ADDRESS TO THE CARDIFF UNIVERSITY ADR EVENT

25 APRIL 2017

I am grateful for the invitation to make some introductory remarks at this annual, and by now I hope perpetual, Cardiff University ADR symposium. The importance of ADR in the context of modern dispute resolution is obvious and hard to overstate. Increased study of and reflection on it, both in academia and among practitioners, is warmly to be welcomed.

Your topic for today is mediation. Perhaps more than any other form of ADR this is the one that impinges on the deliberations of judges. In TCC, Mercantile and Chancery work, with which I am principally concerned, it regularly arises for consideration. Should there be a stay for mediation to take place? If yes, at what stage of the case management directions? If not—and usually the answer is that there should be no stay—how are the directions to be staged or staggered so as best to accommodate mediation? What further information do the parties need to be able to mediate effectively? How is the quest for optimum knowledge to be balanced against the risk that, by the time all t's are crossed and all i's dotted, the costs will have reached such a level that the benefits of mediation are nullified or incapable of achievement? What is the result of a refusal to engage in mediation? These are familiar questions and they call for considerable thought by the parties and those who represent them when court cases are being managed.

However, I am not going to talk about those issues. Nor shall I seek to give any practical guidance about mediation; there is nothing that my limited experience can teach you. Instead I shall offer a few more general thoughts, which are neither original nor informed by any particular scholarship.

It is a truth universally acknowledged that mediation is a Good Thing. Mediation can help to achieve settlement, reduce conflict, save costs, and achieve outcomes more flexible than can be achieved by judicial remedy.

Mediation *can* do those things, but it is not every case for which it will provide those benefits or indeed necessarily be suitable. As for achieving settlement, it ought not to be forgotten that the great majority of cases have always settled. Rarely will the alternatives be starkly

"mediation" or "no settlement". It is my understanding that such research as has existed in the common-law world, at least until the last couple of years, does not offer unequivocal support to the idea that mediation was leading to settlements at lower cost or at an earlier stage than where there was no mediation. Flexibility of "remedy" is certainly a potential benefit. However, most disputes in or suitable for litigation still involve money claims, and most settlements still involve the payment of money. Only in the right case is flexibility a significant boon. Another potential benefit of mediation is that it can give people "ownership" of the outcome. But it's wrong to suppose that everyone necessarily wants ownership of the outcome. That involves taking responsibility. Not everyone wants to do that. Lots of people want someone to blame. A judge will do as well as anyone else in that regard.

This point raises another. Some of us, even on the bench, have a tendency to tell litigants: "You're far better controlling the outcome than trusting the matter into the hands of a judge." Of course, you're free to say what you want to your clients. For my part, I might re-think my practice. It can come close to saying, "You need a judge to get his hands on this like you need a hole in the head." This ethos of talking down the system tends, over time, and by cumulative effect, to erode confidence in the system; and that is a Bad Thing. It brings to mind the short-term populism of politicians who ostentatiously don't take their pay rises: it plays well in the moment; but the longer-term message is: "We're not worth it." No institution can indefinitely survive that kind of thing without damage.

Moving into a more general context: the benefits of a properly functioning civil justice system are, I hope, obvious but are probably largely taken for granted. A properly funded and resourced civil justice system, whereby the state vindicates the people's civil rights through the provision of recourse to public, fair, efficient and affordable courts that will resolve disputes according to law, underpins the rule of law as it concerns private right and provides a necessary framework for an orderly and prosperous society. (Another critical feature of such courts is that they produce publicly available decisions. This is in notable contrast to the position in arbitrations, where many of the biggest commercial cases are dealt with in secrecy. Of course, mediations do not involve decisions in the relevant sense.) These considerations indicate that the civil justice system is not properly to be viewed as a facility or commodity available to customers for a price but rather as an important feature of civil

order. And for present purposes this matters, because the availability of, and even predilection for, ADR must not become an excuse for turning civil justice into a rump—and an under-resourced one at that.

In general terms, settlement is both good and necessary. If cases didn't settle, the system would break down. Further, settlement may itself be a sign that the system is doing well; perhaps one of the biggest incentives to settlement has historically been the knowledge that a reasonably predictable judicial outcome awaits if the parties cannot resolve their differences. A problem arises when the incentive to settlement comes not from the high quality of the judicial system but from its shortcomings. This may be due to delay; I hope that this is not the problem that it once was, and it certainly is not in Wales. It may be due to cost: that is a more serious problem, arising now not only from the high cost of legal services but, most regrettably, from the court system, as a result of the introduction of a level of court fees that, in money claims, seeks not only to recoup the costs of the particular case but even to make a profit to fund other things. (Those who see the recent and, at least temporarily, abortive proposal to increase probate fees as an attempt to introduce covert taxes might see a parallel, though I make no comment.) Such inducements to settle and others—such as cynical over-listing in the knowledge that cases that didn't get on would probably settle to avoid the expense of a further hearing: happily a thing of the past—are a Bad Thing.

In this context, I go back to mediation. The settlements it facilitates must surely be fair, voluntary and consensual. If that is so, we may identify some broad areas of potential concern.

(1) The hallmarks of a fair process are compromised by a system that provides financial disincentive to use the civil processes of vindication of rights. I have mentioned court fees, which incidentally are a far greater disincentive in the kind of domestic commercial disputes dealt with in the Mercantile Courts than they are in the international commercial disputes in the Commercial Court in London. My own view is that the consequences visited on parties under CPR r. 36.17 are also objectionable on similar grounds, though I appear to be in a small minority in this regard.

(2) There is at least room for a problem if settlement is seen as a goal of mediation. This might seem paradoxical, since settlement is surely the primary purpose of mediation. Nevertheless the concern is, or ought to be, real. Judges are impartial: in the nicest possible sense, we do not care what the outcome of the cases before us is. That there will be an outcome is not any achievement of ours: it is inevitable. But a market-place for dispute resolution seems necessarily to involve the sale of wares. There is a tension here: a good mediator has the skill of facilitating compromise; but there is at least a cause for concern if a mediator's selling-point is results, measured by rates of settlement.

(3) The manner of conducting mediations has to be considered. One objectionable practice, in my experience, is overly long mediations. It is by no means very unusual, albeit not common, to hear a litigant complain (normally in the context of an application to set aside a Tomlin Order): "Yes, I reached settlement at mediation. But it was 8pm and I was exhausted. I regretted it the next morning." Another, more subtle problem is emphasis on the cost of litigation. Of course, the provision of information is important, if a party is to make an informed and reasoned decision. But it is a fine line between giving people necessary information and using the threat of cost as a stick with which to bully people into unwanted settlements.

(4) In mediations there may be imbalance of power and of legal awareness. Of course, such imbalances can exist in the court system also. I have mentioned delay and expense; these operate most harshly on the weaker and more disadvantaged. And the courts sometimes get accused of siding with the wealthy and powerful—we must examine ourselves in that respect, though I think that the difficulty tends to be that the poor and disadvantaged have less recourse to the assistance that would help them see the legal position clearly before the case comes for judicial determination. Anyway, the courts can fail just as ADR can. However, the point remains important for at least two reasons: first, judges have, whereas mediators do not, a duty to achieve an outcome according to legal right—they also have, incidentally, a duty to seek to overcome the threat to justice posed by inequality of arms; second, only if those engaged in ADR appreciate that they too are subject to similar risks to those that arise in the context of the court system can they hope to mitigate the risks.

In a celebrated paper, published in 1984 and provocatively—but not inaccurately—entitled *Against Settlement*[1], Professor Owen M. Fiss of Yale University warned of dangers that can arise when there is a significant imbalance in the financial resources available to parties to mediation. Thus the disadvantaged party may be less able to judge the likely outcome of proceedings and the strength (or weakness) of his bargaining position; or he may be more susceptible to the financial pressures brought to bear by the mediation process: on the one hand, the delay in obtaining his full entitlement, and on the other the risk of incurring further costs—and the implicit threat that can accompany this.

There is what seems to me to be a difficulty here. Trust in legal opinion and advice is probably less entrenched in the mind of the public than once it was. But where parties are legally represented, the place for mediation is less obvious than when they are not. If both parties to a dispute have competent representation, they are relatively well able to take a view on settlement without the intervention of a third-party facilitator. Commercial disputes certainly do mediate, but my experience is that on the whole the ADR takes the form of dialogue between the lawyers—or even, sometimes, the businessmen themselves. (That may, perhaps, be less true in commercial property cases than it is in monetary claims.) I am reliably informed that clinical negligence and personal injuries cases almost never go to mediation; settlements are reached primarily through correspondence or by means of joint settlement meetings. On the whole, then, the presence of lawyers probably reduces the need for mediation. Unrepresented parties present an obvious case where mediation can help break down unreasonable positions or bring adversaries to an agreement. But the risk is obvious that the outcomes it achieves in such circumstances may have little relation to the justice of the case.

In this context, I turn finally to say a few words about the Consultation Paper entitled "The Relationship between Formal and Informal Justice: the Courts and Alternative Dispute Resolution", which was recently published as part of a joint project between the European

[1] 1983 Yale L.J. 1073. The paper, which might appear deeply unfashionable, still repays reading.

Network of Councils for the Judiciary and the European Law Institute. As the Consultation Paper explains, the joint project was "established to consider the concerns that have arisen in Europe as a result of the exponential growth of numerous different forms of alternative dispute resolution ('ADR')." The paper identifies a number of risks associated with ADR—both risks attendant on the practice and risks arising from underuse of the practice.

Among the formal responses to the Consultation Paper is one on behalf of the UK branch of *Groupement européen des magistrats pour la mediation* (GEMME). I shall pick out three concerns raised by the Consultation Paper and (in italics) parts of the responses from the UK branch of GEMME. (In both cases, I have edited the texts for the sake of brevity.)

A. The risk that persons will be denied an independent judicial determination

There are a number of situations in which ADR can lead to consumers and unrepresented litigants either being deprived of their right to an independent judicial determination or having the perception that they are being so deprived. Whenever mediation or other ADR is promoted or encouraged by a court or by a more powerful party (e.g. a large corporation or state entity), there is always the risk that individual litigants will feel that they are required to settle their claim. … Judicial authorities and governments are generally keen to see a reduction in the workload and the costs of the courts. As a result, they may regard the possibility that settlements are entered into without adequate safeguards as a risk worth taking.

> *From the initial description of a mediation given by any court dealing with the subject as well as the involvement of any mediator thereafter, it is the expectation that, absent agreement, the parties can have the dispute decided by a judge. A pedestrian manifestation of this is that the procedural timetable will normally be designed to allow a period for mediation with further provision for what is to happen in the event that there is no agreement. There remains the constant fact that lack of funding can mean that a party to a mediation will be unable to proceed to a judicial determination if the mediation does not result in a settlement.*

B. The risk that persons will settle their claims without having first had access to independent legal advice

It is unrealistic to expect every citizen involved in every kind of dispute to receive independent legal advice. There are many reasons why they might not do so. … None of this affects the very serious risk that some individuals will settle valid claims in an ADR process for too little because they have not had access to an adequate and independent legal evaluation of those claims. This risk is, perhaps, greatest in family cases … But it applies in other fields too. What … does seem to be important is (a) that those recommending, requiring or conducting ADR processes or mediations make sure that vulnerable parties do not settle a dispute without understanding their proper legal rights; (b) that parties do not use ADR procedures, including mediation, as a means of avoiding or delaying their legal obligations; and (c) that there is a level playing field between powerful and vulnerable parties to all ADR processes.

> *Within this jurisdiction it is arguable that it is in family matters that the parties are better protected as to making informed decisions than in other kinds of dispute. Nevertheless there are real dangers. The first is simply that by their nature family disputes may militate towards a desire to settle regardless of any indication by … the mediator. The second is that lack of time and/or expertise in the … mediator can result in an unfair outcome. Insofar as other kinds of dispute are concerned, the risk is real. Funds for such advice are lacking, the courts and tribunals have no role to play when not involved in the process and a mediator of civil claims has no duty to seek to procure a balanced outcome.*

C. The risk that … those conducting ADR processes are inadequately qualified

... Councils for the Judiciary in several countries have a reasonable fear that private mediators and ADR entities will not always protect the rights of citizens. …

> *Insofar as those conducting the ADR process are concerned, the danger is real. Thus a mediator who is inadequately qualified to deal with financial matters might severely prejudice a party in a family dispute. A check upon real injustice in family matters of*

which a court is seised is the need to obtain the approval of the court in respect of agreements between the parties. …

Although there are now reputable registers of mediators, there is no legal requirement to be registered in order to mediate. A fundamental problem is the disconnect between the courts and the external mediation process. Except in respect of small claims, it is no more part of the role of a court to recommend a … mediator than it is to recommend a lawyer to represent a party. Apart from a series of lists carrying details of mediators in varying degrees of glossiness, there is little to help an unrepresented party make a choice.

Whether these risks are real and significant in England and Wales and whether the responses adequately reflect the position here are matters that you, with your wide experience of mediation in practice, are no doubt better able to assess than I. One happy thought is that, by the time, if ever it comes, that the fruits of the joint project of European Network of Councils for the Judiciary and the European Law Institute are seen in EU legislation, we in this jurisdiction are unlikely to be directly affected.
