

'Mediation Works' Symposium

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Panel Discussion 2: Mediation Works – in Civil Communities

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I would like to thank you for having me here. I thank in particular Karen Irwin for inviting me. She may not be aware of it. It is probably not a big anniversary in her life. But it is in fact 25 years ago last month that I started as a litigation solicitor in A&L Goodbody, where Karen was a partner. I see Carol ...Caroline Preston here today, I think Marcus Beresford was here earlier. So the...a lot of the people, the higher echelon of the partnership of ...of the litigation department of A&L Goodbody are here today. And I do remember, I won't say which of them said it to me, but one of them did say it to me 25 years ago, and I...literally I think I was aboutin my first week in the firm and I was...said, of course, really, there is not much future for litigation, you know, alternative dispute resolution, arbitration is going to take over in a very short time. It has all the advantages, cost, speed, confidentiality, preserves future relationship. And really, you know, litigation by and large will...will shortly....largely become a thing of the past, which I have to say...the reason it struck in my mind, because it did give me pause, that this was the ...the channel of my career. Now I went on to other channels afterwards. But I have to say that despite predictions of its demise litigation still seems to be growing. The number...we had one day last year where I think there were 17 new judges created. And the sheer volumes....people might be surprised at this, but the volumes in Court Service figures, in relation to most areas of litigation, is expanding all the time. There are all sorts of good reasons possibly for that. Litigation I always think, of course, is in fact a form of alternative dispute resolution in itself. Up to maybe 400...500...600 years ago, you know, disputes were resolved by force of arms and violence. So litigation stepped in. And it seems to be very....certainly pervasive. The point has been made earlier, there are a lot of lawyers in the room. But there are ...I suppose with Turlough here and myself, there is always over manning in the legal profession isn't there. You have two lawyers on the platform even. But I won't say anything on behalf of the Barristers, but there are over 10,500...nearly... nearly 11,000 solicitors on the roll now. So as you can see there are a lot of lawyers who aren't in the room. And the question really is in relation litigation or to...I would just like to address perhaps the issue of litigation and mediation and where they come from and possibly where they are going. Litigation is in many respects the....the ogre in the room here, isn't it. This is the kind of thing that you know is characterised by the qualities of, you know, aggression, conflict, flight, confrontation, the toe to toe type of engagement that President McAleese was referring to. Mediation then represents the peace making, reconciliation, consensus building, more sophisticated approach. Litigation as it were is sort of Paul O'Connell, and mediation is the Dalai Lama. Or is it possibly that

litigation is from Mars and mediation is from Venus. But where and how, because I think the intriguing question is, certainly for me here, and it is part of this discussion here and considerations here today, is how litigation and mediation can come together and work well together. Because certainly litigation was not, as had been predicted 25 years ago, has not been overtaken as a means of dispute resolution by the other alternative dispute resolutions of...of arbitration and expert adjudication. In fact having gone to many...many conferences on this subject over the years I was struck by a comment made by a lawyer in America who maintained that the number of cases resolved by ADR was exceeded only by the number of conferences on ADR. And now, of course, mediation isn't the new kid on the block anymore either. Because we have collaborative law, again something we are very supportive of in the...in the Law Society. And President McAleese spoke inspirationally last ...earlier this month I think at the Collaborative Law Conference in Cork as she did here again today. So the real question is...is how can mediation ...or I think an interesting question is, how can mediation become engaged much more in the mainstream to use the phrase that Carol was using earlier. The poster boy...or the poster...high profile example of mediation in recent times, which has got people thinking and talking about it publicly, was the famous battle of Gorse Hill, where...but I don't think it's really a very good example. Because there you had this...this now notorious dispute between neighbours in Dalkey. And ...but it came...now it was the hero Rory Brady who mediated to a successful conclusion apparently over a weekend. Although interestingly I don't think...my old friend Rory is actually a qualified mediator. But in any case he was the person brought in on that case or was it Judge Mary...Judge Maureen Hardy Clarke who was the person who after the opening statements were made in the case, the case was set to run for a couple of weeks I think, said shouldn't you go off and mediate a solution there. But really it is very late in the game if mediation is being invoked at that stage. Most of the cost and most of the negative publicity has already been incurred. So it is not really a good example, although it did bring to public attention what mediation can do. How much mediation is going on? In the nature of mediation and the confidentiality surrounding mediation we don't have very much by way of evidence and...and firm statistics. We know how many court cases can go on. And the question then is, should ...should people be forced to mediate? Should they be penalised in terms of costs in the litigation process if they don't mediate or mediate to a successful conclusion? There are problems with that, and this is well recognised internationally, in that in an effort to force people to mediate can lead either to mediation being conducted in bad faith. And it robs mediation of one of its most positive attributes which is the fact that it is voluntary. It is undertaken voluntarily...voluntarily by the party. And ultimately in terms of parties being penalised on costs if they don't submit to and...and...and successfully resolve matters by mediation, there is a difficulty with that also. In the...the essence of mediation has to be its confidentiality. And courts cannot examine the reasons for failure to mediate subsequently if ...if...if that confidentiality is to be maintained. Of course, costs are one of the huge driving forces for change in litigation. Voltaire famously said, I was never ruined but twice, once when I lost a law suit and once when I won one. And the issue of costs and whether

litigation is pricing itself out of the market of dispute resolution is a very real one. Now I...lest there be any ...and it may be disappointing for the audience, but I am actually going to largely ...almost entirely agree with what Carol Coulter said earlier. The ...the methods of involvement in mediation with the litigation process....because there are all sorts of...I am...really I am...I am making it clear. I am ...keeping this narrow focus there are all sorts of areas of...of...of disputes in...in society which can be resolved by mediation which don't involve litigation at all. And throughout history we have had ...you know, I think the...you know, reference has been made to George Mitchell's involvement in the Good Friday agreement, Jimmy Carter, the Camp David agreement, you know, even Henry Kissinger, back in the 70s resolving the...the six day ...the 1973 Yom Kippur War, shuttle diplomacy it seems to me was a form of mediation. But in terms of mediation focus in an Irish litigation context, I think one of the keys to it has to be the ...one...the key to...to earlier resolution of ...of disputes has to be better case management. Mrs. Justice Catherine McGuinness and I were on a...a task force, chaired by Mrs. Justice Denham over ten years ago when we made a report on judicial case management. And the earlier that somebody other than the parties, particularly in ...in the litigation model, a judge can become focused on the issues and can identify cases or even issues within a case which may be subjected successfully to mediation the better. There is a huge force behind this now. Carol was referring to Section 6.2 of the Family Law Divorce Act. There is also Section 15a of the Civil Liability and Courts Act 2004 which is proposing litigation or mediation ...the judge is directing people to mediation as part of personal injury litigation cases and other disputes of that kind. That has rarely been invoked. I believe there has only been one case under that Act where the parties were directed, it was reported fairly recently, by Mr. Justice Kevin Feeney to go to mediation. And I am indicating that as a...really as a force behind it...mediation and government support for mediation rather than it actually working in...in effect. The great leader in terms of the court process and mediation is one of the speakers here later today, Mr. Justice Peter Kelly. In the commercial court a very substantial proportion of cases now ...and I have heard various estimates, but I don't know the exact statistic, but I know it's a substantial and impressive proportion of cases are indicated by him at his judicial review engagement or his...his engagement with the process, that he thinks they would be appropriate for mediation. The cases go to mediation, the overwhelming majority of them are in fact mediated to success...to success. We also have ...and again I am showing in...I am really referring to authorities supporting mediation, as recently...it hasn't been mentioned here yet...today yet, but as recently as last month we have an EU Directive, the Mediation and Civil ...EU Directive on Civil...Civil and Commercial Matters, adopted by the Parliament and Council on 23rd April 2008. And this ideally is...this is focused on international ...as I say, the proposed directive is aimed at promoting the use of mediation as a faster and cheaper alternative to going to court in civil and commercial cross-border disputes. It only applies to cross-border disputes. But it talks about training, inviting...judges having the power to invite parties to have recourse to mediation, and agreement to conclude following mediation being enforceable, the issues in relation to confidentiality, a mediator cannot be

compelled to give evidence except in...in limited circumstances, very limited circumstances afterwards. So there is a force behind the move for mediation. It just doesn't make commercial sense and it...solely in the commercial world. I think everything that Carol Coulter identified as mechanisms for creating greater engagement between mediation and the litigation process is correct. And I think we will see more of it. Government clearly want it to happen more. And as President McAleese indicated, it's the spirit of the times to move away from this old fashioned confrontational approach. I suppose another question that has to be asked is, are lawyers in part the problem here? Are lawyers, for the reasons that Carol hinted at, less inclined to engage with mediation than they ought to be? I think there are information issues...information gaps in relation to mediation among the legal profession as there are among the public at large. And I am very interested and I took a note of her proposal for information meetings being required in certain legal processes. There is also the well established as we know...she talked about effectively judges thinking aloud as to what their solution might be. I mean that's a...that is well established. So just to let you know what the Law Society actually says in its professional training course in relation to mediation and in case there is a suspicion that we are somehow dissing mediation. The ...and I quote from the actual materials, and the heading is: It works. It is difficult to say with absolute certainty what the success rate globally for mediation is. However, studies have shown approximately 70%-80% of cases settle at or shortly after the mediation but before trial. And it goes on, all the reasons, all the standard reasons why mediation produces results. One of the things when the present Law Society...James McGill and I go to visit the local bar associations the local county based solicitors associations around the country now, on our standard agenda of items we deal with is mediation and the need for the profession to embrace it. I think that ...and I will say in conclusion ...if the legal profession has a reputation for conservatism, which I think is actually in many respects undeserved, because the profession could hardly have thrived as it has done throughout history, and as it continues to do today, if it didn't adapt well to change. I think it does adapt well to change. I think there is nothing so powerful as an idea whose time has come. I think mediation's time has come. We have to reconcile it and integrate it with the litigation process. But as far as the legal profession is concerned I will speak personally rather than say speak on behalf of the profession, I will say, in the words of the Monkees, I am a believer.