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Court-directed mediation in the Irish High Court: Compelling voluntary processes

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> Many common law jurisdictions have espoused ADR or mediation as being an entirely necessary adjunct to the legal process. *Some suggest the process, when availed of, must always be voluntary. I do not agree; there may be cases where such a process should be mandatory.* But it must be fair. The fact that there may be a penalty of costs for failure to engage in such a process is not, I think, sufficient argument against it, especially when court lists become lengthy and litigation costs become significant. (McMenamin J., in *Fitzpatrick v. Board of Management of St Mary's Touraneena National School & anor* [2013] IESC 62)

Alternative dispute resolution (ADR) has been promoted by the Irish legislature and courts as an alternative to frequently costly and time-consuming litigation since at least the 1980s. While the constitutional right of access to the courts and a right to litigate is well established (see *Tuohy v. Courtney,* Supreme Court [1994] 3 IR 1), this right can be constrained or regulated by the legislature provided that constraints are strictly construed (see *Murphy v. Greene,* Supreme Court [1990] 2 IR 566). The courts have long enforced contractual arbitration and other mandatory ADR clauses in commercial and

construction contracts, and will stay proceedings until the outcome of such ADR.

In the absence of a contractual provision for ADR, however, any requirement to engage in ADR must be scrutinised for compatibility with a constitutional right to litigate and access to the courts, protected under Article 40.3 of the Constitution. A mandatory requirement to engage in mediation also needs to be considered for compatibility with Article 6(1) of the European Convention on Human Rights, which provides that everyone 'in the determination of his civil rights and obligations… *is entitled to* a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. As mediation does not entail a hearing by an independent and impartial tribunal, regard must be had to the extent to which it may interfere with a litigant's Article 6 rights (see Shipman, 2013). The voluntary nature of the process (as acknowledged in the definition of mediation adopted in the Draft General Scheme of Mediation Bill, 2012, and in the Mediation Directive, 2008/52/EC) must also be borne in mind when considering how the courts encourage mediation (and whether they can compel it).

In this paper we consider the progression in Irish law towards court-directed mediation.

Family law

The Judicial Separation and Family Law Reform Act, 1989, introduced for the first time a legislative requirement upon solicitors to draw their client's attention to the possibility of attempting to mediate a separation, to furnish the names and addresses of qualified mediators prior to initiation of separation proceedings, and to certify to the courts, at the time of issue of proceedings, that this has been done (see Sections 5 & 6, Judicial Separation and Family Law Reform Act, 1989). Similar provisions and requirements appear in the Family Law (Divorce) Act, 1996 (see Sections 6 & 7). While these obligations to certify have now been in existence for over a quarter of a century, there has been some judicial scepticism as to whether the impact of such certification has led to 'the option of mediation (being) seriously discussed by many solicitors with their clients' (Coulter, 2007, p. 40).

Mr Justice Michael White, highly experienced in family law, is more emphatic: 'Our family law courts are still too adversarial in nature. That is not to underestimate the importance of the availability of courts to adjudicate on disputes, which regularly centre on disputed

facts, which have to be resolved by a judge. Alternative dispute resolution is not a panacea, but the certificate system which is set out in Section 5 of the Judicial Separation and Family Law Reform Act 1989, Section 6 of the Family Law (Divorce) Act 1996 and Section 20 of the Guardianship of Infants Act 1964 has not been successful in diverting cases into alternative dispute resolution modes' (White, 2013).

These comments demonstrate a judicial perception of a need to go beyond certification and educate both practitioners and litigants as to the potential utility of ADR as a means to resolve disputes. This is reflected in the recommendations in the April 2009 *Report of the Family Law Reporting Project Committee to the Board of the Courts Service* (chaired by Nicholas Kearns J.) that compulsory information sessions be facilitated, whereby the parties to a family law dispute are compelled to attend and made aware of the full range of ADR models and how they might assist in the case under consideration. The Family Law Reporting Project Committee considered that the recommendation would be implemented in Circuit Court Rules on Case Progression, then in preparation (see Circuit Court Rules (Case Progression)(General), 2009, S.I. 539 of 2009, and in particular Rule 7 thereof). The committee expressly did not support the introduction of mandatory mediation in family law cases, a recommendation made to it in Coulter's 2007 report.

Commercial Court

Mediation and other ADR methods have become a mainstay of the case progression and direction tools of the commercial division of the High Court ('the Commercial Court') since inception, as provided for in Order 63A of the Rules of the Superior Courts, introduced in January 2004. Order 63A, Rule 6(1)(b)(xiii) gave the judges in the Commercial Court power, on the application of either party or of the court's own motion, to adjourn proceedings for a time not greater than twenty-eight days to allow the parties to consider whether the issue or proceedings ought to be referred to mediation, conciliation or arbitration. The court was empowered merely to invite the parties to consider ADR and could not compel same. Further, apart from the court's inherent power and discretion in respect of an award of costs,[1]

[1] See *Flannery* v. *Dean* [1995] 2 ILRM 393, which recognised that a court can depart from the general rule that costs follow the event where a party has unreasonably ignored an opportunity to settle.

no explicit costs sanction is attached to a party's refusal to engage with an invitation to consider ADR. We have not found any reported instances of an adverse costs order being made by the Commercial Court against a successful party who refused to engage in ADR. Rather, anecdotally, it appears that on a direction being made under Order 63A, Rule 6(1)(b)(xiii) to adjourn the case for the parties to consider ADR, the parties tend to engage in ADR, inter alia, for fear of costs consequences if they refuse. David Barniville, SC, in 2013 estimated that, up to end of 2011, of the proceedings subjected to an order under Order 63A, Rule 6, 45 per cent had settled at mediation and 55 per cent had returned back to the Commercial List. He also recognised that Kelly J., then having control of the Commercial List, provided considerable judicial encouragement for mediation and was an enthusiastic supporter of mediation in appropriate cases (see Barniville, 2013). Barniville thus recognises that the fear of adverse costs implications in the Commercial Court leads to a significant proportion of litigants entering ADR, and a significant proportion of those entrants reaching resolution through ADR.

Order 56A & adverse costs as disincentive to refusal to mediate

The High Court's powers to incentivise mediation were enhanced when S.I. 502 of 2010 came into force in November 2010. This inserted two new orders into the Rules of the Superior Courts: Orders 56A and Order 99, Rule 1B. Order 56A empowers the court, on application of any of the parties or of its own motion, to adjourn the proceedings before it for such time as it sees appropriate and invite the parties to use ADR to settle or determine the proceedings or issue, or, *where the parties consent*, to refer the proceedings or issue to such process. The court may also invite the parties to attend such information sessions on the use of mediation as the court may specify. A comparison with the wording of Order 63A shows that the High Court (to include the Commercial Court) has here been given broader powers than those under Order 63A. Rather than adjourning proceedings for the parties to consider whether they ought to be referred to a process of mediation, conciliation or arbitration, Order 56A permits an expressly pro-ADR approach of 'invit(ing) the parties to use an ADR process'. Adjournments granted are not limited to twenty-eight days, as in Order 63A. Finally, and perhaps of most practical implication, the introduction of Order 99, Rule 1B empowers the court and, on appeal, the Court of Appeal or Supreme Court, in considering issues of costs,

to have regard, where it considers it just, to the refusal or failure without good reason of any party to participate in an ADR process where an order under Order 56A, Rule 2 has been made.

It needs to be stressed that the court, whether under Order 63A or Order 56A, is not engaged in compelling the parties to mediate but rather that the persuasive issue of adverse costs orders can be brought to bear if a court considers that a party unreasonably refused to engage in mediation. The wording of Order 99, Rule 1B is very broad in the discretion it vests in the court in respect of costs, requiring the court to consider issues of justice and whether a party's refusal to enter ADR is for 'good reason'. The manner in which this discretion is exercised has a material bearing on the voluntariness of the mediation process before the Irish courts and, where voluntariness is in jeopardy, it is foreseeable that the constitutionality of a coercive power will come into question. With this in mind, we propose to now consider the court's approach to the exercise of a power to direct a party to consider ADR and a consequential sanction of an adverse costs order where a party so directed does not engage.

Halsey v. Milton Keynes General NHS Trust [2004] 1 WLR 3002 – English precedent

The Law Reform Commission, in its report *Alternative Dispute Resolution: Mediation and Conciliation*, approved of the English Court of Appeal case of *Halsey v. Milton Keynes General NHS Trust* as setting appropriate guidelines in determining whether to apply a costs sanction. In *Halsey* the court decided that in order to impose an adverse costs order against a successful litigant who had not engaged in ADR, it must be shown that the litigant had acted unreasonably in all the circumstances in so refusing, with the burden of so proving resting with the person seeking the adverse costs order. The court outlined a number of non-exhaustive factors which might be considered in determining that the refusal of ADR was unreasonable:

i. nature of the dispute (some disputes were inherently unsuitable for ADR – examples given were issues of novel law, precedent-setting matters);
ii. merits of the case (a party with reasonable belief that his/her case is watertight might have justification for refusal to mediate);
iii. other settlement methods have been attempted (in cases where there have been prior unsuccessful settlement attempts, with one

side having unrealistic expectations, a refusal to mediate may be reasonable);
iv. the costs of mediation being proportionately high;
v. delay;
vi. whether mediation had a reasonable prospect of success.

Also, the court noted, the fact of the court making an order inviting the parties to consider these factors suggested that the court might already have formed a view on the reasonableness of a refusal in a particular case to engage in ADR. 'A party who, despite such an order, simply refuses to embark on the ADR process at all would run the risk that, for that reason alone his refusal to agree to ADR would be held to have been unreasonable and that he should therefore be penalized in costs. It is assumed that the court would not make such an order unless it was of the opinion that the dispute was suitable for ADR' ([2004] 1 WLR 3002, p. 3011). On judicial encouragement to mediate, 'the stronger the encouragement, the easier it will be for the unsuccessful party to discharge the burden of showing that the unsuccessful party's refusal was unreasonable' ([2004] 1 WLR 3002, p. 3012).

With guidance of this nature, it is little wonder that litigants who did not wish to engage in ADR would actively engage in resisting orders under Order 56A rather than risk subsequent difficulties in resisting an adverse costs order. Were the Law Reform Commission's approval of the *Halsey* test adopted by the Irish courts, there would be real cause for concern that a refusal to engage in ADR could well result in negative cost orders regardless of the outcome of litigation.

Atlantic Shellfish – Guidance from the Irish Court of Appeal

The principles to be applied in this jurisdiction on an application for court-directed mediation have recently been clarified in the (Irish) Court of Appeal judgement in *Atlantic Shellfish & anor v. Cork County Council & ors* [2016] 1 ILRM 287, delivered on 7 December 2015 by Irvine J. (Kelly & Hogan J.J. concurring).

The court dismissed the plaintiffs' appeal from the High Court order of Gilligan J., refusing to adjourn the case for mediation under Order 56A, Rule 2. Gilligan J. concluded that the plaintiffs' application for an Order 56A order was motivated by a belief that the defendants would not accept an invitation to mediate and that the real purpose of the application was to 'copper fasten (the) position

regarding a future application for costs'. He accepted that there was a bona fide reason for the defendants to decline mediation.

The Court of Appeal identified the following principles:

a) The court may only consider exercising its discretion and making an Order 56A order if it is 'appropriate' to do so. In considering whether it is 'appropriate', one must first address whether the issues in the proceedings are amenable to ADR. In the case in point, the issues were not, raising what was described by the court as 'a particularly novel point of law' regarding whether the state, in granting a foreshore licence, owed duties of care to third parties who might be adversely affected by the operation of that licence such as to create an obligation on the state to police and enforce the terms of the licence or ground an action in damages for failure to do so;
b) If the issues were amenable to ADR, the following, non-exhaustive factors were identified as potentially influencing whether an Order 56A order would be made:
    i. the manner in which the parties had conducted the litigation up to the date of the application;
    ii. the existence of any relevant interlocutory orders;
    iii. the nature and potential expense of the proposed ADR;
    iv. the likely effect of the making of the order sought on the progress of the litigation should the invitation be accepted and the ADR prove unsuccessful;
    v. the potential saving in time and costs that might result from the acceptance of an invitation;
    vi. the extent to which ADR can or might potentially narrow the issues between the parties;
    vii. any proposals made by the applicant concerning the issues that might be dealt with in the course of the ADR; and
    viii. any proposals as to how the costs of such a process might be borne.

Halsey is not referred to in the judgement but several common threads emerge. Both courts adverted to potential costs of the mediation. The conduct of the proceedings to date was a factor for both. The prospects of successful mediation were clearly a factor informing criteria (v)–(vii) identified by Irvine J.

Both courts were very much alive to the central issue of the reasonableness of a party's refusal to engage with ADR and the

apprehension that a party might feel after an order is made in relation to the potential costs implications of refusal to engage in ADR. As the Irish Court of Appeal put it, 'the court should not make the order sought if satisfied that the application is brought by a party who knows that an invitation from the court will for good reason be refused and/or where satisfied that the applicant has no real interest in the ADR proposed but is motivated to make the application knowing that the refusal will allow them proceed to trial while, so to speak, holding the sword of Damocles over their opponent until the very end of the litigation' ([2016] 1 ILRM 287, p. 296).

Atlantic Shellfish was subsequently applied in June 2016 by the High Court (Costello J.) in *Richard Grant & ors v. Minister for Communications, Marine & Natural Resources & ors* [2016] 6 JIC 1408. The plaintiff ship operators had initiated proceedings in 2003, challenging various decisions of the respondent minister concerning the licensing and regulating of the plaintiffs' vessels. They sought, amongst other things, declarations of breaches of constitutional rights and EU law and damages against the respondent minister for misfeasance in public office. The court agreed with the respondents that the matters were not amenable to ADR as declaratory reliefs could not be mediated, and required court order. Given the longevity of the proceedings, it was not expected by the court that the parties were likely to abandon long-held positions such as whether there was an entitlement to the declaratory reliefs sought. The court was entitled to bear in mind the poorer chance of success in mediation which is not undertaken on a voluntary basis (see [2016] 6 JIC 1408, para. 17). It is submitted that this *obiter* comment cannot be construed to mean that the court can compel mediation under Order 56A. Rather, it is suggested that the comment refers to the prospect of a party engaging reluctantly and unenthusiastically in ADR, post an order being made under Order 56A, for fear of the costs implications under Order 99, Rule 1B. The court also determined that it was not unreasonable for state defendants facing allegations of misfeasance in public office to decline ADR in favour of testing the allegations in public and having their stance vindicated. Notably the judgement makes no express reference to constitutional rights in identifying the applicable principles, and yet the right to have justices administered in public, protected under Article 34 of the Constitution, was clearly material in the court's consideration of the reasonableness of a refusal to engage in ADR and sets the Irish principles apart from those in the UK.

New rules of court

The court continues to enthusiastically propound a resort to ADR in appropriate cases. The recent commencement of the new Rules of the Superior Courts (Chancery And Non-Jury Actions and Other Designated Proceedings: Pre-Trial Procedures) 2016, S.I. 255 of 2016, demonstrates this on the part of the Superior Courts Rules Committee in making it clear that a judge in a chancery or other designated list may make orders under Order 56A in the context of pre-trial preparation (see Order 63C, Rule 5(1)(xii), Rules of the Superior Courts, as inserted by S.I. 255 of 2016). While it is arguable that the recital of Order 56A powers as being available in such a context is a repetition, in circumstances where Order 56A may be invoked on application any time not later than twenty-eight days after first listing for hearing (and later, where the court for special reason to be recited in the order allows), the specific placing of a power to utilise Order 56A in a pre-trial case management context is entirely consistent with the court's experience as vocalised in the *Richard Grant* case and other cases that 'proceedings are most likely to be resolved by mediation after the pleadings are closed but before the parties have incurred the expense of complying with discovery'. It should be noted that as of 22 September 2016 the President of the High Court has indicated – after representations being made to him and pending the provision of appropriate necessary resources – that he does not intend to assign a list judge within the meaning of the new rules and that at least two months' advance notice of such assignment will be provided to practitioners (see Courts Service, 2016).

Mandatory mediation – Will the courts compel unwilling parties?

The timing of when to encourage mediation and when mediation is most likely to be successful was considered in the Court of Appeal judgement of Kelly J. on 6 October 2015 in the case of *Keith Ryan v. Walls Construction Limited* [2015] 10 JIC 0606. The case concerned the application of Section 15 of the Civil Liability and Courts Act, 2004, which contrasts with Order 56A. Order 56A and its equivalent in the Commercial Court, Order 63A, recognise the voluntary nature of mediation and judicial recognition that 'any element of compulsion attendant upon a reference to mediation will certainly not enhance its prospects of success' (per Kelly J.). Section 15 of the 2004 Act, on the

other hand, entailed 'the legislature (legislating) for compulsory mediation' ([2015] 10 JIC 0606, para. 17). Section 15 empowers and requires the court, on the application of either party (but not of its own motion, unlike the situation in Order 56A), to direct the parties in a personal injuries action to participate in a mediation conference if it considers that such a conference 'would assist in reaching a settlement in the action'. The court may nominate the 'chairperson of the mediation conference' if no agreement is reached between the parties as to the identity of a chairperson.

The earlier High Court case of *Carmel McManus v. Kevin Duffy & anor* (unreported judgement of Feeney J., High Court, 4 December 2006) was relied upon by the plaintiff applicant for mediation referral, as authority for the proposition that an assessment of whether mediation would 'assist in reaching a settlement' constituted a lower, more attainable threshold than whether the mediation had 'a reasonable prospect of success'. In the Court of Appeal, Kelly J., while cognisant that no party could exercise a veto on a mediation under Section 15, stated that the court 'should consider whether in the case of a definitive and reasoned refusal to consider settlement of an action the making of an order under Section 15 would have any reasonable prospect of success… A court is entitled to bear in mind the poorer chance of success in a mediation which is not undertaken on a voluntary basis'.

Kelly J. differed from *Halsey* in stating that 'a court should not countenance the making of an order under Section 15 in circumstances such as the present case where no realistic attempt at settlement on a face to face basis has been attempted' ([2015] 10 JIC 0606, para. 60). Ordering mandatory mediation against an unwilling participant at a late stage was only likely to compound expense and delay. The judge's experience showed that 'mediation had the greatest prospect of success if it was sought immediately after the proceedings were closed and the issues had therefore been defined, but prior to the commencement of the expensive and time consuming discovery process' ([2015] 10 JIC 0606, para. 60).

European context – Is mandatory mediation (or coerced mediation) compatible with EU law and Article 6 of the European Convention on Human Rights?

The European Court of Justice, in the 2010 case of *Rosalba Alassini v. Telecom Italia SpA* [2010] ECR I-02213, confirmed that an Italian

mandatory pre-litigation ADR procedure was valid and did not offend EU law. The court based its decision on the following characteristics of the ADR process concerned:

- it did not result in a decision binding on the parties;
- it did not cause substantial delay;
- it suspended the limitation period for the initiation of proceedings; and
- it did not give rise to costs, or gave rise to very low costs.

Therefore, it seems that mandatory mediation is acceptable at EU law, subject to satisfaction of criteria such as those identified in *Rosalba.*

The European Court of Human Rights may well analyse things differently and will be concerned to ensure that if a person's Article 6 right is to be waived, it is done of their own free will and not tainted by constraint. In considering free will, the court has been persuaded that the rights of litigants have been safeguarded where legally represented prior to agreeing to ADR procedures (see *Osmo Suovaniemi et al. v. Finland*, Application no. 31737/96, 23 February 1999, and *Karl Emich Zu Leiningen v. Germany*, Application no. 59624/00, 17 November 2005, *Reports of Judgements and Decisions 2005–XIII*; also *Heinrich Pfeifer & Margit Plankl v. Austria*, Application no. 10802/84, 25 February 1992, where the court found that lack of legal advice, inter alia, led to a waiver being ineffective and a violation of Article 6 occurring).

The court may also consider a waiver of rights to be tainted by constraint or duress. The 1980 case of *Deweer v. Belgium* [1980] 2 EHRR 429 concerned a butcher who was charged with a criminal offence of overpricing meat. The offence carried with it an order for closure of his business until the outcome of a criminal trial to determine guilt or, alternatively, the payment of a modest fixed penalty fine. Despite having an arguable defence, Mr Deweer paid the fine rather than have his shop closed pending the criminal trial. The payment entailed foregoing the right of access to court. The Belgian authorities argued that there was an effective waiver of Article 6 rights and that the only constraint was the legitimate constraint of fear of a more adverse outcome at trial as motivation for settlement. The court did not accept this and held that the constraint of the significant financial expenses entailed in the closure pending trial were 'pressure so compelling that it is not surprising that Mr Deweer yielded'. The constraint imposed led to ineffective waiver and a breach of Mr Deweer's Article 6 rights.

The court may regard the threat of adverse costs orders for failure to avail of mediation as a constraint on a person's waiver of Article 6 rights but this would depend upon the context of the particular case before it. The court would need to consider whether the perceived threat was a real or likely one, the nature and quantum of the costs involved, and the impact of a perceived threat of adverse costs order upon the particular applicant bringing the case to the court.

If the court views it as a constraint, the court will then have to decide if the constraint impairs the very essence of the right, if it is in pursuit of a legitimate aim and if it is proportionate. It is likely that a requirement to mediate or coerced mediation would not be viewed as impairing the right of access to a court – at most merely imposing a short delay to explore options of settlement. Given the dicta of various judicial proponents and the inclusion of the Mediation Bill in the current legislative programme, it is unlikely that the European Court of Human Rights would question the bona fides of an Irish assertion that adverse costs orders pursue the legitimate aim of encouraging the use of ADR as an efficient means of resolution of disputes, and that it assists in the use of court time and resources. An opinion on proportionality is probably dependent on the practice of the courts developing in respect of adverse costs orders. From the cases considered and indeed from the draft Mediation Bill, the question of reasonableness of refusal to mediate is central. Once assessed on a case-by-case basis, as it must be under the current regime for adverse costs orders, it is submitted that reasoned judicial adverse costs orders are likely to be considered proportionate.

Conclusion

Practice to date suggests that Irish courts are mindful of the importance of preserving the voluntariness of the mediation process. Nonetheless, the courts are satisfied in appropriate cases to make orders under Order 56A (for example, decision of Laffoy J. in *Irish School of Yoga Ltd v. Nicole Henkel Murphy* [2012] 5 JIC 2802), inviting the parties to consider mediation, with the costs implications which may follow under Order 99, Rule 1B. It is also clear that the court and practitioners regard the costs implications of Order 99, Rule 1B as being potentially quite persuasive in procuring engagement in court-invited ADR.

The fact that the courts have not yet expressed misgivings about the constitutionality of penalising costs orders is interesting. It remains the

case that when invited to make adverse costs orders consequent upon a refusal to engage in ADR, the courts will need to remain vigilant to ensure that due weight is attached to the constitutional rights to have justice administered in public and to have access to the court. How the courts deal with the challenge of balancing a now established policy of promoting ADR against individual litigation rights when adjudicating on costs applications going forward remains to be seen.

There is place for an enhanced role for ADR in litigation but this might better be secured not through coercive measures of penalising costs orders but through the education of practitioners and litigants – the promotion of the effectiveness of ADR as 'carrot' as opposed to the 'stick' of adverse costs orders. The introduction of court options to compel 'information sessions' (see Circuit Court Rules (Case Progression)(General), 2009, S.I. 539 of 2009, reflected now in Head 12, Mediation Bill) and greater certification obligations on practitioners as to the information furnished to clients, as provided for in the draft Mediation Bill, represent significant steps forward in this regard.

The unique selling point of mediation to disputants is its voluntary nature, and it very often achieves results highly satisfactory to all parties. However, judges frequently acknowledge that it is not a 'panacea'. There will be cases to which mediation is not suited and parties who, in all bona fides, cannot mediate a resolution. It is vital therefore that mediation remains an option in which people engage voluntarily and in good faith, and is not mandatorily imposed on unwilling parties as an extra box to be ticked.

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