Efficiency in civil justice and the right place for mediation

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1 The scope of this paper

One of my great professional pleasures as a mediator and trainer of mediators over the last six years or so has been working in South Africa and meeting a number of lawyers, mediators, judges and professional people there and learning about how mediation, long familiar in labour disputes, has been developing in civil commercial non-family disputes. "Non-family" in this context refers to mediation in divorce, especially over financial provision on relationship breakdown and financial, provision for, custody to and access to children, areas in which I have not worked, but where mediation has an important role in reducing painful strife. However, I would include disputes in family companies and inheritance claims as being encompassed in civil commercial mediation. I also include personal injury and medical malpractice claims and claims against professionals in those arenas, these being sectors in which I have taken a special interest as a mediator .

Having met two senior representatives of the South African Rules Board in the autumn of 2013 to discuss the Rules Committee's exciting plans over court-annexed mediation in the Magistrates Courts, I have pondered whether it might in any way be helpful to share some reflections on how mediation has found its way into the civil justice system in England and Wales, including some wider reflections on whether it is appropriate for courts to encourage its use. This is a task which I undertook in writing *Mediation Law and Civil Practice,* published in September 2013 by Bloomsbury Professional, and it will be hard to condense, let alone expand, some of that thinking without skating over the surface of a complex topic. But I offer what I have written below, in all humility, as one who has not studied the South African situation closely nor possesses much knowledge of its current rules of civil procedure. I have seen the new Magistrates Mediation Rules and the draft High Court Practice Directive on case management.

I have also looked over the last decade at how mediation has been assimilated in a variety of other common law and civil law jurisdictions, having travelled around the world to train mediators, so have some sense of what has been happening in Nigeria, Rwanda, Pakistan, India, Egypt, Hong Kong (and of course South Africa) as well as a number of European countries and the USA. During my travels I have spoken to and even trained a number of judges and lawyers, and engaged in debate about mediation within civil procedure. I do not hold myself out as an expert on comparative law and procedure, yet there may be lessons from what has happened in England and Wales and from my travels in the law which may be of interest elsewhere which I will try to convey, accepting at once that they may have no or little relevance to South Africa because of legal, procedural, cultural and political differences. Certainly the draft High Court Practice Directive suggests that some of these ideas are already taking root in South Africa.

2 What does an unsatisfactory civil justice system look like? England thirty years ago

It might help to describe what the English civil justice system looked like thirty or so years ago, expanded by impressions of other non-South African systems which I have been able to observe, without any assumption that South Africa's system has ever shown any such features or shows them now. I certainly have no information on which to judge such matters.

It seems to me that the following features might be regarded as evidence that a system needs reform:

- Serious delay between issue of proceedings and trial, which may be because
    - the courts permit parties' lawyers to conduct litigation at their chosen speed, or
    - the courts are too clogged up with cases (or a combination of both);
- Where lawyers control the speed of litigation, the gulf between weak and strong representation is accentuated, reinforcing any power imbalance, and poorly represented clients can lose their case through want of prosecution by less than competent lawyers;
- Adjournment of interlocutory and trial hearings is permitted as a matter of course, especially when the parties consent, so that delays simply mount up exponentially, slowing the courts down further and undermining the authority of judges ;
- Court lists, especially interlocutory hearings, are clogged by largely tactical trivial applications, regardless of the their overall value in the scheme of any given case;
- Procedures are highly but unnecessarily technical and incomprehensible to all but expert lawyers, compelling parties to surrender their cases to the legal profession and thereby losing control over and even participation in their own claims and defences;
- Discovery and evidence rules are not such as to prevent ambush at trial;
- Trial is a theatrical event run by lawyers for lawyers, in ways which exclude parties from their own cases and leave them marginalised and often angry and dissatisfied, even when they "win";
- The possibility of settlement is largely ignored by procedural rules;
- Consequently, court-door settlement is a norm, usually because the case has only just been properly assembled with all the key players (clients and lawyers) present, involving serious wastage of judicial and witness time and unnecessary aggravation for lay parties in cases where a properly managed settlement process several months before would have achieved the same outcome;
- Settlement rates are low, placing enormous pressure on the court system – anecdotally, the settlement rate of civil claims in England is around 90%, whereas in Pakistan, for example, it has been 10%, with 90% issued cases requiring trial, resulting in ten year delays or more;
- Inadequately controlled legal costs , making litigation seriously unaffordable for a lot of private and even corporate litigants, and with legal costs very often wholly disproportionate to the sums at stake, and making it possible for parties with deep pockets (such as insurers and banks) to starve opponents into submission;
- Largely unfettered rights to appeal on law and even on fact, so that litigation seems endless.

3 The purposes of a civil justice system

I suggest that these, together with any suggested solutions, should largely aim at preventing the kind of features outlined above. Defining these purposes in broad terms against the backdrop of the above catalogue of shortcomings as found certainly in England and Wales not so long ago, they might be said to be:

- To eradicate all unnecessary delays so as to counter the challenging maxim "justice delayed is justice denied": every case should be heard within a reasonable time of issue, and blockages to trial should be scrutinised and minimised; this is important not just for individuals who bring or defend their rights – it is also very significant for commercial parties to be able to get access to swift outcomes so that they can regulate their affairs and thus give impetus to a jurisdiction as a good one in which to trade (one of the main drivers of Nigeria's mediation initiatives has been to counter poor impressions of dispute resolution formed by hose considering inward investment);
- Courts and those who work in them should somehow be encouraged, or if necessary compelled, to operate on the basis that the civil justice system exists to deliver swift and affordable justice to litigants themselves, and not just to perpetuate comfortable livings for lawyers;
- Lawyers should not be able to dictate the speed at which a case proceeds, once issued; the court should oversee closely the way litigation is conducted and have powers to order dilatory parties to speed up, seeing through and not tolerating excuses or collusively arranged delays by lawyers on each side of every case, often without their client's knowledge or instructions;
- Refusal of adjournments should be the norm for judges, only being granted where there is a serious risk that justice will not be done to the detriment of one or preferably both **parties** (but paying no attention to lawyer incompetence or embarrassment, often best dealt with by a costs order against the lawyer personally);
- Taking steps to outlaw trivial and tactical interlocutory applications which clog the procedural lists – this was dramatically and comprehensively achieved in England by a Practice Direction of March 1999 which provided that at the end of any hearing lasting no more than a day (so almost every interlocutory application and many trials) the costs liability of the losing party would be assessed summarily and the amount ordered normally payable within 14 days, with the losing party (if absent from the hearing) to be immediately informed by their lawyer of the fact of the adverse judgment. At a stroke, the number of such applications (e.g. for further and better particulars or further discovery etc.) disappeared from lists, because lawyers could not bury any adverse costs orders until the end of the case, and did not want to ask their clients for money to pay their opponent's costs of an ill-judged application or defence. This has made a huge difference to the workload of procedural judges, who now mainly conduct weighty case management conferences prescribed by the rules.
- Restoring and enhancing the authority of judges, by:
    - Giving them case management powers and responsibilities;
    - Making sure that cases are worth their time, by encouraging settlement of cases that can settle and freeing their lists to deal with cases that are worth hearing;

    - Minimising wasted trial preparation by judges and wasted court sitting arrangements by outlawing and even penalising court-door settlement which should have been possible well before a trial date;
    - Emphasising their significance as being the proper constitutional authority of last resort to decide cases which the parties cannot decide for themselves.
- Simplifying procedural rules and court requirements;
- Outlawing evidential ambush, requiring cards on the table litigation conduct, with full pre-trial discovery of documents and the shape of oral evidence from parties, witnesses of fact and opinion (including experts);
- Requiring a degree of proportionality as between sums and relief claimed and the legal costs at stake;
- Having a tight control over appeals, which should only proceed if a judge takes the view that there is a reasonable prospect of success, and on the basis that a trial judge's findings of fact or exercise of a judicial discretion will rarely be open to challenge on appeal.
- According a proper place for settlement of civil claims and taking steps to enhance the use of proven procedures at the right time, to help parties choose to take cases out of the civil justice system if a consensual outcome proves acceptable, leaving the system to deal with those cases where settlement could not be achieved consensually, but without their cases being damaged by such private settlement discussions;
- Doing everything possible to place the parties at the centre of their own disputes, trying to de-mystify and de-professionalise civil justice and to let parties know that they have a right to exercise informed consent over their initial and continued participation in the civil justice system.

4 How to deliver such objectives

One step recently taken by some civil justice systems has been to try formally to define their objectives. It was done for the first time in England and Wales in 1999 when the new Civil Procedure Rules 1998 (the CPR) came into effect, following the *Access to Justice* reports written by Lord Woolf. The very first Part (sections or rules of the CPR are called "Parts) defines the overriding objective of the civil justice system, which means:

enabling the court to deal with cases 'justly' *and at proportionate cost*.

The words underlined here and below were added on 1 April 2013 following the Jackson Costs Review's recommendations. This terse and rather general objective is then explained as follows:

Dealing with a case justly *and at proportionate cost* includes, so far as practicable:
(a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with cases in ways which are proportionate to the amount involved, the importance, complexity and the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the court's resources.
(f) enforcing compliance with rules, practice directions and orders.

Responsibility for ensuring delivery rests both with the court and the parties (and of course their lawyers), as the Part then provides:

The court must seek to give effect to the overriding objective when it
(a) exercises any power given to it by the Rules; or
(b) interprets any rule……

and also:

The parties are required to help the court to further the overriding objective.

The way the court is to further the overriding objective is **"by actively managing cases."** This responsibility is explained thus:

Active case management includes:
(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
(b) identifying the issues at an early stage;
(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
(d) deciding the order in which issues are to be resolved;
(e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate, and facilitating the use of such procedure;
(f) helping the parties to settle the whole or part of the case;
(g) fixing timetables or otherwise controlling the progress of the case;
(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
(i) dealing with as many aspects of the case as it can on the same occasion;
(j) dealing with the case without the parties needing to attend the court;
(k) making use of technology; and
(l) giving directions to ensure that the trial of case proceeds quickly and efficiently.

A very similar exercise has been undertaken in the Hong Kong High Court Rules 1998, which talk of the "underlying objective" of civil justice (rather than "overriding") while using much of the same language.

The key provisions in the above seem to me to be:

- Transferring case management and thus responsibility for the speed at which litigation is conducted from lawyers to judges;
- Requiring legal costs recoverable as between parties depending on outcome to be proportionate to the issues at stake;
- To make the court's own resources a proper consideration, so that disproportionate occupation of the court's time to the detriment of other cases can legitimately be controlled, so as to limit undue occupation of the court's time by an unmeritorious or over-blown piece of litigation;
- Really encouraging judges to undertake a very active and demanding role in managing the way an action is to be heard, in consultation with lawyers who are themselves bound by the same objectives and as officers of the court;
- Encouraging a co-operative atmosphere in litigation, including encouraging and facilitating settlement and alternative dispute resolution;
- (a 2013 addition) greater enforcement of compliance with rules, practice directions and orders by judges in their case management role, a tough approach which subsequent cases have confirmed, in which failure to comply with time limits has led to limitations on costs awardable even if the plaintiff wins, and the non-admission of relevant evidence;

These provisions were seen as revolutionary at the time and remain so, and have had a really profound effect on litigation culture in England and Wales. However, it would be very surprising if exhortations such as those set out in CPR Part 1 would of themselves wreak such a profound change without more. The two most significant additional features of the CPR designed to force this culture change through were the new discretions as to the award of costs as between litigants, and the related power given to judges to assess and penalise unreasonable litigation conduct by a party even if they are the winner of the litigation, and whether or not the unreasonable conduct occurred before or after the issue of proceedings.

The relevant rules are set out in CPR Part 44 as follows:

44.2 (1) The court has discretion as to:
(a) whether costs are payable by one party to another;
(b) the amount of those costs;
(c) when they are to be paid.

(2) If the court decides to make an order about costs -
(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
(b) The court may make a different order.

(3)……..

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including -
(a) the conduct of all the parties;
(b) whether a party has succeeded on part of his case, even if he has not been wholly successful;
(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36).

(5) The conduct of the parties includes-
(a) conduct before as well as during the proceedings and in particular the extent to which the parties followed the Practice Direction (Pre-action Conduct) or any relevant pre-action protocol;
(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
(c) the manner in which a party has pursued or defended his case or a particular allegation or issue;
(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

(6) Where the court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed.

These provisions created a far wider band of discretion for judges in awarding costs of the litigation in favour or against parties, and indeed created greater uncertainty as to what the costs outcome might be. Under the old Rules of the Supreme Court 1965, the expectation was that the winner would get a good proportion of their legal costs of the litigation as well as their remedy. Whether they had conducted the litigation aggressively or obstructively was irrelevant. Similarly, if a defendant made a payment into court which the plaintiff beat by 1p, the claimant got their costs; but if the claimant got no more than or less than that payment into court they would be liable for the defendant's costs (if necessary out of the damages awarded) from the date of the payment into court. The new discretionary costs regime set out

in CPR 44 means that a successful party who conducted their claim in an unreasonable way, whether before or after issue of proceedings, might well not get all the costs they would have expected to be awarded under the old regime. Courts will now also deal with costs on an issue- based assessment: for instance, if 60% of a trial was devoted to deciding an issue contested by a claimant which was found against that claimant, despite which the claim succeeded in part (e.g. a finding of contributory negligence which the claimant had contested), judges might well award the claimant only 40% of the costs of trial. Amendments (too complex to detail here) have been made to the procedure for payments into court. These have now been changed to formal offers to settle (no money having to be lodged in court any more), which both claimants and defendants can make and which will have costs consequences if not beaten by the other party. Again, judges may vary the normal expectation of parties if such an offer is or is not beaten, by reference to the CPR 44 factors.

The result of this softening of the costs award regime has been a marked improvement in litigation behaviour. It is too risky in England and Wales to conduct litigation in an aggressively adversarial way. Lawyers must not do it and they must advise their clients not to do it, as otherwise they may lose a substantial part of the fruits of victory through adverse costs sanctions. This has almost certainly been the biggest incentive for a more co-operative culture of litigation conduct. Parties are strongly enjoined to agree what they can, and only to use the court (of last resort) to rule on issues which they cannot agree.

Additional to the CPR were a number of Pre-action Protocols, which defined what constitutes reasonable conduct of a claim and responses to a claim before it is safe to issue proceedings free of the risk of costs sanction. This was the first time in English civil procedure that judges were given power to police party conduct before issue of proceedings and right back to the creation of the alleged cause of action. The combined effect of these provisions was to slow the issue of proceedings until any relevant protocol had been complied with, and to have lurking within the court's powers the possibility of penalising even a successful litigant who acted in an unreasonable way, both in terms of meeting responsibilities under the overriding objective and more broadly.

It is true that the legal profession in England and Wales expressed very considerable scepticism that the courts could possibly take over case management responsibilities competently and efficiently when the County Courts had something of a record of misplacing files, and the High Court was unused to running case files at all. But that fear has turned out to be largely unfounded. This is probably because court lists have been thinned out by the disappearance of trivial summonses and applications from lists, and because where one party fails to observe the court's management directions, the other party has usually been swift to seek observance and enforcement. The only thing that courts must be careful to forestall is collusive avoidance of obligations by lawyers on both sides.

5 Mediation and the settlement of civil disputes

In relation to mediation and settlement, it seemed feasible in the years following the introduction of the CPR that a judge might see fit to sanction a successful litigant who had unreasonably refused to mediate, and this has indeed turned out to be the case in a line of well-established cases where on the facts the court has found intransigent or unreasonable refusal to mediate. The current state of case-law in England and Wales establishes that:

- Courts may make a "ADR Order", which, while not amounting to mandating mediation, amounts to a robust judicial recommendation to mediate, which if ignored can of itself justify a costs sanction even against a winning party;
- Courts may also impose a costs sanction on any party (whether they win or lose the case) if they unreasonably refuse a genuine invitation to mediate made by the other party. The burden to prove unreasonable refusal lies with the losing party seeking to escape the normal rule that the winner is awarded costs, but if a party merely ignores a genuine invitation to mediate and fails to respond with a sound reason for not agreeing to it, it is up to that party to justify their silence, and failure to do so convincingly may lead to a costs sanction even if the refuser wins the litigation.
- Such a sanction may well be imposed where a party merely ignores an invitation to mediate: courts expect parties to co-operate over the possibility of using settlement processes as well as over agreeing court directions, only turning to the court to resolve serious differences of view.

6 The effect of such reforms

No English lawyer would claim that the CPR as introduced following Lord Woolf' reports are perfect. There was much criticism that even though one set of rules was devised for all civil courts, they were still complex and did little to reduce costs expenditure. This is what led to the further investigation and report by Lord Justice Jackson and to further reforms introduced in April 2013. But the CPR had a profound effect on the conduct of civil litigation in England and most would accept that these changes were for the better. I would summarise the effects of the civil procedure reforms in England and Wales as follows:

- Wilfully adversarial conduct of litigation is risky and even a successful party may be penalised in not recovering their costs for behaving unreasonably;
- Time from issue of proceedings to trial has significantly shortened, and the lists are no longer as overloaded as they were in the late 1980s and early 1990s;
- Fewer cases are issued annually: the peak for civil claims was 1990, with over 3.6 million issued. These declined until the year before the CPR was introduced and went up to 2.47 million. In 2011, the number of issued civil cases in all courts was around 1.64 million, with a greater drop in High Court cases, and more cases referred to County Courts: presumably more cases are settling early because of the Pre-action Protocols;
- Evidential ambush has been effectively abolished, and a "cards-on-the-table" approach is expected. Where an ambush or disclosure at trial of late or new evidence is sought, the judge will allow ample time for consideration by the surprised opponent, and may well make and adverse costs order against the party seeking to introduce it, who should have found or produced it earlier;
- As noted above, there are very few trivial interlocutory summonses any more – lists have been cleared of these so that case management conferences could replace them;
- Adjournments are sought at the peril of the applicant and are only sparingly granted;
- Court-door settlements are increasingly rare;
- A huge increase in mediation has occurred. CEDR's last survey reckoned that there are at least 8,000 mediations of civil non-family commercial claims per year, to which must be added thousands of small claims mediations through the Courts and Tribunal Service's own Small Claims Mediation Service, handling claims of up to £5,000

(recently increased to £10,000) plus the mediation of employment disputes on their way to Employment Tribunals by ACAS; of course these are still dwarfed by the number of issued actions;

- Significant confidence is being openly placed by judges on the use of mediation to assist in achieving the overriding objective of the CPR, by reducing the trial lists in settling cases that can settle, narrowing the issues between parties, reducing court-door settlements and ensuring that those cases which are tried are, so to speak, worth judicial time and skill in trying them – cases hold up if they have been tested in mediation, yet remain unsettled.
- Judges are even advising parties to mediate because courts often cannot order outcomes tailored to suit compromise: at court one party wins and the other loses, based on a legal evaluation of past rights based on evidence; but no consideration can be given by a judge to past or future interests, what is wise for the future, whether a flexible outcome can be devised which is not simply a declaration of winner and loser, and whether a business relationship might even be restored.

7 The place of alternative dispute resolution (ADR) in civil justice

There seems to be a correlation between efficiency in a civil justice system and the growth of mediation. Certainly in England, trial dates come much more quickly than before 1999 and the culture change from adversarial to co-operative attitudes in the conduct of cases has dramatically improved. Mediation has been established around the world now as an extremely useful way of assisting parties to settle, and it needs little justification as a process. The question is whether mediation should be positively supported by judges, who can feel unsettled by the idea that there is an "alternative" system in competition with the constitutionally essential status of the civil courts which should be open to all.

It is right to distinguish the two main processes regarded as ADR, namely arbitration and mediation. Arbitration is effectively a self-contained system in most jurisdictions, in that it provides private determination of rights in a binding way normally not open to challenge in the courts – the extent to which this is possible varies from system to system. Arbitration clauses in contracts can bar access to the civil courts, whether the courts like that or not. Awards have no precedental force and to that extent starve the common law of new authorities. Privacy is not a means to an end in arbitration. It is valued for its own sake by the parties, who choose not to air their dispute in public, perhaps for reputational reasons. With the increased cost of arbitration, in which the parties must effectively pay an economic rate to the judges, they can hardly be choosing it on grounds of cost saving, and anecdotally, arbitration has got as slow and complex as litigation.

Mediation is entirely different. It does <u>not</u> lead to an adjudicated outcome and it does <u>not</u> bar the road to court. It offers a confidential environment which is designed so as to make it possible for parties to discuss frankly and without commitment or risk to their public claim or defence, to see if acceptable terms arise. There is absolutely no compulsion to **settle** at a mediation**.** Hence to describe it as alternative dispute resolution is a misnomer, as there is no "either/or" about using mediation, nor is there any guarantee of actual resolution. If acceptable terms do not emerge, the path to trial can be re-joined, and nothing which was said or which occurred at the mediation can be used to upset any party's case in court. The debate at mediation of a civil claim usually centres on evaluating and re-evaluating the risks of

achieving success at trial, so that settlement may often be on a risk-discounted basis. Judicial suspicions that mediation is a competitor system are therefore also unfounded.

If a case settles at mediation (or in any other manner) the courts are relieved of the need to adjudicate further. In England and Wales, where the settlement rate is broadly over 90% (i.e. less than 10% of issued proceedings are tried), this allows the courts to concentrate on worthwhile disputes incapable of settlement. In Pakistan and Nigeria, where the settlement t rates are broadly reversed (i.e.90% of issued cases are tried and many go on to appeal without any screening), the courts are appallingly clogged and justice is truly both delayed and denied. Mediation first grew in the USA simply because of the pressure on court dockets.

Mediated settlements have a high satisfaction rate and only very rarely collapse, largely because the outcome was under the close control of by the parties and positively chosen by them. Mediation also enables parties to restore and enhance communications which have often broken down and been aggravated by litigation, and to fashion outcomes which courts have no power to deliver, such as apologies, compromises, the possibility of improved future relationships on specific areas of behaviour and so on. The confidentiality of the mediation process is a means to an end here – enabling frank exchanges to be made to explore settlement possibilities, and thereby leading in most cases towards to a legally enforceable outcome.

The fundamental point to be made about the relationship between mediation and the civil courts is that mediation largely depends on the availability of a mature and efficient civil justice system, which has declared the law comprehensibly, so as to allow parties to measure what risks they face if they litigate to trial, and to which parties can have ready access if settlement does not emerge. Mediation truly operates in the shadow of the law, in a complementary and symbiotic relationship with the civil courts. This is not so true of arbitration, which does indeed take adjudications away from the civil courts, while availing itself of the binding force of court decisions in reaching its private outcomes. Maybe the best way of countering the attractiveness of arbitration to commerce is for the civil (and especially the commercial) courts to dedicate themselves to providing swift affordable and reliable access to justice in a way which lessens the attractiveness of private resolution for parties. It will be seen that judges need not fear any such competitive edge when considering the relationship between the courts and mediation. The short point is that mediation is **not** "alternative" to litigation: it sits next to it and does not compete with it.

There is a continuing debate about whether courts should mandate participation in mediation. Both in England and Wales and South Africa there is considerable resistance to compulsion, including among mediators, who want parties to have come willingly to engage in the process. Mediation participation is not mandatory in England, but unreasonable refusal to participate can lead to imposition of a costs sanction on even a successful party. However, in very many common law jurisdictions around the world, especially in the US and Australia, it is mandatory to mediate before a civil trial can be invoked, and is so even in some Western and Eastern European civil law jurisdictions. What is the right approach, if it is true that a mature mediation function assists the health of a civil justice system?

It is really important to distinguish between the question as to whether **initial participation** in mediation needs to be voluntary or might be mandated, as opposed to whether **continued participation** in the process, once under way, should be voluntary. The

latter is fundamental. Parties should be free to leave a mediation without settling, and without fear of any sanction. Settlement or not is entirely a matter of choice within a mediation, and even an unreasonable rejection of offered terms should not be capable of later criticism in a public court. If what goes on behind the veil of confidentiality at a mediation is capable of later disclosure in all but circumstances of extreme and identifiable and (probably) unarguable misconduct, parties will not open up to each other frankly in order to see whether acceptable terms might emerge.

However, there is no firm evidence that compelling parties to mediate at all in the first place necessarily undermines the prospects of success for the process. Sometimes parties are glad not to be seen as having initiated mediation, fearing being seen as having a weak case. Lawyers certainly may try to deflect the possibility of mediating because they fear negotiating with their client present, when a properly managed face-to-face encounter might be just what is needed to break a deadlock or the effect of fractured communications. Lawyers may also not like being seen to need a third party neutral to "do their job for them", a popular misconception , as mediators and lawyers do very different jobs at a mediation. No wise mediator seeks to undermine the advisory relationship between client and lawyer, who remains fixed with the responsibility of advising the client whether terms that emerge are acceptable in all the circumstances. But with the possibility of sanctions for not mediating lurking in the background in England and Wales, many parties now come to mediation reluctantly, but there is no evidence at all that settlement rates have dropped as a result. Once at the mediation, it is normal for even those who attended reluctantly to be caught up in the search for settlement, never forgetting that if acceptable terms do not emerge, they can walk away without penalty and go to court.

Many commercial mediations take place now in England because an earlier commercial contract between businesses has specified the dispute resolution processes to be used in the event of dispute, building in a required mediation stage before litigation or arbitration may be commenced. Courts in England firmly enforce such contractual obligations and will stay any litigation brought in contravention of such an agreement.

Each jurisdiction will make its own judgment as to what will work and where on the spectrum from purely voluntary to mandatory mediation it places its procedural requirements. Commercial civil mediation was slow to grow in England when it was purely voluntary. Its growth was swift when it became clear that judges could and would penalise a party in costs for unreasonably refusing to mediate. Judges may firmly recommend mediation at case management conferences, making what is called an "ADR Order", and to ignore such a recommendation would be dangerous. Recently the Court of Appeal has held that simply to ignore an invitation to mediate without explaining why or suggesting an alternative timing or process, can of itself justify a costs sanction against an otherwise successful party.

7 Court-annexed and private mediation

Moving towards a discussion of the new Court-annexed Mediation Rules for South African Magistrates Courts (which are roughly equivalent, as I understand it, to English County Courts), I report on where court-annexed mediation has reached in England. Mediation in England is almost entirely a private unregulated activity, and arguably none the worse for that. Even the European Union has held back from proposing regulation of mediation. Regulation may come, but on the whole the standards set by mediators for mediation in the

UK as a whole have held up well. There is a Civil Mediation Council representing individual mediators and provider organisations which is looking at how best to do this. Mediators operate under published Codes of Conduct and complaints procedures, and there have been very few reported instances of misconduct or incompetence.

For a while a number of the larger English County Courts set up mediation schemes in various ways, usually with a local panel of mediators or using one or mediation provider organisations to service such mediations,. Typically the mediation took place on court premises outside sitting hours and lasted three hours and were at fairly low cost to the parties. However, even the relatively low administration requirements for these schemes proved too much for over-pressed and under-trained court staff, and these schemes were replaced by a National Mediation Helpline. This too has run into funding problems, and the availability of local mediators now depends on local and national lists. There are no court schemes in the County Courts any more, with one minor exception in the City of London, which is run by the City Disputes Panel (now oddly part of the London Chamber of International Arbitration).

There are two major court-annexed schemes left. The highly successful one has already been mentioned – the Small Claims Arbitration Service, which disposes of several thousand small claims . mostly by telephone mediation, every year, and takes considerable pressure off District Judges in the County Courts who would otherwise be conducting far more small claims hearings. The scheme is administered by the Courts and Tribunals Service, and the mediators are mostly ex-senior court staff who were trained by CEDR. They deal only with issued claims and their services are free, effectively included in the issue fee paid when a case is started at court.

The other scheme is the Court of Appeal Mediation Scheme, through which parties to an appeal can agree to attempt to mediate a settlement. When permission to appeal is sought, the Appeal Court judge can recommend use of the scheme. Administration is contracted out to CEDR, one of the leading providers of mediation services, but the court supervises the panel of experienced mediators (not all are CEDR mediators). If referred to the scheme, a mediation must be given a set date within ten weeks or the case is returned to the list for appeal hearing. The appeal is not delayed by referral to mediation. The fee is just under £1000 per party. Use of the scheme is patchy but recently the Court has tried to require it to be used for personal injury and contractual cases where the claim is no more than £100,000, as experience shows that costs of such claims and appeals can be wholly disproportionate.

So court-annexed mediation has not been a huge success in England. It has of course in the US and in Nigeria, where the multi-door courthouse concept has flourished in the Lagos High Court: at the top of the court-house steps on Victoria Island, a disputant chooses whether to turn left into the courthouse or right into the ADR Centre, and there have been a number of mediation weeks set up with the initiative of the Chief Justice. This all reminds us of the need to consider carefully what each jurisdiction's needs are and how they are best to be met to suit local legal and cultural conditions. Court-annexed mediation has a very significantly successful history in a number of jurisdictions and that fact that it works less well in one does not mean it will not work well in another.

8 South African proposals for civil justice reform

The first thing to say is that it is very exciting to see a court initiative to promote use of mediation in any jurisdiction, and I wish the new Magistrates Court rules for voluntary mediation every success, especially as there is absolutely no sign of any such reform in England and Wales or Scotland. The rules seem to produce a sound structure making mediation where chosen by the parties easily accessible and affordable. I have written a separate paper commenting on these Rules and the appended forms. What these Rules achieve is to make it possible for the courts gently to refer parties to mediation even if they have not chosen it hitherto, providing a clear structure and documentation to make such a referral easy. There will undoubtedly be challenges for the system in training up clerks and registrars to deal knowledgeably with the questions that parties and their lawyers will ask of them. Whether this will raise the need to involve external mediation providers and training organisations will doubtless emerge. Certainly nothing has emerged for the courts to fear from the use of external help of that kind in England and Wales, where the training of the Small Claims Court mediators and the administration of the Court of Appeal Mediation Scheme were both contracted out to CEDR.

I have also seen the draft High Court Practice Directive. This looks to move case management away from lawyers to the court in just the way that has seemed to work successfully in England and Wales, taken with the other reforms which I have outlined above. It seems to me very important that if this shift is to work in South Africa, court lists need to be cleared so that judges can concentrate on case management instead of being diverted by trivial tactical applications and summonses. I cannot over-emphasise the significance of allowing judges to assess costs on such applications summarily and order their payment immediately. Lawyers will immediately see that it is too risky to chance casual summonses or casually defending such summonses if they or their clients have to pay money immediately to their opponents for the costs of any failure.

My other comment on what looks like an excellently drafted shift towards court case management is that the CPR reforms in 1999 seem to me to have worked because of the package of measures, especially the broadening of risk over costs outcomes to reduce aggressive adversarialism and tactical ploys, and eliminating evidential ambush. It may be necessary to widen the scope of the Practice Directive in such a way so as to ensure and underpin the culture change that it signals.

It is worth adding that the CPR was seen as having succeeded in a number of ways but not to have achieved several of its objectives. One of these was in reducing the cost of litigation for civil parties, hence the Jackson reforms on costs, which are too complex and probably irrelevant to set out here. But the other thrust of the Jackson reforms was that, even given all the changes wrought by the CPR, there was evidence that these had not been strongly policed by procedural judges. This explains some of the additions made to the overriding objective in CPR Part 1, set out above in section 4 of this paper, in particular that "dealing with cases justly" involves, among other things:

(f) enforcing compliance with rules, practice directions and orders.

This addition amounts to an acknowledgement that courts have to ensure that the discipline set by procedural rules is consistently maintained, however demanding that may be, and that in some respects this still has not been happening in England and Wales. Judges for instance were not being demanding enough that parties should observe their obligations under the

Pre-action protocols when proceedings start, or perhaps were being soft in allowing flexibility over adjournments or other procedural steps. Once the courts ore given an overall responsibility for managing cases with all other cases in mind, it means that they have to resist and if possible prevent the knock-on effect that being indulgent over one case can have on the prospects of another equally or more deserving case getting a hearing. To anticipate some of these problems and go into a change of culture with these problems in mind and solutions available seems to me to create the best possible chance of a really good outcome. The first decisions from the Court of Appeal on this aspect of the CPR as amended in 2013 following the Jackson report is that a much tougher regime of compliance is going to be implemented, however unwelcome to the legal profession!

If anyone wishes to follow up any points in this paper, my contact details are below.

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