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Access to Justice and Mediation. Extracts from the Solicitors Journal

Maintaining access for all

1 June 2007

By Kerry Underwood

Mediation must not be used to prevent people from going to court, argues Kerry Underwood

Lord Neuberger, one of the Law Lords, is reported as saying that judges and masters should be able to force parties to mediate before being allowed to come to court (*Law Society Gazette*, 26 April 2007).

Meanwhile in the crucial case of *Woollard v Fowler* [2005] EWHC 90051, concerning the issue of whether fixed costs are indeed fixed, or whether “agency” fees can be added, a behind closed doors deal has been done between certain medico-legal reporting organisations and certain insurance companies. The appeal to the Court of Appeal has been withdrawn and thus there remain directly contrasting lower court decisions – Peter Hurst’s in *Woollard v Fowler* and all of the other judges in all of the other cases – the *Earle v Centrica* [2005] (LTL 5 October 2005) school of thought.

Thus in a matter of great public importance – the whole question of whether as a society we make legal costs certain and predictable in advance – the Court of Appeal has abdicated its responsibility by allowing a stay for mediation, resulting in a non-binding fudge between two different representatives of big business. Talk about the unacceptable face of capitalism.

Worse still it was aided by the Civil Justice Council, now tainted forever. Does it not see the irony of the ‘Civil Justice’ Council preventing the judiciary from ruling on this crucial matter?

Elsewhere we have the absolute farce of grievance procedures in employment matters – something about which all sides of industry trades unions, employers and lawyers – warned the government. Grievance procedures make HIPs look like a slick piece of government. One aspect of these *Alice in Wonderland* regulations beggars belief. My trainee solicitor Elish McKee takes up the story: “I have returned from a tribunal hearing today where the claimant claimed discrimination on the grounds of her religious beliefs and constructive unfair dismissal.

“The claimant raised a grievance as required under the statutory procedures, and the outcome of the grievance hearing was entirely in her favour. However as far as she was concerned the damage had been done and she could no longer work for the company.

“The claimant did not appeal the decision, and as a result under the regulations a mandatory 10 per cent reduction, and potentially up to 50 per cent of a discretionary reduction will be made should the judgment go in the claimant’s favour. Surely it is absurd to have to appeal a decision that is in your favour. What would her grounds be? That she doesn’t want a reduction in her compensation when this case gets to tribunal? Hardly the conciliatory process Parliament intended.”

Now, mediation has its place, for example in family matters, neighbour disputes and in

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private commercial disputes where the parties hope to have a continuing business relationship. Indeed in employment matters where the employee is still working for the company, a properly thought-out grievance procedure makes eminent sense.

But never, never should mediation in any shape or form be set up to assist the judiciary in avoiding making difficult decisions, to prevent people who want to go to court going to court, or to set up procedural barriers, as with the Employment Act 2002 (Dispute Resolution Regulations 2004) to limit the number of cases going to court. Schemes that filter out cases on procedural technicalities, especially where many people are litigants in person, rather than on the merits of the case, are abhorrent.

Nor should mediation ever be allowed in cases where the issue is one of public importance, such as the *Woollard v Fowler* case. In the United States, whose civil litigation system has much that we could learn from, many states have 'sunshine in litigation' laws which prevent private settlements and litigation confidentiality clauses. This is to prevent rich people and corporations buying off bad publicity.

Mediation, often by someone not properly qualified, is very expensive. It may save the state money but it does not save the parties money. Most clients are rightly suspicious of mediation.

The Employment Tribunal mediation system whereby you could have a highly specialized and qualified employment tribunal hearing your case for free or some mediator hearing your case for free has had a take-up of less than one in 10,000, that is under 0.01 per cent, or to put it another way, over 99.99 per cent prefer a court to mediation.

The great Mayor's and City of London Courts voluntary mediation scheme attracted, wait for it... 17 cases last year.

Any notion of people being "allowed" to go to court alarms me. It should be an absolute and unqualified right – as I thought it was by virtue of Article 6 – to have your dispute decided by an independent and public tribunal.

If courts and the litigation process are traumatic, expensive and drawn-out, then let us address that issue, for example by mandatory electronic filing by 1 January 2009, video hearings, weekend courts, etc.

Forced mediation seems to me to be a contradiction in terms.

I have nothing against Alternative Dispute Resolution in appropriate cases – I am a Fellow of the Chartered Institute of Arbitrators – but the starting point in a civilised society is that courts and tribunals are the first option, not a remedy of last resort.

Law Lords should make the system work and seek improvements to it and not try and draw attention away from the courts' problems by banning people from access to justice.

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Mediation and access to justice for all

29 June 2007

By Tim Wallis

You cannot force people to mediate but why not force them to at least consider alternatives to litigation, asks Tim Wallis

Encouraging or requiring a party to mediate simply does not equate, as Kerry Underwood suggested in *Maintaining access for all* ((2007) 151 SJ 686, 01. 06. 07), with preventing people from going to court. The fact that most people who mediate do, generally, settle their cases does not mean that they are forced to settle and they are free not to settle and proceed to court if they wish.

The somewhat provocative headline in the *Law Society Gazette* (26 April 2007) suggested that Lord Neuberger called “for forced mediation”. In fact, the law lord said that giving courts the power to order mediation might be “worth considering”.

Mr Underwood’s finding is that “Most clients are rightly suspicious of mediation.”

Mediation is a relatively new concept and most people are suspicious of new things. There are, however, a number of research papers that deal with client satisfaction with mediation. Not everyone who has mediated would chose to repeat the process but researchers generally find a high level of client satisfaction with mediation. The reasons for this, quite apart from issues of speed and cost, centre on the greater degree of participation in decision-making and the fuller opportunity for parties to express themselves and communicate their views. “User friendly” is a trite and superficial phrase, but this is what the research is getting at. Mediation has grown, and in this country this is particularly true in respect of the mediation of commercial disputes, because clients come back for more.

What would a client satisfaction survey about users of litigation tell us? As litigators we may enjoy litigation (and it may be an important aspect of our job satisfaction) but the client perspective is perhaps a little different.

Lord Neuberger observed that the initial reactions of many when first confronted with mediation are hesitation and hostility. This, he said possibly arose from misconceptions, including the fear that mediation precluded claims being argued out in court and rather than bludgeoning parties into mediation or depriving them of their rights to trial, Lord Neuberger concluded that he envisaged more sophisticated solutions.

Mr Underwood also complains that in *Woollard & Anor v Fowler* [2005] EWHC 90051, a “behind closed doors” deal has been done on medical agency fees. If we are talking about “rights” here, surely the parties have the right to chose how they deal with it: to take it to court or to deal with it privately by way of negotiation, mediation or arbitration. Importantly, in a mediation the parties are free to deal with their dispute in a way which the court cannot. A court can say “You win”, “The law is this . . .” or “You pay him this sum of money”. A judge cannot order that a “deal” be done, that future transactions will be carried out in a certain way or that previous legal rights be adjusted in return for future actions.

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In these circumstances the powers of the court are limited and 'industry agreements', many of which have now been facilitated by the Civil Justice Council, have been able to deliver a good deal more to the civil court system and its users than could possibly have been achieved in the courts.

There are no rights and wrongs in many of these matters and although I agree with Kerry that people should not be prevented from going to court I do think it is useful to raise some alternative perspectives on some of the issues raised.

Anything that suggests to people, especially litigants in person, that they are being pushed in to a different system is dangerous. Whatever Lord Neuberger said, the judiciary seems in favour of forced mediation. Interestingly once the courts hear actual cases they rarely punish a party in costs for not mediating.

Personal injury cases are mediated between a claimant solicitor and an insurance company with 99 per cent settled. In employment cases ACAS facilitate settlement in thousands of cases each year, even though these are the most contentious claims that have usually already been issued due to the tight time limits involved.

The difference between ACAS and traditional mediation is that the lawyers are mediating in the employment case as they work towards settlement, with ACAS as a third party to facilitate it. I have no problem with arbitrators and conciliators as an adjunct to courts, but not a replacement.

Woollard v Fowler is a disgrace. Parties who embark upon litigation are not free to choose how to deal with it. The whole concept of the Civil Procedure Rules is court-managed, not client-managed litigation. Quite right too. I am surprised at the suggestion that Civil Justice Council 'industry agreements' have delivered more than the court system.

In the past seven years the costs war has enveloped everyone. People might all chat in 'big tents' but they are manning the machine guns and shooting each other as soon as they leave. The system has been saved from collapse time and time again by the courts, specifically the Court of Appeal and specifically Lord Phillips, the greatest judge of modern times.

True it is that the courts' options are limited, but that need not be so. Family courts have flexibility to make almost any order they think fit. Employment tribunals make declarations, order reinstatement and re-employment, not just compensation. Courts need greater flexibility. All lawyers should be trained in mediation techniques. If disputes are unresolved then an open court adversarial system is the best way to deal with them. That is why people from all over the world seek to have their cases heard in England.

Tim Wallis, mediator and solicitor, director of Expedite Resolution Limited, has 30 years experience as a litigation solicitor, 16 years experience of mediation, is a founder member of the Civil Justice Council and chairs its ADR committee.

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Kerry Underwood - senior partner in Underwoods

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