

## **'Mediation Works' Symposium**

*Royal Hospital, Kilmainham  
Tuesday, 27 May 2008*

### **Mr. Justice Peter Kelly, The Commercial Court**

Good evening ladies and gentlemen. My name is Peter Kelly and I am going to be chairing this last session of the day. My day job consists of sitting in the High Court and I am the Judge in charge of the commercial list of that court. And I have been asked to say a few words to you by way of introduction to the work that is done there, particularly with reference to the ability of that particular division of the court to refer matters to alternative dispute resolution procedures and in particular mediation. Some of you, I know, know all about the commercial list of the High Court, because you are practising lawyers. And I see a few familiar faces from my court room. But the bulk of you probably have no particular insight into it. So if you would bear with me for just a few moments, I would like to give you a little bit of background as to how this division came to be set up and what its purpose is. It really came about as a result of a general dissatisfaction with the way in which commercial litigation came to be processed in this country. There was no differentiation made between commercial litigation and any other form of litigation. And there was a perception on the part of government that if we were going to be able to regard ourselves as a 21<sup>st</sup> century country providing a 21<sup>st</sup> century service we would really have to do something in respect of the way in which litigation was conducted. In the Financial Services Centre, as you know, there are hundreds of finance houses down there, all of whom were used to operating in jurisdictions where there was a dedicated commercial court, whether that was on the continent or in the United Kingdom. The Commercial Court in London, for example, has been in existence for over a hundred years. And there has been a commercial court in Belfast and in Edinburgh for a substantial number of years also. And all of the member states' courts have a dedicated commercial court. So we were rather exceptional in not having one. So it was decided to set it up and to provide really an entirely different approach to the conduct of commercial litigation. It began life in January 2004. So it's now in its fifth year of existence. The dissatisfaction with the existing way of conduct of litigation arose from largely the delays and the lack of focus in relation to the bringing of those proceedings to trial. As to delays, although there are rules of court which govern the way in which litigation ought to be conducted, it was, I am afraid, honoured more in the breach than in the observance. And commercial litigation tended to move at the speed of the slowest party. Now as you can understand with commercial interests abroad it sometimes serves one party's

purpose to delay litigation as much as possible. If you are a defendant and you know that you really have no answer to a plaintiff's claim well then you could long finger it literally for years by playing a procedural game. If on the other hand you were a plaintiff with a dud action but nonetheless an action that was going to have commercial repercussions for your rival, the defendant, you could equally play a waiting game and keep the action extant for years. The reason for that was because there is no port intervention in the conduct of such litigation until one or other party actually moves the court to consider some aspect of the procedure and to make orders in relation to it. So if you are a defendant and you fail to observe the time limits for delivering a defence an application will be made for judgement in default and an order will be made extending time. And you could disregard that, because nobody was going to do very much about it. They would go back to court on another occasion and another order would be made. And perhaps on the third occasion you would be told you really must get your house in order. So you then deliver a blank defence denying everything and that would in turn give rise to applications for particulars. And then when you got to discovery you could have blanket discovery requests which would take eons of time to comply with. And finally, when you get through all of that and your case comes on for trial and you all turn up in your shiny shoes and your suit and tie and all your clients have flown in from all over the world, you will be told, sorry, there is no judge available and consequently you will go back to the next list. Now I speak from bitter experience because there is nothing worse from a barrister's point of view than preparing for a case, having yourself all ready to go, only to discover that you are not going to get on and you go away for another six or eight months and you have to go back then like going back to cold dinner. It is never as appetising as it was in the first instance. So the idea was to bring a change to all of that. And a whole different climate was introduced. Because instead of the parties governing the way in which the litigation was conducted it was managed by the judge. So the pace is dictated to a great extent by the judge. And there are rules of court which provide for sanctions not available elsewhere so as to ensure that litigation gets on. What sort of litigation is it? Well it is divided really into three parts. There is, what I would call, conventional commercial litigation, the sort of commercial disputes that are dealt with in the commercial courts all around the world, that is to say, business disputes between business people. There is a lower limit that has to be observed for the most part. It has to involve a dispute worth in excess of €1 million. In fact most of the disputes are worth multiples of that sum. The second element, which is unusual in commercial courts, is that we also have a jurisdiction to deal with intellectual property cases, so patents and trademarks and copyrights. And there is no monetary limitation in respect of those. And the third is entirely unique to this jurisdiction, an ability to deal with public law questions if they have a substantial

commercial overtone to them. By public law questions I mean applications by way of judicial review or statutory appeals from regulators such as electricity regulators, telecom regulators, or perhaps the most popular of all, An Bord Pleanála. So if you are a developer who has sunk tens of millions into a development you get your planning permission and you think that it is all over when An Bord Pleanála has finally made its decision then somebody pops up with a judicial review application. Perhaps a resident, perhaps an ecowarrior, perhaps somebody with a lot of merits on their side, one knows not. But what could be said with certainty was that was putting your development on hold for at least another three years. So those sort of cases can also be admitted to the court as a matter of discretion. And when they come in the judge takes hold of them, the judge dictates the pace at which they move and the cases ought to get on for hearing and be assured that on the day that they are fixed for hearing there will be a judge available, not merely that, the judge will have read the papers in advance thereby shortening the length of the trial time. We also have procedures which don't apply in other divisions of the court. For example, your witness statements have to be served in advance so that everybody knows what the case is all about. And trial by ambush has unfortunately disappeared. So adherents to that blood sport I am afraid are a bit disappointed in the commercial court. There is also an exchange of legal submissions in advance. So trial times are substantially reduced. And what has been the outcome of all of this? Well since the court began on 12<sup>th</sup> January 2004 539 cases have been admitted to it. That is up to last week. And 426 of those have been disposed of. So we just have 113 cases awaiting trial. How have they been disposed of in terms of time? Well between the entry into the commercial list and the allocation of a hearing date, there is an average of 11 weeks. And between the entry into the list and the conclusion of the action there is an average of 21 weeks. Now prior to this court if you got rid of your case in 21 months you would be doing very well. And how does that break down? Well 25% of the cases were concluded in less than 7 weeks. 50% of the cases concluded in less than 15 weeks. 75% of the cases concluded in less than 30 weeks. And 90% of the cases are disposed of in less than 47 weeks. So few indeed are the cases that remain in the commercial court for in excess of a year and the vast bulk of them are disposed of in less than 30 weeks, which ...those of you who are practitioners either at the bar or in the solicitors profession will realise what a change that is to what was the theretofore regime. It is also a case, and we take some pride in this, where we have never missed a date. Every case that was assigned a date got on on the date before the judge assigned to it. The court, in addition to the other changes in procedure, has an ability to require parties to go off and consider mediation. I can't compel parties to mediate. And it's probably wise that I shouldn't. Because if mediation I think is to be successful there has to be at least some element of goodwill.

But what I can do is stay proceedings for a period of 28 days so as to enable them to consider mediation. And if I conclude that somebody has behaved unreasonably in relation to that then there are cost penalties which are available regardless of outcome. I am delighted to say I have never had to apply them and I have never yet had a case where somebody behaved unreasonably in relation to a request to mediate. How many cases have been sent to mediation? Well they go to mediation in one of two ways. Either I can make the order under the rules or I can suggest to parties that they might consider it. And by merely making the suggestion very often I am told that they will do so and they agree to mediate. And there is a higher success rate in those circumstances than in respect of ones where I have made the order. Now you might think there is a comparatively small number of cases have actually gone to mediation, 43 in all. But that's actually a little bit misleading. Because those are cases which have survived beyond the initial stages where a very substantial number of cases are disposed of. For example, once a case comes into the list, sometimes there is an application to strike out the case on the basis that it has no reasonable prospect of success. So 38 cases went that way. A number of cases settle immediately they are entered into the list, 26 in that fashion. And a very high number are disposed of after the initial directions hearing has taken place, 110. So it's only after that stage that one would normally consider mediation. 109 cases have gone to full trial. But of the 43 that went to mediation there were 20 that were sent by order of the court. And of them, 8 were successful, 2 are ongoing, and 10 proved to be unsuccessful. Of the cases where a mere suggestion was made, 13 were successful, 4 were unsuccessful and 4 are ongoing. So if you make the suggestion and parties go off of their own volition there is a higher success rate. It is still a small enough number and the reason for that is I think a lack of confidence and a lack of knowledge about mediation on the part of both practitioners and their clients. But from an anecdotal point of view I can tell you that the success rate is increasing. Initially this was looked upon very suspiciously and people were less than enthusiastic about it. But as it has gained momentum I now actually have occasions where people are suggesting even before I do that they ought to consider mediation. So I think it is meeting with a greater degree of confidence on the part of practitioners and clients. And I am wholly enthusiastic about it because I have seen the most intractable cases brought to a successful conclusion, not merely the case before the court, but on occasions outlying cases either in existence or contemplated. *And that has proven to be a boon.* It has a number of other distinct advantages in that, in a two horse race which is what litigation is, there can only be a winner and a loser. And one side goes away disappointed regardless. Whereas in the mediation there is less of that and both sides can go away feeling that they have got something. And particularly in the area of commerce where people

might be a bit shy of having their linen washed in public, and under our Constitution justice must be administered in public, save in a number of exceptional circumstances, a mediation provides an ability to have your disputes disposed of without the attendant publicity. So I am wholly enthusiastic about it. And my hope is that it will become even more popular in the commercial court than it has been to date. But certainly so far it has not been disappointing I think, both from the point of view of the court and for those who have participated in it. So with those few words of introduction I am now going to sit back and listen to the words of wisdom that are going to fall from the next speaker and to see how a mediation ought actually to be carried out. Because the one thing that a judge doesn't do is participate in the mediation. And in fact I have received some advice that I shouldn't ever train as a mediator because it would blunt your judicial skills I am told. I am not sure if that is actually correct. But perhaps in retirement I might take up a mediation course. It is very popular I am told amongst United States judges, some of whom take early retirement in order to be mediators. Thank you very much. [applause]