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ALTERNATIVE DISPUTE RESOLUTION: AN ENGLISH VIEWPOINT

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My professional life in the law started as a barrister 46 years ago. In England a young barrister in those days cut his teeth on small criminal prosecutions, such as infringements of road traffic legislation and small civil cases in the County Court, such as disputes between landlord and tenant. Actions in the High Court normally went to barristers of experience. One such action was down for trial in which a senior member of my chambers was instructed for the plaintiff. Then, at the last minute, he was unable to appear because a previous action in which he was appearing had overrun. Our clerk persuaded the solicitor to transfer the brief to me instead. This was my first High Court action, producing mixed emotions of excitement and terror. I read the papers with great care.
My client was an elderly lady who had slipped and fallen in a vegetable shop, sustaining a nasty broken ankle. She alleged that she had slipped on a squashed plum that had been left on the floor, and that the shop was in breach of its duty to her under the Occupiers' Liability Act. The shop denied this and suggested that the old lady must have tripped over her own shopping bag.

None the less, the shop's liability insurers had made an offer to settle on the basis of paying 50% of the damages. My client had refused this offer. There were no witnesses. The result of the action was going to depend on whether the judge accepted my client's version of the accident.

I met my client for the first time in the corridor outside the court on the day that the Action was due to begin. She was obviously very nervous. The first thing that she said to me was "I won't have to give evidence will I?"
I explained to her that her evidence was absolutely critical. She said that she was too frightened to go into the witness box. Try as I might I could not persuade her to change her mind. What a disaster for my first High Court case. I saw my opponent at the opposite end of the corridor. He was a very experience counsel who regularly acted for the insurance company involved. I went up to him and explained that I had only just come into the case. I said that my view was that my client had been foolish to reject the 50% offer (so it was, but I did not tell him why). I asked whether the offer was still open for acceptance. Experienced as he was he viewed my question with some suspicion. "Is your client actually here?" he asked? I assured him that she was and pointed her out to him.
He then took instructions and returned to say that the insurance company would still settle for 50%, so I quickly clinched the deal on that basis.
She was relieved to miss her day in court, but I was very disappointed to miss mine.

That was my first lesson in the merits of alternative dispute resolution. It avoids the trauma of court proceedings. If, like my client, you are not prepared to undergo that trauma at any price, then there is no alternative to alternative dispute resolution, and in the first thirty years of my life in the law, the only form of ADR was negotiation. Any sensible person who finds himself party to a dispute will wish to resolve it, if possible, by negotiation. Over 90% of actions that are commenced in England end in a negotiated settlement before trial. One reason for this is the cost of litigating under the adversarial process. Resolving a dispute by adversarial litigation usually involves a solicitor on each side, a barrister on each side and the judge, whose cost is covered by the court fees that the claimant has to pay.

Add to this, very often, the cost of professional expert witnesses on each side and it is no wonder that the cost of litigation is frequently disproportionate to what is at stake.

Under the English procedure, there is a principle that 'costs follow the event. This means that the party who loses has to pay not only his own legal costs, but the costs of the successful party. So the detriment of losing an action is immeasurably greater than the benefit of winning. This added to the incentive to negotiate a settlement, and this used to be the only realistic form of dispute resolution that provided an alternative to litigation or arbitration. If a plaintiff refused to accept the best offer that the defendant was prepared to make, there was one way that he could attempt to protect himself against the costs of the litigation. That was to pay into court the sum that he was prepared to pay in settlement.
If the plaintiff did not accept the money paid into court, but recovered less than this, he would have to bear the costs of the litigation from the time that the money was paid into court. This was a protective measure that the defendant could only take once an action had been commenced by the plaintiff.

The risk of a disproportionate liability to pay costs has been significantly increased, for defendants at least, by the legalisation of conditional fee agreements, or CFAs, under the Access to Justice Act 1999. These were introduced by the Government as an alternative to providing claimants with free legal aid. Under a CFA the claimant agrees with his lawyers that if his claim fails he will pay no legal fees, but that if it succeeds his lawyers will receive a mark-up of up to 100% on top of what they would otherwise have charged.

This mark-up is known as a 'success fee'. Where the claim is successful the unsuccessful defendant is liable to reimburse the claimant both for his costs and for the success fee. Indeed the defendant's position may be even worse, because a CFA only protects the claimant from having to pay his own legal expenses if his claim fails. He remains liable to pay the defendant's costs in that event. But he can insure against the risk of his claim failing and thus of having to pay the defendant's costs. The premium for such insurance is often very large. If the claimant's claim succeeds, he can recover not only his own legal costs and the success fee from the defendant but also the premium he had to pay for insuring against his potential liability in costs to the defendant. So in addition to losing the action the defendant is faced with a huge bill for the claimant's costs and insurance.

So the desire to avoid the risk of liability for all these costs is an additional cogent reason why a defendant may want to seek an alternative means of dispute resolution that does not involve litigation.

In this lecture I propose to concentrate on that form of ADR that is described as mediation. In 2004 the Centre for Effective Dispute Resolution, known as CEDR, published a revised definition of mediation as follows:

> "A flexible process conducted confidentially in which a neutral person assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution"

Mediation offers many attractions in addition to that of avoiding the cost and trauma of litigation.

In India it may well be that it is not so much the cost of litigation as the delay involved that makes the parties anxious to find an alternative way of solving their disputes. Before this audience I suspect that there is no need to labour the other attractions of mediation. It is a private and confidential way of resolving a dispute. It is informal. It is voluntary. It is a process that those involved can understand.

Once you are in the hands of professional litigants they take charge of you, willy-nilly, and you find that you have embarked on a course that has no turning back and the incidents of which you cannot even understand. Mediation is not like that. You can always turn back and you have explained to you precisely what is going on. You are in control of what is happening to you.

You can preserve, or restore, good relationships with the other party to the dispute – you can come to feel that you are partners in a common endeavour rather than antagonists. And the resolution of the dispute can involve a much wider range of remedies than the court can offer.

There are of course down sides to mediation. If what you are after is your just rights according to the law, then mediation is not the place for you – but you need to consider carefully the cost of seeking those rights. Above all, so it seems to me, mediation is really suited for two parties who are in genuine dispute.

Sometimes it is necessary for a defendant to stand his ground and challenge the claimant to prove his case in court, because if he does not do so, he will find himself facing claims that are not made in good faith but are brought be fraudsters, relying on the fact that the defendant may think that it is cheaper to reach a settlement agreement than to fight the action, even if successful.

I started this talk with an account of a claim by an old lady who had slipped over in a shop and who was undoubtedly a *bona fide* claimant. But local authorities in England are familiar with claims from people claiming to have injured themselves by tripping over uneven paving stones, some of whom are not genuine claimants but fraudsters "tripping and slipping". There was one local authority, Knowsley Council, that almost always settled such claims on the grounds that this was a desirable alternative to litigation.

In 1998 they dealt with 600 claims. By 2002 the number of claims had risen to 1800. They then had a change of policy and rigorously investigated and defended claims, with the result that by 2006 the annual number of claims had reduced to below 400.

Mediation is a relatively recent arrival on the legal scene – having its origin in the United States in the latter half of the C 20. In the United States there are different

reasons for resolving disputes without recourse to litigation. In litigation in the States the successful claimant does not recover his costs from the defendant, but has often agreed that his lawyer will receive a substantial percentage of any recovery he makes under a contingency fee agreement. The defendant is often faced with the fact that if he loses the action the damages will be assessed by a jury and the sky will be the limit.

Mediation has been enthusiastically embraced by a number of States, often making it a mandatory stage of the court process. I have seen a judge conducting mediation in California – admittedly some years ago now, and it was very robust indeed. In England the court's enthusiasm for mediation had been much more muted and the growth of what I might term 'court induced mediation' has been attributable in large measure to the enthusiasm of a comparatively small number of judges.

I shall start with the greatest and most influential of these – Lord Woolf, who preceded me in the offices of both the Master of the Rolls and the Lord Chief Justice. He will be known personally to many of you. In the early 1990s there was an awful lot wrong with the civil justice system in England and Wales.

Cases moved very slowly, they were beset by complex and costly interlocutory battles and, in part for this reason, they were inordinately expensive. Lord Woolf was asked to examine our civil system and to recommend reforms to it. He did so very comprehensively, tearing up and re-writing from scratch our rules of civil procedure. But, for present purposes the interest of his reforms lies in their approach to mediation. Some urged him to follow the America example and make ADR compulsory.

In his *Interim Access to Justice Report in* 1995 he declined to follow this course. He did not recommend court annexed mediation. He saw the role of the court as being no more than to encourage the parties to consider ADR, without suggesting any sanction if they declined to respond to such encouragement.

As so often in the file of English civil law, the English Commercial Court was ahead of the game. The Commercial Court, of which I was a member when I was a puisne judge, is drawn from barristers who practice in commercial work, much of which is international, and they tend to be more forward looking than some of their colleagues. In 1994 the Commercial Court had published a Practice Note requiring legal advisers in all cases:

> (a) to consider with their clients and the other parties concerned the possibility of attempting to resolve the particular dispute or particular issues by mediation, conciliation or otherwise; and
> (b) to ensure that parties are fully informed as to the most cost –effective means of resolving the particular dispute.

This Practice Note may not sound very significant – but it was none the less valuable.

One problem with mediation had been that neither side wanted to be the first to propose it, fearing that this would be taken for a sign of weakness. Now the court had made it mandatory for the parties to at least consider ADR. I shall be returning to the support given to mediation by the Commercial Court in due course. But first I want to return to Lord Woolf.

In his final *Access to Justice Report* Lord Woolf recommended that, when a judge was considering how to award costs at the end of an action he should take into account an unreasonable refusal of a court's proposal that the parties should attempt

to resolve their differences by ADR. When the new Civil Procedure Rules were drawn up in 1998 they contained a number of express provisions designed to promote ADR.

The very first Rule laid down an overriding objective of the civil procedure rules, namely that of 'enabling the court to deal with cases justly'. This includes 'saving expense' and 'dealing with the case in ways which are proportionate...' Instead of leaving it to the litigants to make the running, the new Rules placed a duty of 'active case management' on the court, and this includes:

> "1.4(e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure".

This was the first time that ADR was officially recognised by the rules of court.

Under the old rules, when the court was considering awards of costs, it was only entitled to have regard to how the parties behaved after the action had been commenced. The new rules radically change the position.
Rule 44.5 now provides that the court must have regard to the conduct of the parties, including conduct before as well as during the proceedings and, in particular, the efforts made, if any, before and during the proceedings in order to try to resolve the dispute.

Here then is a Rule that permits the court to use liability in costs as a sanction against a party who unreasonably refuses to attempt alternative dispute resolution before the action begins. We shall see in due course what use the English court has made of that power. First, though, I want to draw attention to another novelty of civil procedure consequent upon Lord Woolf's Reports, and that is the 'pre-action protocol'. These are protocols, prepared individually, for different types of litigation, that direct the manner in which the parties ought to behave before the litigation is commenced.

They are endorsed by Practice Directions issued by the Master of the Rolls as my nominee. Since 2006 these have directed that every pre-action protocol shall contain the following clause:

> "The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation and, if so, endeavour to agree which form to adopt. Both the Claimant and Defendant may be required by the court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still being actively explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs."

We shall see, in due course, to what extent the courts have made use of the costs sanction to encourage parties to resort to ADR. First let me draw attention to provisions in the Rules that enable the court to encourage ADR while the action is in progress.

Early on in an action there is a stage called allocation, when the court decides on the manner in which the action is to be tried.
The Rules provide that at that stage the court may, on the application of the parties or on its own initiative, stay the proceedings to enable the parties to explore ADR and the court may, where appropriate, extend that stay.

A more powerful weapon is given to the court by a Practice Direction (Part 29 PD 4.10(9), introduced in 2005, as follows

> "in such cases as the court thinks appropriate, the court may give directions

requiring the parties to consider ADR. Such directions may be, for example, in the following terms:
"The parties shall by [the date determined by the court] consider whether the case is capable of resolution by ADR. If any party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the trial, should the judge consider that such means of resolution were appropriate, when he is considering the appropriate costs order to make.

The party considering the case unsuitable for ADR shall, not less than 28 days before the commencement of the trial, file with the court a witness statement without prejudice, save as to costs, giving reasons upon which they rely for saying that the case was unsuitable".

That order was invented by a Queen's Bench Master, Master Ungley. It stops short of ordering the parties to resort to ADR, but it certainly concentrates the mind and fires a warning shot across the bows of any litigant disinclined to resort to ADR.

Master Ungley deals with a lot of personal injury litigation and, as you can see, he is an enthusiast for ADR. Another enthusiast who has recently retired from the Commercial Court is Mr Justice Colman. Some of you may know him, for he is not only an enthusiast of ADR but also an enthusiast of India.
He it is who must take most, or perhaps all, the credit for what has come to be known as 'the Commercial Court ADR Order'. This takes, more or less, the following form:

"(1) On or before [Date 1] the parties shall exchange lists of 3 neutrals or identifying one or more panels of individuals who are available to conduct ADR procedures in the case prior to [Date 4]
(2) On or before [Date 2] the parties shall in good faith endeavour to agree a neutral individual or panel from the lists so exchanged or provided.
(3) Failing such agreement by [Date 3] the court will facilitate agreement on a neutral individual or panel.
(4) the parties shall take such serious steps as they may be advised to resolve their disputes by ADR procedures before the individual or panel so chosen not later than [Date 4].
(5) If the case is not settled, the parties shall inform the court what steps towards ADR have been taken and why such steps have failed.

This is a pretty robust order. So far as I know, litigants have not objected to it and it quite often results in a mediated settlement.

We have now seen how, over the last 12 years – and it is only 12 years Rules of Court, which are statutory instruments, give the court the powers to encourage ADR but fall short of entitling the court to direct that the parties actually engage in this. The Rules also expressly impose on the court the duty to have regard to any unreasonable refusal to take part in ADR when considering awards of costs. In his final Report on *Access to Justice* Lord Woolf had gone further and recommended that the court should have regard when awarding costs to unreasonable conduct in the course of ADR. That recommendation was not adopted and, indeed, it would be difficult to reconcile with the confidential nature of the mediation process.

I am now going to turn to see how the English courts have responded to the Woolf Reports and to the powers that they have been given by the new Rules. The first case that I wish to refer to is one in which Lord Woolf was presiding as Master of the Rolls. It is particularly significant because it was not a dispute between two private parties but a public law dispute. The case is *Cowl and others v Plymouth City Council* [2001] All ER

(D) 206. The claimants were elderly people (the oldest was 92) who lived in an old people's home run by the Council. The Council had decided to close down their home and they were understandably upset. Some said that Council officials had assured them that they could live out the rest of their days in the home. The claimants sought judicial review to quash the closure decision. The Council made a sensible suggestion under which the claimants' complaints would be dealt with by an informal process before an independent panel, but the claimants insisted on going to court.

There were proceedings that lasted several days at first instance in which psychiatric evidence was called as to the effect that closure might have on some of the claimants. The judge decided that the Council had acted lawfully and expressed the view that it was a pity that that the Council's offer had not been taken up. He observed that the offer was still open. The claimants did not, however, take advantage of it. Instead they had a lengthy and expensive visit to the Court of Appeal, where they got Lord Woolf.
He was characteristically gentle to the claimants, but he made it plain that they had been mistaken in resisting the overtures of the Council to an alternative to litigation. He observed at the outset of his judgment:

> "The importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible."

Later on he added:

> "Without the need for the vast costs which must have been incurred in this case already, the parties should have been able to come to a sensible conclusion as to how to dispose of the issues that divided them".

In fact, earlier in the year, the Lord Chancellor published a pledge on behalf of all Government Departments and Agencies that ADR would be considered and used in all suitable cases whenever the other party accepted it. The Government regularly publishes figures that purport to show that it is honouring this pledge.

Lord Woolf's judgment in *Cowl* was given in December 2001. Two months later Lord Justice Brooke gave the only judgment of the Court of Appeal dealing with costs in *Dunnett v Railtrack* [2002] 2 All ER 850.

Sir Henry Brooke is a great jurist and I made him my deputy as President of the Civil Division of the Court of Appeal when I was Master of the Rolls. He was and is a great enthusiast for mediation. He retired from the Bench 18 months ago and has since conducted 30 mediations with a 75 to 80 % success rate. His enthusiasm for ADR is apparent from his decision in *Dunnett*. It was a sad case. Mrs Dunnett kept horses in a field that abutted a railway line. Railtrack installed a new gate between her field and the line and she requested them to keep it padlocked. They declined to do so. Strangers left the gate open and three of her horses wandered onto the line and were killed by the Swansea to London express. She sued Railtrack in negligence, claiming both for the value of her horses and for psychiatric injury that she said she had suffered as a result of the accident. She lost at first instance but was given permission to appeal. At that point the Court of Appeal offered a free mediation service. The judge who gave permission to appeal urged the parties to take advantage of this. Mrs Dunnett was prepared to do so but Railtrack turned the suggestion down flat. They offered £2,500 in settlement but Mrs Dunnett turned the offer down. She lost her appeal and Railtrack applied for an order that she pay their costs. They argued that she should have accepted their offer. Lord Justice Brooke was not sympathetic. He refused to award them their costs. He observed:

> "...this was a case in which, at any rate before the trial, a real effort ought to have been made by way of alternative dispute resolution to see if the matter could be resolved by an experienced mediator, with out the parties having to incur the no doubt heavy legal costs of contesting the matter at trial."

So far as the appeal was concerned, he held that Railtrack had been wrong to turn down the offer of mediation.

He said:

> "Mr Lord, when asked by the court why his clients were not willing to contemplate alternative dispute resolution, said that this would be necessarily involve the payment of money, which his clients were not willing to contemplate, over and above what they had already offered. This appears to be a misunderstanding of the purpose of alternative dispute resolution. Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve. The court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide. Occasions are known to the court in claims against the police, which can give rise to as much passion as a claim of this kind where a claimant's precious horses are killed on a railway line, by which an apology from a very senior officer is all that the claimant is really seeking and the money side of the matter falls away.**"**

He added**:**

> **"**It is to be hoped that any publicity given to this part of the judgment of the court will draw the attention of lawyers to their duties to further the overriding objective in the way that is set out in CPR Pt 1 and to the possibility that, if they turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequences."

Practitioners certainly did take this judgment to heart. They were shocked by a decision that robbed the successful party of costs even though an offer of settlement made by that party had been refused. CEDR (the 'Centre for Effective Dispute Resolution') keeps statistics.
Those statistics showed that mediations increase at the rate of 25% per annum in the two years that followed the decision in *Dunnett*. CEDR say '*post hoc ergo propter hoc*' and I am inclined to think that they re right.

The Courts adopted the approach in *Dunnett* in a number of other cases. In *Leicester Circuits Limited v Coats* 92003] EWCA Civ 333 the parties had actually agreed to mediate and appointed a mediator. The defendants then pulled out of the mediation the day before it was due to take place. Their solicitors had, apparently, insisted that they do so. The claim failed but the Court of Appeal subsequently denied the defendants the costs that they had incurred after pulling out of the mediation. This was on the basis that the mediation might have been successful and saved incurring these costs.

Royal Bank of Canada v Ministry of Defence [2003] EWHC 1479 was a landlord and tenant dispute.
The Ministry of Defence was successful on most of the issues, but had several times refused an offer of mediation. The court ruled that this was contrary to the Government's pledge to make use of ADR and refused to award the Ministry of Defence its costs.

Another enthusiast for mediation is Sir Gavin Lightman, who has recently retired from the Chancery Division. He has been an outspoken critic of the high cost of civil litigation and in *Hurst v Leeming* [2001] EWHC 1051 he ruled that a number of reasons that were given by the defendant for refusing an offer of mediation were without validity. These included that heavy costs had already been incurred, that the claimant was alleging that the defendant had committed serious professional negligence and that the defendant was confident that he had a watertight defence. He held, however, that it was reasonable to reject the request for mediation because mediation would have been doomed to failure.

The facts of that case were extreme. The claimant was an obsessive litigant who was suing everyone in sight on charges of professional negligence and I do not think that it would have been reasonable to expect anyone to sit down with him at the mediation table. In general, however, it does not seem right to me to entertain an argument that the mediation would not have succeeded as justification for a refusal to mediate. Usually it is impossible to know whether a mediation may succeed until you try it.

These were all cases in which the Court made, or considered making, adverse costs orders against parties who declined to attempt mediation, usually in circumstances where this had been urged by the court. There were, however, a number of early cases in which the court actually directed the parties to mediate. I have referred to the standard Commercial Court order, which comes very close to that.

In one unreported case Mrs Justice Arden, now Lady Justice Arden, sitting in the Chancery Division, directed that a particularly complex web of disputes be referred to mediation, over the objections of some of the parties. Mr Justice Blackburne, also sitting in the Chancery Division, followed her example in making an ADR order in the face of strenuous opposition from the claimant. Whether it was appropriate for the court to act in this way came under review in what has, to date, been by far the most important English judgment about ADR. This is the judgment of the Court of Appeal delivered by Lord Justice Dyson in two appeals that were heard together: *Halsey v Milton Keynes General NHS Trust* and *Steel v Joy and Halliday* [2004] EWCA Civ 576; [2004] 4 All ER 920.

In each case the relevant issue was whether it was right to deprive a successful party of an award of costs on he ground that the party had refused an invitation from the opposing party to take part in alternative dispute resolution. Lord Justice Dyson used the appeals, however, as a vehicle for some general observations on ADR. First he dealt with the question of whether the court had power to order ADR and, if so, whether it was a power that the court should exercise. He said:

"We heard argument on the question whether the court has power to order parties to submit their disputes to mediation against their will. It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court.
The court in Strasbourg has said in relation to article 6 of the European Convention on Human Rights that the right of access to a court may be waived, for example by means of

an arbitration agreement, but such waiver should be subjected to 'particularly careful review' to ensure that the claimant is not subject to 'constraint'. See *Deweer v Belgium* (1980) 2 EHRR 439, para 49. If that is the approach of the ECtHR to an *agreement* to arbitrate, it seems to us likely that *compulsion* of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6. Even if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it.

We would adopt what the editors of Volume 1 of the White Book (2003) say at para 1.4.11:

> 'The hallmark of ADR procedures, and perhaps the key to their effectiveness in individual cases, is that they are processes voluntarily entered into by the parties in dispute with outcomes, if the parties so wish, which are non-binding. Consequently the court cannot direct that such methods be used but may merely encourage and facilitate.'

If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process. If a judge takes the view that the case is suitable for ADR, then he or she is not, of course, obliged to take at face value the expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR.
But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it.
Parties sometimes need to be encouraged by the court to embark on an ADR. The need for such encouragement should diminish in time if the virtue of ADR in suitable cases is demonstrated even more convincingly than it has been thus far. The value and importance of ADR have been established within a remarkably short time. All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR. But we reiterate that the court's role is to encourage, not compel. The form of encouragement may be robust."
Later in his judgment Lord Justice Dyson commented on the Commercial Court ADR Order.

He commented that this was the strongest form of encouragement but that it stopped short of actually compelling the parties to undertake an ADR.
He then referred to the Order devised by Master Ungley, commenting:

> "This form of order has the merit that (a) it recognises the importance of encouraging the parties to *consider* whether the case is suitable for ADR, and (b) it is calculated to bring home to them that, if they refuse even to consider that question, they may be at risk on costs even if they are ultimately held by the court to be the successful party. We can see no reason why such an order should not also routinely be made at least in general personal injury litigation, and perhaps in other litigation too. A party who refuses even to consider whether a case is suitable for ADR is always at risk of an adverse finding at the costs stage of litigation, and particularly so where the court has made an order requiring the parties to consider ADR."

These comments were strictly *obiter dicta*.

The same is not true of the comments that Lord Justice Dyson made in relation to the

use of adverse costs orders as a sanction for an unreasonable failure to resort to ADR. He said:

> **"**In deciding whether to deprive a successful party of some or all of his costs on the grounds that he has refused to agree to ADR, it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. In our view, the burden is on the unsuccessful party to show why there should be a departure from the general rule. The fundamental principle is that such departure is not justified unless it is shown (the burden being on the successful party) that the successful party acted unreasonably in refusing to agree to ADR. We shall endeavour in this judgment to provide some guidance as to the factors that should be considered by the court in deciding whether a refusal to agree to ADR is unreasonable."

Lord Justice Dyson identified the following factors as being relevant to whether it was reasonable to refuse an invitation to mediate:

> (a) The nature of the dispute. Some disputes are not suitable to mediation – for instance a dispute where the parties want the court to set a binding precedent on a point of law.
> (b) The merits of the case. Lord Justice Dyson said that it could be reasonable to refuse mediation where one reasonably believes that one has a strong case. He rejected the view to the contrary expressed by Lightman J in *Hurst*.
> (c) Failure of other settlement methods may make it reasonable to decline ADR.
> (d) The cost of ADR may be disproportionately high.
> (e) ADR may threaten to involve unacceptable delay.
> (f) Lord Justice Dyson agreed with Mr Justice Lightman that it was not unreasonable to refuse mediation if, by reason of the intransigence of the other party, mediation had no prospect of success. He held, however, that the burden was on the party seeking to avoid paying costs to show that mediation would have had a reasonable prospect of success, not on the party refusing mediation to show that mediation would not have had a reasonable prospect of success.

Lord Justice Dyson's judgment has been controversial. Those who support ADR say that it has had a dampening effect on the willingness of parties to agree to mediation. They suggest that in some respects, Lord Justice Dyson's analysis was wrong. In his judgment Lord Justice Dyson differed in some respects from the judgment of Mr Justice Lightman in *Hurst*.

Mr Justice Lightman got his own back at a summer reception given by solicitors called SJ Berwin for mediators and mediation users. The reception was enlivened by a jazz and blues band, but I doubt if this was any more lively than the critique Mr Justice Lightman made of Lord Justice Dyson's judgment in a talk entitled 'Mediation: An approximation to justice'.

In that talk Mr Justice LIghtman drew attention to the fact that the cost of litigation and the withdrawal of legal aid have left many disadvantaged citizens without realistic access to justice in the courts. He argued that for this mediation was a necessary palliative. It could provide an approximation to justice. But if it was to do so, it required the removal of two obstacles placed in its path by the decision in *Halsey*.

The first was the finding that the court could not require a party to proceed to mediation against his will, because this would defeat his right of access to a court under Article 6 of the European Convention on Human Rights. The second was the

finding that the burden of proving an unreasonable refusal to proceed to mediation lay on the party seeking a costs sanction. Mr Justice Lightman described these findings not merely as unfortunate but, in his opinion as "clearly wrong and unreasonable". As to the first proposition, Mr Justice Lightman said this:

"(1) the court appears to have been unfamiliar with the mediation process and to have confused an order for mediation with an order for arbitration or some other order which places a permanent stay on proceedings. An order for mediation does not interfere with the right to a trial: at most it merely imposes a short delay to afford an opportunity for settlement and indeed the order for mediation may not even do that, for the order for mediation may require or allow the parties to proceed with preparation for trial; and (2) the Court of Appeal appears to have been unaware that the practice of ordering parties to proceed to mediation regardless of their wishes is prevalent elsewhere throughout the Commonwealth, the USA and the world at large, and indeed at home in matrimonial property disputes in the Family Division. The Court of Appeal refers to the fact that a party compelled to proceed to mediation may be less likely to agree a settlement than one who willingly proceeds to mediation. But that fact is not to the point.

For it is a fact: (1) that by reason of the nature and impact on the parties of the mediation process parties who enter the mediation process unwillingly often can and do become infected with the conciliatory spirit and settle; and (2) that, whatever the percentage of those who against their will are ordered to give mediation a chance do settle, that percentage must be greater than the number to settle of those not so ordered and who accordingly do not give it a chance."

Turning to the question of the burden of proof on the issue of whether it was unreasonable not to agree to mediation he said**:**

"The decision as to onus must be guided by consideration of three factors: (1) the importance that those otherwise deprived of access to justice should be given a chance of an approximation to it in this way;
(2) the commonsense proposition that the party who has decided not to proceed to mediation and knows the reasons for his decision should be required to give, explain and justify his decision; and (3) the explicit duty of the court to encourage the use of mediation and the implicit duty to discourage unjustified refusals to do so and this must involve disclosing, explaining and justifying the reasons for the refusal. All these factors point in the opposite direction to that taken by the Court of Appeal."

Mr Justice Lightman ended with this conclusion:
"no thinking person can but be disturbed by the imposition of the twin hurdles to mediation which the decision in *Halsey* creates to achieving the approximation to justice which the institution of the mediation process may afford"

This is pretty punchy stuff by way of commentary on the decision of a superior court, but Gavin Lightman is not one to pull his punches. Is his criticism of these parts of *Halsey* well founded?

Let me first deal with the suggestion that Lord Justice Dyson was wrong to express the view that it would infringe Article 6 of the European Convention on Human Rights for the court to order the parties to submit to mediation.

Article 6 provides, in so far as relevant:

> "In the determination of his civil rights and obligations ...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgments shall be pronounced publicly..."

Lord Justice Dyson referred to the decision of the European Court in the case of *Deweer*.

He did so, however, only as supporting the proposition that any waiver of the Article 6 right to a public trial must be subjected to careful review to ensure that it was not induced by "constraint" – ie that it really was voluntary. Some have attributed considerable significance to this reference to *Deweer*. The authors of the useful ADR Practice Guide, now in its Third Edition, describe it as the leading case on this topic.

So let us see what the European Court had to say. In *Deweer* a Belgian butcher was facing a criminal prosecution for over-charging for pork. The Belgian authorities threatened a provisional closure of his business until the conclusion of the criminal proceedings, which might be for a period of months. Alternatively they offered the butcher what they described as 'a friendly settlement', which involved payment of the relatively modest sum of 10,000 Belgian francs.

Not surprisingly he chose the 'friendly settlement', but he complained to the European Court of Human Rights at Strasbourg that he had been constrained to do so and thus was in reality denied the fair trial to which he was entitled. The Strasbourg Court agreed. It held that while there was nothing wrong in principle with a party waiving his right to either a civil or a criminal trial by entering into an agreed settlement, on the facts of the case the settlement had been procured by constraint, so that it was not voluntary. The consequences of having his business closed down for months were so severe that the butcher had no practical alternative but to agree to pay the 10,000 francs. What in effect had happened was that the state had inflicted a penalty on the butcher without a trial.

The facts of *Deweer* are a long way away from the imposition of a mediation order. That case demonstrates that a coerced agreement that involves waiving the right to trial will infringe Article 6.

Does if follow from *Deweer* that it is contrary to the citizen's right to have his dispute resolved by a court to compel him first to try to reach an agreement by mediation? I think that it depends what you men by 'compel'. This involves considering the sanctions if the litigant does not comply with the court order to attempt mediation. It is of the essence of mediation that the parties are prepared to consider forgoing their strict legal rights. What of the litigant who simply refuses to contemplate this. Who when the court orders him to attempt mediation simply says 'no I won't'. If you commit him to prison for contempt of court then you can truly say that you are compelling him to mediate. What if you say – unless you attempt mediation you cannot continue with your court action. In quite a lot of jurisdictions mediation is ordered by the court on this basis.

I think that if a litigant in Europe was subjected to such an order, refused to comply with it and was consequently refused the right to continue with the litigation, the European Court of Human Rights at Strasbourg might well say that that he had been denied his right to a trial in contravention of Article 6. The European Commission has shown support for mediation, but not compulsory mediation. Whether such a scenario is a very likely is another matter. Experience shows that where a court directs the parties to attempt mediation they usually comply.

Lord Justice Dyson approved of the practice of the English courts of penalising a party in costs for unreasonably refusing to attempt mediation, so he plainly did not consider that

the use of a costs sanction was tantamount to compelling a party to litigate.

But Lord Justice Dyson significantly weakened the costs sanction by saying that the burden was on the party seeking costs to show that the other party had *unreasonably* refused to resort to mediation, rather holding that it was on the party refusing mediation to justify his conduct. I think that there is little doubt that this finding significantly reduced the pressure on English litigants to attempt mediation. After all, parties usually resort to litigation because they believe that they are going to win and, if you win, it can be quite difficult for the loser to show that you acted unreasonably on insisting on your full legal rights. At the time that Lord Justice Dyson gave his judgment in *Halsey* I agreed with it, but with hindsight I tend to agree with Gavin Lightman that it is a pity that he said what he did about burden of proof. There is much to be said for the robust attitude that a party who refuses to attempt mediation should have to justify his refusal.

I referred to the support given to mediation by the European Commission. Let me tell you about that. In 2002 the European Commission circulated a Green Paper seeking the views of Member States on ADR in civil and commercial disputes. The answers led the Commission to extol the virtues of mediation and to comment:

> "The Commission believes that mediation holds an untapped potential as a dispute resolution mechanism and as a means of providing access to justice for individuals and businesses"

In 2004 the Commission published a draft Directive designed to encourage mediation. The most significant Article of this, Article 3, provides:
"1. A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may in any event require the parties to attend an information session on the use of mediation.
2. This directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not impede on the right of access to the judicial system, in particular in situations where one of the parties is resident in a Member State other than that of the court."

That Article does not explain how a court can make mediation compulsory without 'impeding the right of access to the judicial system'. On the face of it this is something of a contradiction in terms.

Whatever European law says, the fact remains that in a number of jurisdictions the courts make orders which, on their face, compel the parties to resort to ADR, and these, as I understand it, include India.

What are the pros and cons of compulsory mediation? Strong views are expressed about this on both sides. Those opposed argue that compulsion is the very antithesis of mediation. The whole point of mediation is that it is voluntary. How can you *compel* parties to indulge in a voluntary activity? 'You can take a horse to water, but you cannot make it drink'. To which those in favour of compulsory mediation reply, 'yes, but if you take a horse to water it usually does drink'. Statistics show that settlement rates in relation to parties who have been compelled to mediate are just about as high as they are in the case of those who resort to mediation of their own volition.

Let me end by nailing my colours firmly to the mast. I number myself with Sir Anthony Colman and Sir Gavin Lightman as an enthusiastic supporter of ADR.

It is madness to incur the considerable expense of litigation – in England usually

disproportionate to the amount at stake – without making a determined attempt to reach an amicable settlement. The idea that there is only one just result of every dispute, which only the court can deliver is, I believe, often illusory. Litigation has a cost, not only for the litigants but for society, because judicial resources are limited and their cost is usually born – at least in part – by the state. Parties should be given strong encouragement to attempt mediation before resorting to litigation. And if they commence litigation, there should be built into the process a stage at which the court can require them to attempt mediation – perhaps with the assistance of a mediator supplied by the court.

I believe that we are moving in that direction in England. In family law disputes about property there is now a requirement for the parties to attempt mediation and this has I believe, an 80% success rate.

The government has established a National Mediation Helpline which currently receives 7,800 calls a month. Through this mediation can be arranged for civil law disputes on fixed fees. For those who qualify legal aid is available for this. For this service there is a 15% year on year growth rate planned. At the end of last year there was at Cobham an important meeting sponsored by the Ministry of Justice, the Civil Justice Council and the Civil Mediation Council, in which the Master of the Rolls took part. It was agreed to form a Proportionate Dispute Resolution Team to consider possible reforms of the law and practice of ADR. Suggestions included a Mediation Code, an appropriate practice direction, mediation training for judges and lawyers, the mandatory inclusion of mediation as part of legal professional training and legislation to alter the effect of the decision in *Halsey*.

In this field, as in others, India is ahead of us.
I was aware before this visit of the amendment made to your procedural code by the famous Section 89 and of Chief Justice Sabharwal's support of mediation in *Salem Advocate Bar Association, Tamil Nadu v Union of India* (2003) 1 SCC 49. On this visit I have been learning with admiration of the progress made in instilling a culture of ADR in this jurisdiction. I hope very much that we shall follow where India is leading.
