MASTER OF THE ROLLS

LORD CLARKE OF STONE-CUM-EBONY, MASTER OF THE ROLLS

MEDIATION – AN INTEGRAL PART OF OUR LITIGATION CULTURE

LITTLETON CHAMBERS ANNUAL MEDIATION EVENING

GRAY'S INN, 08 JUNE 2009

Introduction

1. Good evening. It is a great pleasure to be here at your annual mediation evening and to have been asked to say a few words about mediation. As you may have guessed, I have covered some of this ground before, not least at last year's annual Civil Mediation Council annual conference at Birmingham, egged on by Henry Brooke. I then examined amongst other things, the Court of Appeal's decision in *Halsey*. Much has been written and said about it and you will no doubt be relieved to hear that I do not intend to go back over it this evening, except to say that I have not changed the view I expressed about it at Birmingham. Philip Bartle features it in his paper for this evening.

2. Instead I want to focus on the relationship between mediation and litigation, although before doing so I will very briefly summarise the main conclusions I set out in Birmingham. They are:

    1) Mediation is a good thing because it helps to engender settlement and only a fool does not want to settle.
    2) The courts should encourage it.

3) Mediation should not be permitted to give rise to satellite litigation because satellite litigation is one of the evils of civil litigation, as the years of wasted time and cost involved in applications to strike out for want of prosecution show.
4) The courts may well have the power under the CPR as they stand to direct mediation.
5) The reason why mediation is not used as much as it might be (if it is not) is lack of education. What is required is education of judges, lawyers (both solicitors and barristers) and, perhaps most important, repeat clients such as .liability underwriters. Put another way: education, education, education.

3. I also expressed the view that mediation and ADR are *part* of the civil procedure process. Thus, as I see it, mediation too is an integral part of litigation, and not simply ancillary to it. Many would say, echoing Jane Austen's famous comment about single men and large fortunes, that it is, or at least should be, a truth universally known that mediation is and must play a fundamental and integral role in our litigation culture.[1] Others would not perhaps agree. They might view mediation with suspicion. They might see it perhaps as a Trojan horse for downgrading access to justice and the civil justice system. I do not. But that is not to say that such concerns, which have been most clearly and recently articulated by Professor Dame Hazel Genn in last year's Hamlyn lectures, should not be taken seriously. They should. And all those of us with an interest in civil justice (which I assume includes all those here this evening or you would not be here, unless of course you are here only for the CPD points) would do well to study those lectures closely when they are published this year.

4. In my opinion mediation has an important role to play. I do not think that Professor Genn disagrees. She rightly pointed out that mediation is an '*important supplement to courts that should be made available to anyone contemplating litigation*'.[2] The point she would make, I think, is one that places emphasis on the idea that mediation is a supplement to the determination of legal disputes through the formal civil process. Mediation is an adjunct to

[1] Austen, *Pride and Prejudice* begins: *"It is a truth universally acknowledged, that a single man in possession of a good fortune must be in want of a wife*".
[2] Genn, as cited in Rozenberg, *Dame Hazel Genn warns of downgrading of civil justice*, The Law Gazette (16 December 2008).

formal justice. It presupposes the necessary existence of an effective, efficient and accessible civil justice system; a civil justice system that is accessible to all. I doubt any of us would dissent from that view. I for one would not. In this sense mediation (and other forms of ADR) is or should be integral to our litigation culture because it is part of a wider whole and one which necessarily encompasses a properly funded and effective civil justice system.

5. The increased emphasis on mediation and other forms of alternative dispute resolution since the early 1990s might however seem to question that view. Both the Heilbron/Hodge report commissioned jointly by The Law Society and The Bar Council and the two Woolf Reports placed what at first blush might be taken to be a greater and different emphasis on ADR and mediation.[3] Indeed as Joshua Rozenberg, the chairman of this evening's event, reported it, Professor Genn's view is that such a change in emphasis was ushered in by the Interim Woolf Report. You, Mr Chairman, reported, Professor Genn's view in this way:

"*It was all the fault of Lord Woolf, Dame Hazel suggested. Supporters of ADR had enjoyed little success, even in the commercial field, until the then Master of the Rolls published his much-heralded review of civil justice in 1996.*

As part of his research, Lord Woolf had travelled to the US, Canada and Australia, becoming convinced of the value of mediation as an essential element in reforming justice. The fundamental premise of his interim report, said Dame Hazel, was that all cases should be settled as soon as possible, and ADR should be tried both before and after the issue of proceedings in order to achieve this.

His final report [Dame Hazel is reported to have said] was even firmer. It led, in turn to the new Civil Procedure Rules – the so-called Woolf reforms."[4]

6. The picture painted here is one where settlement is now the aim of our civil justice system and where, as Sir Peter Middleton put it in his 1997 Report to the

[3] Heilbron & Hodge, *Civil Justice on Trial – A Case for Change*, (1993) Joint report of The Bar Council and The Law Society; Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO) (1995); Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, London) (1996)
[4] Rozenberg, *op cit.*

Lord Chancellor, justice means '*the satisfactory resolution of disputes*.'[5] A satisfactory resolution is not of course the same as a resolution which sees legal rights properly adjudicated by the courts. While it could of course encompass such a judicial determination of a dispute, it goes wider than that and could encompass, or even come to mean no more than, mediated dispute resolution without the determination of rights. It seems that Professor Genn fears that satisfactory dispute resolution could come to mean no more than just that. On this view mediation and ADR would be the rule and formal litigation through the civil justice system would become the exception. To echo Professor Genn, on this view formal litigation is a supplement to ADR. And it might be said, we all know what can happen to supplements? Deemed surplus to requirements they can be dispensed with. It is not difficult to understand the fear at the heart of Professor Genn's analysis. She is concerned and (in my opinion) rightly concerned with, for example, the ever escalating court fees.

7. There are surely some fundamentals upon which we can all agree. An effective civil justice system that is readily accessible to everyone is an absolutely essential element of any open, democratic society committed to the rule of law. It is not nor can it be a supplement to other forms of dispute resolution. It is a *sine qua non* of our society. It is because as Sir Jack Jacob put it in *The Fabric of English Civil Justice*, whilst discussing adjectival law, an effective and accessible civil justice system is the only

> "*. . . practical way of asserting the primacy of law, the practical way of securing the rule of law, for the law is ultimately to be found and applied in the decisions of the courts in actual cases . . .*"

Moreover, it is only through an effective and accessible civil justice system that our society provides

> "*. . . the effective safeguard against arbitrary, capricious or unprincipled invasion or denial of the legal rights of any person, and it takes on the*

[5] Middleton, *Report to the Lord Chancellor*, (HMSO) (1997) (http://www.dca.gov.uk/civil/reportfr.htm) at 10 – 11.

character of a protective shield to prevent any person being deprived of or suffering any loss of his rights except by due process of law."[6]

8. The picture painted by Professor Genn, is one which expresses the fear that our civil justice system will be, or perhaps is, being traduced through the promotion of various means of consensual settlement. As I said earlier, Professor Genn's concerns as set out in the Hamlyn lectures will repay careful attention when they are published. They should sound a warning to us all; a warning that we cannot afford to ignore.

9. However, for my part, I do not think that the existence and value of the role of the courts in the civil justice system is in any way threatened by ADR in general or mediation in particular. On the contrary they are an important adjunct to the role of the courts and, critically rely upon the courts to succeed. The emphasis given to ADR and mediation over the last fifteen or so years has in fact been, in Professor Genn's words of approval of it, '*an important supplement*' to court determination of disputes that should be made available to all. It is as such that it is an integral part of our litigation culture.

10. First, neither Heilbron & Hodge nor Woolf understood their commitment to ensuring that the '*philosophy of litigation should be primarily to encourage settlement of disputes whether through the court process or by alternative means of dispute resolution*', to mean that ADR was to be something more than an important supplement to the formal determination of claims.[7] Such statements were firm endorsements of a truth that our civil justice system has long recognised: that the vast majority of disputes settle before trial – the present figure of 98% settlement rates mirrors that which was noted in the 1820s by the Common Law Commissioners.

11. The statements of Woolf (and Heilbron & Hodge and others) recognised that all those engaged in the delivery of justice, whether lawyers or judges, should focus their efforts on maintaining that figure and encouraging those other claims that could properly settle to join and swell the ranks of the 98%.

---

[6] Jacob, *The Fabric of English Civil Justice*, (Stevens & Co) (1987) at 66.
[7] Heilbron & Hodge, *ibid*, at 6; Woolf (1995) at 5.

12. Secondly, neither Heilbron & Hodge nor Woolf saw ADR as a universal panacea or, as such, a replacement for formal litigation. Heilbron & Hodge put it this way:

"*Most parties to litigation want to resolve their disputes . . . ADR can in certain suitable cases provide the solution. It will never replace litigation . . .*"[8]

It would not replace litigation because, as they stated earlier in their report:

"*. . . it is fundamental to the basic precepts of any civilised society that no section of the community should be excluded from their just entitlement to equality before the law, whether or not circumstances necessitate their using the courts . . .*

. . . Public confidence in the administration of the law has to be maintained."[9]

Lord Woolf in his Interim Report said this:

"*Despite [its] advantages I do not propose that ADR should be compulsory either as an alternative or as a preliminary to litigation. The prevalence of compulsory ADR in some United States jurisdictions is largely due to the lack of court resources for civil trials. Fortunately the problems in the civil justice system in this country, serious as they are, are not so great as to require a wholesale compulsory reference of civil proceedings to outside resolution.*

In any event, I do not think it would be right in principle to erode the citizen's existing entitlement to seek a remedy from the civil courts, in relation either to provide rights or to the breach by a public body of its duties to the public as a whole."[10]

13. Both Heilbron & Hodge and then Woolf, while emphasising various means how and why ADR and mediation should be encouraged and facilitated by the courts, were firmly in the camp which regarded ADR as important supplement to the resolution of disputes by the courts. They both acknowledged the

[8] Heilbron & Hodge, *ibid*, at 72.
[9] Heilbron & Hodge, *ibid*, at 4 – 5.
[10] Woolf (1995) at 136.

fundamental importance of an effective civil justice system committed to ensuring the proper and formal determination and enforcement of substantive legal rights. Their recommendations as to ADR (and thus mediation) were by way of providing *options* for litigants, alternatives to formal litigation, while rendering the formal litigation process more accessible and efficient. The CPR implemented that view. It institutionalised it and did so in a number of ways, each of which emphasise how ADR and mediation as an aspect of that are integral to our litigation culture but remain a supplement to it and not a potential successor to our formal civil justice system.

14. First of all, the CPR, through the overriding objective and the general case management power set out in CPR 1.3(e) must manage cases by encouraging parties to use ADR and facilitating its use if such is appropriate. Equally, CPR 3(2)(m) provides the court with the general case management power take any other step or make any other order in order to further the overriding objective and properly manage individual cases. Without breaching my self-denying ordinance not to refer to *Halsey* again this evening, I cannot but think that this provides the power, in an appropriate case and consistently with the duty imposed on the court under CPR 1.3(e), to direct parties to enter into mediation or ADR procedures in appropriate cases. In considering whether to exercise these powers, it seems to me, that the court will have to consider a number of questions. So will the parties and their advisors because of the duty imposed by CPR 1.3 to assist the court to further the overriding objective. Thus both the court and the parties are under a duty to consider whether it is proportionate to pursue their claim through the formal litigation process or whether a mediated settlement might a just way of dealing with their case. Equally, the question will have to be asked whether it is proportionate to other litigants for their particular claim, to be pursued through formal litigation, or whether it would improve access to justice for other litigants if they mediated their case: see CPR 1.1(2)(e).

15. These considerations lead to the conclusion that mediation and other forms of ADR should become second nature to litigators, litigants and the courts. It is surely the duty of people like you to spread the word. Education, education, education. I suggest that we should start with the law schools and the professional parties and their lawyers. For example, in the case of PI claims, if

the large firms of claimant lawyers espoused mediation, it would soon be prevalent. So too, would it be prevalent if liability insurers did so.

16. I want to leave you with one thought. In the late 1960s Leiber and Stoller, the famous song writers, turned into song a story by Thomas Mann called *Disillusionment*. The song was famously sung by Peggy Lee. It was called, as some of you who are of the older persuasion might recall, *Is that all there is?*. Neither today nor in the future can formal litigation, ADR or mediation be all that there is. ADR and mediation are, as I see it, an essential supplement to the role of the court and as such are and must be an integral part of our litigation culture. They seem to me to facilitate access to justice for the many, and hence presuppose an effective formal civil justice system, by ensuring that only those cases that truly need to resort to formal adjudication do so. There will only be very few of those because, as I said earlier, only a madman does not want to settle. Speaking only for myself (as they say in the Court of Appeal) I do not think that the proper use of ADR and mediation supplants in any way the role of the courts or risks any downgrading of civil justice. On the contrary the existence of the judges and the courts remain in order to determine the rights and obligations of the parties in the very few cases in which settlement is impossible.

Postscript

17. My plea to you all in the next few weeks is to respond constructively to Rupert Jackson's costs inquiry because the costs of civil litigation are out of hand and he is at present the only show in town to do something about it.
