of the model's process is the discussion of the issues and the possibilities for compromise, which will occur with everyone present, and in caucus sessions by each side with the mediator, who shuttles between the sessions. The involvement of the registrar as mediator is continuous, and must be to be of value.

The registrars report that good legal representation manifests in its measured empathetic advocacy, which reassures the other side it is being understood, communicates clearly and simply the represented party's interests, and manages the hostility that preparation for litigation will not have helped.

At the same time, the legal representative is not the only person on their side who is involved, nor even are they necessarily the most important

advocate. The client's presence and involvement are crucial – indeed both are *required* in most cases. Most importantly, there should be an authority to settle present or readily to hand, if the process is to have the best chance of working as it should.

The solution that emerges from the diamond model's process will ideally be one that is well understood, and is accepted voluntarily by all sides, as something with which they can go forward with satisfaction. A solution satisfying to the parties in this sense is the 'gold standard', and is something more than is necessary to withstand judicial review.[10] But it is the standard for mediations in our Court and to which the Court aspires.

It is sometimes said that at worst the mediation in which the parties sought unsuccessfully to resolve their underlying dispute will have clarified the issues for their litigation. This, however, seems to be false to the classical model of mediation, as being about the parties' interests, and not their issues. A better identification, and narrowing, of the issues may indeed result. But having such identification and narrowing as an aim going into mediation would seem to be unhelpful, and that seems to be the experience. Such an aim would, however, be of the essence of other forms of mediation, such as that between experts, to which I have already referred.

The upshot of the mediation

Following a successful mediation, another of the advantages of mediation by our registrars may emerge. This is their ability to make an order with immediate enforceable effect.[11] But there are other possibilities.

Often the parties do not want to have the disclosure on the record of the sort an O 43 R 16(2) order represents. Also what the parties have agreed may not readily be captured in an order, as where an inheritance dispute is settled by one beneficiary taking everything, but sharing the benefits with another claimant. And the mediation may not issue a crisp solution in any event, but rather the outline of the basis for one.

In the sorts of situation just described, the mediation may conclude in heads of agreement being decided upon, and the legal representatives going away to work on drafts of a deed of compromise. This has all the flexibility of a good agreement. It also offers confidentiality. As far as the Court is concerned, the conclusion of the deed will result in the parties consenting to an order that the action be dismissed, with no order as to costs. There may be a record of the compromise kept at the Court, but in a confidential form, in a sealed envelope. In all of this, the mediator, as we have seen, is a competent but not compellable witness.

What form of mediation is this?

The process I have described, from the experience of the registrars on which I have drawn, is a robust form of mediation. By this I mean that the registrars directly invite the parties to consider their alternatives. If necessary, the registrar will suggest options for the parties to consider. This necessity may arise where the registrar perceives that the parties have not put forward possible options, but also arise because an option may only be perceived as possible by the parties if it has not been suggested by either party, but by the registrar. In either case, if an option is suggested by the registrar, care is taken to put the option in a way that does not constitute a recommendation. The usual formula is to put the option as a question: 'Would it work to do …?'

While it is possible to debate whether or not this is mediation in the 'classic' sense, it may at least fit within the terms of one widely used typology of mediation described by Professor Boulle.[12] In those terms, the model being employed by the registrars would appear to be 'settlement mediation'.

Assessing our experience (whether it is 'a good thing')

Assessing whether any mediation, and in particular provision for court-annexed mediation of the type I have described, is worthwhile is a rather more difficult exercise than it might seem. There is extensive literature to this effect.[13]

In particular, one must be careful about determining value from 'success rates'. There are comparison problems with unmediated settlements that might have occurred anyway, and with litigation itself, where that might have produced, from the standpoint of society

at large, a superior outcome.

It is undoubtedly true, on the literature Professor Mack refers to, that mediation of the sort our Court provides is associated with high client satisfaction. But, to repeat, the issue is, 'compared with what?'

That said the base data from our Court is impressive. This shows that case management, particularly in the form developed by 1996, has been followed by a significant reduction in the rate of entry of cases for trial. The rate has changed, for the period 1992 to 1996, from a high of 9.24 per cent (1993) and a low of 5.37 per cent (1996) to the latest figures, for the period 1999 to 2003 (ignoring the transition period under new rules), of a high of 3.93 per cent (1999) to a low of 3.13 per cent (2003). (These figures appear to be of the same order as the corresponding figures, and at the lower end of the comparable ranges, for other Australian courts.)

This of course may not be due to court-annexed mediation. In fact, as far as I can tell, only about 400 cases annually in recent years have been referred to mediation, whereas the number of new cases commenced each year has been about 1600, many of which would of course continue for some time before court-annexed mediation would be directed, but many of which would cease before any question of mediation arose. However, the settlement rate for court-annexed mediation in this Court has been put at about 60 per cent, which is in line with data from other courts, and is impressive, and suggestive.

It is almost certainly a significant underestimate of mediation's effect, however, given the contribution an unsuccessful court-annexed mediation can make to a much later settlement, and the incidence of (voluntary) mediation in cases other than the 400 or so, including mediation stimulated by (but not ordered under) the case management process as that is described by the extracts from Order 29A below (see Appendix).

It seems likely that the percentage of cases that have not undergone some form of mediation before trial is quite small. However, it should also be noted that all of the data given above are approximations, as precise, entirely reliable statistics are not available in this as in many other areas of court administration.

Further, there is the confounding problem of the emphasis in our Court on case management having accompanied large scale blow-outs in case loads and delays in producing litigated results. The blow-outs and delays and the publicity they have received may have produced self-help solutions other than those the Court encouraged, but with the same effects. But data of the sort I have referred to for this Court do not seem likely to be an artefact of a coincidence of market-generated solutions with a court-generated response to the same problems. The Court appears to have been very well served by the response the court crafted, including its court-annexed mediation.

To repeat, the research does show that mediation of the sort our Court provides is associated with high client satisfaction. This is not all there is to a modern system of civil procedure, but it is indispensable to the enterprise.

There is, however, a further issue that is harder to address. That is, why court-annexed mediation of the sort I have described has had the success I have indicated. Certainly, court compulsion to mediate, and the involvement of a court officer as a mediator, would, on the literature Professor Mack refers to,[14] appear to have significance, even if this is hard to quantify. However, there does not appear to be empirical data which would readily permit us to assign relative weights to those factors, or to others, such as court-annexed mediation's relative cost and ease of arrangement, let alone to make finer grained determinations to permit comparisons of the contributions made by different ways in which court-annexed mediations might be approached. There would appear to be a fertile field for research in this area which would be of great interest to courts like my own. ●

The Honourable Justice Ralph Simmonds is a judge of the Supreme Court of Western Australia and can be contacted at Supreme Court of Western Australia, Stirling Gardens, Barrack St, Perth, WA 6000.

Endnotes

1. Mack K Court *Referral to ADR: Criteria and Research* (2003).
2. Boyle S *Experiences of Mediation in the Supreme Court: What Salome was Hiding* (2000).
3. See *Supreme Court Act 1935* (WA) ss 50-52, and O 35.
4. See *Supreme Court Act 1935* (WA) s 71(4).
5. For the position before the change see *WJ Green & Co v Wilden*, Library No 970186, 1996, Parker J.
6. See O 29 R 2(s), and the common form of order as to expert evidence in Common Form 80, on which see Seaman P, *Civil Procedure Western Australia*, [29.3.2] and [31A.14.2].
7. See O 29 R 2(ra) and O 29A r 3(2)(k).
8. See *Ruffles v Chilman*, Library 9702464, 1997, Full Court.
9. Above note 1, p 4.
10. See *Pittorino v Meynert* [2002] WASC 76.
11. See O 46 R 16(2).
12. Most usefully summarised in Professor Mack's monograph, see above note 1.
13. Boulle L *Mediation: Principles, Process, Practice*, 1996, Butterworths, pp 28-30 read with 53.
14. See above note 1.

Appendix: the Framework for Mediation in the Supreme Court

Supreme Court Act 1935

69. Interpretation

In this Part, unless the contrary intention appears –

"**mediation under direction**" means mediation carried out by a mediator under a direction of the Court under and subject to the Rules of Court;

"**mediator**" means –

(a) a Registrar appointed by the Chief Justice to be a Mediation Registrar under the Rules of Court;

(b) a person approved by the Chief Justice to be a mediator under the Rules of Court; or

(c) a person agreed by the parties.

[Section 69 inserted by No 27 of 2000 s 18.]

70. Protection of mediator

A mediator carrying out mediation under direction has the same privileges and immunities as a Judge of the Court has in the performance of judicial duties as a Judge.

[Section 70 inserted by No. 27 of 2000 s 18]

71. Privilege

(1) Subject to subsection (3), evidence of –

(a) anything said or done;

(b) any communication, whether oral or in writing; or

(c) any admission made,

in the course of or for the purposes of an attempt to settle a proceeding by mediation under direction is to be taken to be in confidence and is not admissible in any proceedings before any court, tribunal or body.

(2) Subject to subsection (3) –

(a) any document prepared in the course of or for the purposes of an attempt to settle a proceeding by mediation under direction;

(b) any copy of such a document; or

(c) evidence of any such document,

is to be taken to be subject to a duty of confidence and is not admissible in any proceedings before any court, tribunal or body.

(3) Subsections (1) and (2) do not affect the admissibility of any evidence or document in proceedings if –

(a) the parties to the mediation consent to the admission of the evidence or document in the proceedings;

(b) there is a dispute in the proceedings as to whether or not the parties to the mediation entered into a binding agreement settling all or any of their differences and the evidence or document is relevant to that issue;

(c) the proceedings relate to a costs application and, under the Rules of Court, the evidence or

Published by ePublications@bond, 2005

document is admissible for the purposes of determining any question of costs; or

(d) the proceedings relate to any act or omission in connection with which a disclosure has been made under section 72(2)(c).

(4) A mediator cannot be compelled to give evidence of anything referred to in subsection (1) or (2) or to produce a document or a copy of a document referred to in subsection (2) except -

(a) in proceedings referred to in subsection (3)(d); or

(b) in proceedings relating to a costs application where there is a dispute as to a fact stated or a conclusion reached in a mediator's report prepared under the Rules of Court on the failure of a party to cooperate in the mediation and the evidence or document is relevant to that issue.

(5) In subsections (3) and (4) – "**costs application**" means an application for the costs of the mediation or of the proceedings to which mediation relates.

[Section 71 inserted by No 27 of 2000 s 18]

72. Confidentiality

(1) Subject to subsection (2), a mediator must not disclose any information obtained in the course of or for the purpose of carrying out mediation under direction.

(2) Subsection (1) does not apply if –

(a) the disclosure is made for the purpose of reporting under the Rules of Court on any failure of a party to cooperate in a mediation;

(b) the disclosure is made with the consent of the parties;

(c) there are reasonable grounds to believe that the disclosure is necessary to prevent or minimize the danger of injury to any person or damage to any property; or

(d) the disclosure is authorised by law or the disclosure is required by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.

[Section 72 inserted by No 27 of 2000 s 18]

Rules of the Supreme Court Order 29 – Case Flow Management: Powers of the Court

…

2. Court may review any case

(1) In any proceedings the Court may at any time of its own motion on notice to the parties or upon the hearing of a summons for directions or other application review the progress of the proceedings and make such orders or give such directions to lead to their efficient and timely disposal as it may consider just and expedient and, without limiting the generality of that power, may –

(q) on any terms suitable, direct at any time that the parties confer on a "without prejudice" basis for the purpose of resolving or narrowing the points of difference between them;

(r) direct that a –

(i) Registrar appointed by the Chief Justice to be the Mediation Registrar; or

(ii) person approved by the Chief Justice to be a mediator,

may conduct the conference;

(ra) in relation to a conference conducted by a mediator, give such directions as it considers just and expedient but shall not, without consent of the parties, direct that a conference take place where a party would become liable to remunerate a mediator;

(s) direct that experts, whose reports have been exchanged pursuant to Order 36A consult on a "without prejudice" basis, for the purpose of

narrowing any points of difference between the experts and identifying any remaining points of difference; and

…

(2) A direction that parties attend a mediation conference does not operate as a stay of proceedings, unless otherwise ordered.

3. Mediation conferences

(1) In the absence of any other order –

(a) mediation conferences will take place at the time and place as directed;

(aa) each party shall, subject to any directions, take such steps as may be necessary to ensure that the mediation conference occurs as soon as possible;

(b) each party shall attend the conference or if a party is not a natural person, a representative of that party familiar with the substance of the litigation and with authority to compromise it, and the solicitor or counsel, if any, representing each party;

(ba) each party's costs of and incidental to a mediation conference shall be the party's costs in the cause, unless it is ordered otherwise or the parties agree; but a party may apply for those costs if they have been unnecessarily incurred due to the conduct of the other party;

(bb) the fees and expenses of any mediator who is not a Mediation Registrar shall be paid by the parties in equal shares, unless it is ordered otherwise or the parties agree;

(c) within 2 weeks after the conclusion of the conference, the plaintiff shall lodge with the Court a report, signed by or on behalf of each party –

(i) confirming that the conference has occurred as directed; and

(ii) recording the substance of any resolution or narrowing of the points of difference between the parties resulting from the conference.

(2) A Mediation Registrar or a mediator –

(a) shall not, unless the parties agree, report to the Court on a mediation conference;

(b) whether or not the parties agree, may report to the Court on any failure by a party to cooperate in a mediation conference; but the report shall not be disclosed to the trial judge except for the purposes of determining any question as to costs.

[Rule 3 inserted in Gazette 26 March 1993 p1843; amended in Gazette 20 April 1993 p 2104; 28 October 1996 pp 5682-3.]

Order 43 Drawing Up Judgments and Orders

…

16. Consent orders

(1) The parties to proceedings or their solicitors may file a written consent to the making of an order in those proceedings …

(2) Upon the written consent being filed, the Registrar may settle, sign and seal the order without any other application being made in any case in which in his opinion the Court would make such an order upon consent of the parties or may bring the matter before the Court which may, if it thinks fit and without any other application being made, direct the Registrar to settle, sign, and seal the order in accordance with the terms of consent.

(3) The order shall state that it is made by consent and shall be of the same force and validity as if it had been made after a hearing by the Court.

[Rule 16 inserted in Gazette 3 October 1975 p 3769; amended in Gazette 26 March 1993 p 1845; 28 October 1996 p 5699.]