JUDICIARY OF ENGLAND AND WALES

Speech by Mr Justice Lightman

Mediation: An Approximation to Justice

At S J Berwins

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1. When the Government gave statutory effect to the European Convention on Human Rights in the form of the Human Rights Act, the Government proudly boasted "human rights have come home". The Government's welcome in words was blunted by the Government's actions. For at the same time the Government continued the process of withdrawing the protection of citizens' rights (human and otherwise) by emasculating civil legal aid at a time when the costs of enforcing or defending such rights had reached heights beyond the reach of all but the very rich and the legally aided. As a fig leaf the Government proffered as an alternative to legal aid statutory provision for the conduct of litigation on the basis of a conditional fee. The statutory provision recognises two essential components of the conduct of litigation on this basis. The first is the acceptance by the legal advisers of instructions on terms that they receive a fee below what they would ordinarily charge (or indeed nothing at all) if the action fails, but an uplifted fee up to 100% above their normal charges if the action succeeds, and this uplifted fee may be recoverable from the losing party. The second component is that the client is protected by insurance against any liability under any adverse order for costs made in case his action fails, with the premium likewise recoverable if the action succeeds from the losing party.

2. The Government was made aware that there were the most serious legal and ethical problems raised by the conditional fee – in particular why should the losing party be exposed to paying more in costs merely because his successful opponent finances his litigation in this manner? and how could the lawyer's conflicts of interest be resolved when agreeing with his client the uplift and determining whether to agree terms of settlement? Going beyond these problems, the inherent limitations of the conditional fee are obvious and they have later proved critical in practice; legal advisers will only agree to accept instructions on this basis and the insurer will only provide insurance if the prospects of success in the action are very high – above 80%, indeed often 90%. Otherwise it is not financially worthwhile for them to provide the required services and insurance to the client.

3. The Government has been willing to spend millions on luxuries such as wallpaper, the Dome and the Olympics but has been unwilling to provide funds on essentials such as affording access to justice. In this situation others

have had to focus on alternatives to the resolution of disputes by the court. Resolution of disputes by arbitration could not provide an answer. Arbitration can prove as expensive as, and indeed more expensive than, court proceedings, for arbitrators charge and judges are for free. As an aside I may record the suggestion that the reason for this difference regarding the pricing of the services of arbitrators and judges is that in terms of quality you get what you pay for.

4. The dilemma has been accordingly how to provide the protection of the law where the citizen does not have the means to pay for it or cannot afford the risk of losing and in consequence incurring the risk of incurring liability for the opponent's costs and of consequent bankruptcy. Where can you find the wherewithal to provide protection? Advocates do it every day in court, but in the real world you cannot make bricks without straw. Mediation cannot provide such protection. But mediation affords a palliative. What it can do and does do is to open previously locked doors to a settlement. What it can afford is a mechanism through the efforts of trained intermediaries for opening the eyes of parties to the merits of the opponent's case, the issues involved, the risks and costs of litigation and the attractions of a settlement.

5. The practice of mediation was given a hefty boost by CPR 1.4 which provides that the court must further the overriding objective of: (1) dealing with cases justly by encouraging the parties to use ADR if the court considers that appropriate; and (2) facilitating the use of that procedure and helping the parties to settle. In accordance with this rule the courts have played their part in encouraging the taking of giant strides forwarding the wide and effective use of the mediation process, but they (like the Duke of York) have also on occasion themselves unfortunately taken giant strides backwards. The giant strides forward include (amongst others): (1) the abandonment of the notion that mediation is appropriate in only a limited category of cases. It is now recognised that there is no civil case in which mediation cannot have a part to play in resolving some (if not all of) the issues involved. Indeed on the Continent mediation between the accused and the victim has now a substantial part to play in criminal cases, and this development yet may find its place here; (2) practitioners (and in particular litigators) generally no longer perceive mediation a threat to their livelihoods, but rather a satisfying and fulfilling livelihood of its own; (3) practitioners recognise (or should recognise) that a failure on their part without the express and informed instructions of their clients to make an effort to resolve disputes by mediation exposes them to the risk of a claim in negligence; (4) the Government itself adopts a policy of willingness to proceed to mediation in disputes to which it is a party; (5) judges at all stages in legal proceedings are urging parties to proceed to mediation if a practical method of achieving a settlement and imposing sanctions when there is an unreasonable refusal to give mediation a chance; and (6) mediation is now a respectable (indeed fashionable) legal study and research at institutes of learning.

6. We have to recognise today that under the prevailing circumstances the disadvantaged citizen for economic reasons is all too often without legal redress or protection, that this leads to a social divide between the advantaged who enjoy the protection of the law and the disadvantaged who do not and this in turn leads to understandable loss of confidence in the law and the legal

system. Do not believe that justice can be readily achieved by litigants acting in person. Quite the reverse. They cannot generally distinguish what is and what is not arguable, what course serves their interest and what risks they run as to costs. Their liability for their opponent's costs so often renders the perceived injustice which prompted proceedings a mere pin prick in comparison with the final (self inflicted) pain. This state of affairs has brought to the fore the crucial need for mediation as a palliative – as the only available recourse of those who cannot afford the costs and risks of litigation, the chance of the approximation to justice which it affords.

7. As I have repeatedly said on occasions such as the present since the decision of the Court of Appeal in Halsey v. Milton Keynes [2004] 1 WLR 3002, the achievement of this approximation requires the removal of two obstacles placed in its path by the Court of Appeal decision in that case. The court there held that: (1) the court cannot require a party to proceed to mediation against his will on the basis that such an order would contravene the party's rights to access to the courts under Article 6 of the European Convention on Human Rights; and (2) to impose a sanction (and in particular a sanction as to costs) on a party who has refused to give mediation a chance, the burden is upon the party seeking the imposition of the sanction to establish that the party who refused to proceed to mediation acted unreasonably. The burden is not on the party against whom the sanction is sought to prove that his refusal was unreasonable.

8. Both these propositions are unfortunate and (I would suggest) clearly wrong and unreasonable. Turning to the first proposition regarding the European Convention my reasons for saying this are twofold: (1) the court appears to have been unfamiliar with the mediation process and to have confused an order for mediation with an order for arbitration or some other order which places a permanent stay on proceedings. An order for mediation does not interfere with the right to a trial: at most it merely imposes a short delay to afford an opportunity for settlement and indeed the order for mediation may not even do that, for the order for mediation may require or allow the parties to proceed with preparation for trial; and (2) the Court of Appeal appears to have been unaware that the practice of ordering parties to proceed to mediation regardless of their wishes is prevalent elsewhere throughout the Commonwealth, the USA and the world at large, and indeed at home in matrimonial property disputes in the Family Division. The Court of Appeal refers to the fact that a party compelled to proceed to mediation may be less likely to agree a settlement than one who willingly proceeds to mediation. But that fact is not to the point. For it is a fact: (1) that by reason of the nature and impact on the parties of the mediation process parties who enter the mediation process unwillingly often can and do become infected with the conciliatory spirit and settle; and (2) that, whatever the percentage of those who against their will are ordered to give mediation a chance do settle, that percentage must be greater than the number to settle of those not so ordered and who accordingly do not give it a chance.

9. I turn to the second proposition regarding the onus of proof of reasonableness or unreasonableness. The decision as to onus must be guided by consideration of three factors: (1) the importance that those otherwise deprived of access to justice should be given a chance of an approximation to

it in this way; (2) the commonsense proposition that the party who has decided not to proceed to mediation and knows the reasons for his decision should be required to give, explain and justify his decision; and (3) the explicit duty of the court to encourage the use of mediation and the implicit duty to discourage unjustified refusals to do so and this must involve disclosing, explaining and justifying the reasons for the refusal. All these factors point in the opposite direction to that taken by the Court of Appeal.

10. A thermometer of the health of mediation today reveals its world-wide spread and appeal. It permeates the US insolvency system. Training courses are given throughout Eastern Europe. A European Directive on Europe-wide mediation is on the card. (I should add that the caveat has been "imminent" for a long time.) I am and have been for some years the UK Board Member of GEMME, an organisation of European Judges committed to mediation, an organisation recognised and partly financed by the European Union. Its purpose and activities are directed to promoting the use and understanding of and training in mediation within Member States.

11. Developments ahead (as I see them) include the following: (1) increasing efforts to secure public awareness of the benefits and availability of mediation; (2) increasing provision of public funds, facilities and trained mediators to facilitate mediation in all the courts and tribunals; and (3) increased insistence (indeed pressure) on litigants to give mediation a go.

12. I come now to my conclusion. I see often in court the price paid by parties who have not (for any of a variety of reasons) proceeded to mediation and have in consequence picked up the heavy tab of the litigation. I have seen litigants and their families broken by the process and by the cost of litigation. Plainly it is the duty (in particular) of the law and lawyers to avoid this scenario and at the same time to afford to those who on grounds of means have been deprived of access to justice the chance of the approximation to justice that may be available through mediation. I suggest that: (1) no thinking person can be but embarrassed by the lack of provision by the State of the means for access to the court; and (2) no thinking person can but be disturbed by the imposition of the twin hurdles to mediation which the decision in Halsey creates to achieving the approximation to justice which the institution of the mediation process may afford.

13. The removal of the first hurdle is a matter for the legislature and the second is for the courts. The removal of the second by the courts may be made easier by a greater familiarity with the mediation process and by the recognition that in practice the hurdles are regularly sidestepped or overlooked without occasioning any shock waves causing tremors to the scales of justice.