Conference Speech by Judge Paul Kelly, President of the District Court

Mediators' Institute of Ireland Conference

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Title of Speech: The Changing Face of Mediation in the Irish Courts – Dropping the "A" from ADR?

Good afternoon and thank you for the invitation to address your annual conference today. May I first compliment the organisers, and the previous speakers on the quality of the contributions so far, and the variety of the subjects covered. I would also like to congratulate your President, Margaret Conisidine on her election as your President, and her energetic and inspirational stewardship of the Institute. Margaret and I have family connections going back many years and I am very grateful to her for her role in my appearance here today.

Your conference is very well named – "A year like no other" – although as we are unfortunately discovering, it has stretched into a second year, with no end yet in sight. No less than any other sector of society, the Courts, and judiciary have had to grapple with unprecedented problems, find new and innovative ways of doing things to keep what is an essential service running throughout the pandemic. I am very proud to say that the District Court has sat every single day since the onset of the pandemic – it may surprise many of you to know that the District Court provide 24/7 365 cover, and that on every day, including Christmas Day, at least one District Court judge sits to provide emergency cover for urgent applications such as Emergency Care Orders in Child Care cases, search warrants, preservation of crime scenes and so on.

To analyse the changing face of mediation in the Irish courts, it is helpful to look briefly at how, when, and to what extent mediation has featured in the Courts. It is fair to say that most lawyers, by virtue of their training, experience and outlook regarded mediation as something of a "dark art", or if not that, a trendy, new fangled excuse for depriving them of fees! Many Judges were equally suspicious, and slow to embrace Alternative Dispute Resolution, including mediation.

Historically, the main form of ADR as far as the legal system was concerned, was Arbitration, dating from the Arbitration Act in 1947. Lawyers tended to have less reservations about Arbitration for a

number of reasons – among them, the fact that it operated within a statutory framework, and in practice mirrored the formality and structure of the courts (although without the wigs and gowns!). Privacy and speed were also factors.

Mediation was a much later phenomenon, and the exotic species of "Accredited Mediator" began to appear in the legal jungle from about the 1990s. Few of us lawyers really knew what they were or did. Around the same time, Family Law began to catch up with society, and the numerous Family Law acts dealing with judicial separation and divorce, along with advances in legislation in domestic violence, maintenance, access and custody appeared. The word "mediation" appeared in the Judicial Separation and Family Law Reform Act, 1989, sections 5 and 6 of which obliged solicitors filing applications for judicial separation decrees to advise clients to consider firstly, reconciliation, and then mediation, and to provide information on services available in both. The solicitors had to provide a certificate to the court office when lodging their application in the court office certifying that they had advised their clients accordingly. I think it is fair to say that in very many cases, this was regarded as a "box ticking" exercise, and other than telling the client about it, and giving them leaflets explaining the process, and contact details of the few such services available in those days, little serious effort was made to explore ADR. The same procedure was repeated in the other legislation to which I have referred, with similar results.

The family law procedures were applicable to cases in the Circuit and High courts, and as the District Court didn't (and still doesn't) have jurisdiction in judicial separation and divorce cases, there was little opportunity for mediation in the formal sense to operate in the District Court. However, the Family Mediation Service provided by the Legal Aid Board, about which Fiona McAuslan has spoken in the breakout session, has been a game changer for family law in the District Court, and quite a few cases are now diverted from the Court before proceedings are instituted because of this free and speedy facility. If it has a fault, it is that it is not fully accessible in many parts of the country, particularly in rural areas.

As ADR gained in popularity over the past 30 years, it began to be used more frequently, particularly in the High Court and the Commercial Court, where parties, and lawyers, in high value litigation recognised the advantages of mediation in terms of speed, privacy and cost, as well as the ability to determine outcomes on their own terms.

In 2004, following another game changer for the courts, namely the establishment of the Personal Injuries Assessment Board, s15 of the Civil Liability and Courts Act 2004 allowed the court to adjourn proceedings in personal injury cases to allow a "mediation conference" take place.

While informal mediation by the Small Claims Registrar was a feature of the Small Claims Court since its inception, it wasn't until 2014 that the District Court Rules were amended to allow the judge to adjourn proceedings and invite the parties to use ADR/mediation, and to give them information about it. Courts could extend the time for compliance with court rules while mediation was taking place. Again, this has been little used, and lawyers (apart from the small number of those who specialise in mediation, and some of the larger firms who have mediation departments) are still quite wary of ADR and mediation.

Lawyers, as a species, are generally quite conservative – the motto of the Bar Council, for example, is "Nolumus Mutari" – we will not be changed! I suggest that some of the reasons for the slow uptake of mediation are: fear – of loss of income (to all you mediators!); lack of familiarity with how it works; lack of training, qualifications and experience; and a "cultural predisposition" to fighting, and winning cases. In the past decade there have been numerous initiatives designed to take lawyers out of dispute resolution – e.g., PIAB, the Rent Tribunal, the WRC. While lawyers have gradually edged their way back in to some of these proceedings, it is small wonder therefore, in an environment where society and politicians enthusiastically champion initiatives to curtail legal costs (a very recent example being the new Personal Injuries Guidelines) that lawyers will resist what they see as further encroachment on their already endangered incomes.

But the winds of change blow through the dusty corridors of the courts, no less than other sectors. After many years' gestation, the Mediation Act 2017 became law on the 1st January 2018, and I don't have to explain to you how it works. It gives some statutory structure to mediation, and provides for a Mediation Council, which will hopefully allow for legally based accreditation and standards, as well as regulation of a heretofore unregulated sector – for example, there is still to this day, no formal, legally recognised qualification for mediators. For the courts and the lawyers, it gives greater powers to the courts to encourage mediation, and provides, in sections 13 and 14 for obligations on solicitors and barristers to advise and encourage clients to mediate and applies obligations similar to those in the early Family Law legislation to proceedings of all kinds. So as doors may close for lawyers, they quite probably open for you and your colleagues! The professional bodies responsible for training barristers (the Kings Inns/Bar Council) and solicitors (the Law Society) have included mediation training in their programmes, and mandatory CPD (continuing professional development) now routinely includes such training. In recent years, the Law Society has offered a specifically tailored mediation course for judges, and included retired judges, and judges close to retirement, who might like to act as mediators after retirement.

The Irish judiciary is also actively engaged in GEMME, the European network of judges for mediation. At present there are 30 Irish judges (out of a total judiciary of 175) who are members of GEMME, and I am on the executive committee of the Irish branch. We are actively trying to increase our membership, and the participation of judges. We have recently run some very well attended events which have increased our profile among our colleagues.

Change is however constant, and even in the past couple of years, two particular developments have accelerated the pace of change in the courts. The first is technology, and the hugely increased availability of online meeting facilities, such as Teams, Zoom, Pexip and others. As judges we regularly interact nowadays with lawyers, litigants and witnesses using laptops, tablets and phones – only a month ago, I heard a case where on of the parties (a lawyer in France) joined the proceedings using his mobile phone while parked on the side of a busy road in France! While these technological advances were becoming increasingly available over the past few years, they have been catapulted into daily and widespread use by the second development – the pandemic, since March last year.

Suddenly, public health restrictions compelled us to conduct significant amounts of business online, and especially in the higher courts, remote hearings became the norm. For many judges, here and around the world, this was a steep learning curve, and figuring out how to unmute, and more importantly mute your microphone at the crucial time was an early challenge. The appearance on screens of cats, dogs, and occasionally small children occasionally demonstrated an incomplete mastery of online techniques. Even some lawyers were unable to banish cat face filters, exotic backgrounds, and more embarrassingly, disparaging comments about a judge made over unmuted mikes to a virtual courtroom full of others – including the judge!

As I mentioned above, the Irish branch of GEMME recently held a very successful event at which we were honoured to have Sir Geoffrey Vos, Master of the Rolls in England and Wales as guest speaker. He is the "second in command" of the English judiciary and has been to the forefront of reform in the English court system. I would like now to reiterate some of the key points he made about mediation and online dispute resolution.

Even with the advent of digital technology, the court processes in the UK and Ireland are rooted in the 19th century, and earlier, and are as Sir Geoffrey put it, "ruthlessly analogue"! While remote hearings are welcome, we are in reality simply doing what we used to do face to face but using digital technology – the process leading up to the hearing, and the hearing itself remain the same, but with video added. He suggests increasing the use of online technology in the preliminary processes – in making the claims applications to the court offices, and with the use of software and apps to direct claimants to accredited dispute resolution platforms, before the legal proceedings

themselves are issued. This would simply mirror what happens in business – e.g., eBay resolves 60 million disputes annually, online, without apparent dissatisfaction from users. Already in the UK, there are a number of online portals which resolve disputes in large numbers: the Financial Ombuds Service (300,00 cases annually); the Housing Ombuds (15,000 cases); the Communications Ombuds (20,000 cases) and the Energy Ombuds (57,000 cases). 500,000 cases annually are dealt with in the Personal Injuries pre-action portal; they even have, since May this year, a specific pre-action portal for whiplash claims, which has already dealt with 60,000 cases! In family law, an applicant cannot make any kind of application to a family court without having attended a pre-claim Mediation Information and Assessment Meeting, held online. There are also in the UK, several online court platforms, where judges can deal with preliminary applications and directions hearings for cases that have made it through the pre-action portals.

These are just some examples which demonstrate that mediation can, and should, play an increasingly important part in claims resolution. The key ingredients necessary for dispute resolution to succeed are that the process is cohesive, more streamlined and less costly to users, and that cases are resolved more quickly.

There has, heretofore, been a narrow approach by some in the mediation community, and many in the legal community. Some cases will resist compromise all the way, until the highest court in the land has spoken. But the vast majority of cases are in fact amenable to settlement – but only if the right intervention is applied at the right time, and in the right way. Sir Geoffrey describes this as "the sweet spot" at which the case is most likely to resolve. The sweet spot, however is different for every case, so the traditional approach here in Ireland, where mediation is tried once, and abandoned if unsuccessful, often allows the lengthy, costly and disruptive court proceedings to take their course, and the sweet spot is missed.

There are also several different options for mediated interventions, ranging from full, formal mediations with all the parties and their lawyers present, to less formal mediations, without lawyers, and which can take many forms. But we should not simply go through the list of possible interventions, in a set order, or at set times. Courts and judges should be open to considering another form of intervention if an earlier one didn't work and should do so all the way through the process. This perhaps involves a change in the judicial mindset towards resolution rather than dispute. As court proceedings drag on, and parties set down their positions on the papers which are exchanged, they become more entrenched, and the court process, inadvertently, often has the effect of drawing the focus on to the grievances, and making the parties more, not less intransigent.

Judges should consider what preliminary issue needs to be resolved in order to set the stage for consensual resolution. It is no longer enough for judges just to hear evidence, listen to legal argument and deliver judgement. We should not be there to referee a fight – we should be there to break it up! A distinguished predecessor of Sir Geoffrey, Lord Woolf, later Lord Chief Justice of England and Wales, oversaw a far-reaching reform of civil procedure in 1988, and shifted the paradigm from a search for "perfect justice" to one for "expedient and proportionate justice". Sir Geoffrey now wants to shift the paradigm again towards a focus on resolution rather than dispute.

Technology now allows us to rethink the justice process. Online dispute resolution is becoming more available and can improve both access to justice and the full range of mediated interventions that we have historically called ADR. Technology can also help us to reconsider how we in the courts can resolves disputes judicially where mediation fails. The current system is cumbersome, costly and slow, and technology (including artificial intelligence) can help us tackle some of these drawbacks.

I will leave you with this quotation from Sir Geoffrey: "The mediation community can and should be in the vanguard of advocates for online dispute resolution. It offers the very best prospects of really, finally ditching the "alternative" from alternative dispute resolution."

Thank you.