

Solutions

The background is a solid teal color. It features several abstract, geometric shapes in a lighter shade of teal. One large shape on the left resembles a stylized human figure or a chair. Another shape on the right is a circular, stylized human head profile. The overall aesthetic is modern and professional.

11

August 2008: Workplace bullying |
Family disputes | EU mediation
directive | Personal injury | Training |
Mediation preparation

The magazine of the Law Society's Dispute Resolution Section



Comment from the Chair

The briefest flick through recent editions of the *Law Society Gazette* leave you in no doubt that dispute resolution issues top the law agenda. Inevitably, the issue of costs is among them with both the Ministry of Justice (MoJ) and the Master of the Rolls calling for a review. Costs issues plagued the first 10 years of the Woolf experience. Over those years, the Civil Procedure Rules (CPR) have been amended many times. Practitioners argue that not all these changes have been cost-beneficial. Some have added to the work lawyers have to do in every case. We are entitled, therefore, to be concerned whenever there are calls for reviews of costs not linked to review of the rules. Much of the cost of dispute resolution is in the process. The less complex the process, generally the lower the cost. It is time to put all the calls for reform of costs law and funding mechanisms into perspective.

Talk within the solicitor's profession increasingly suggests that the CPR is overdue for major review. Ten years may seem a short space relative to the time the preceding arrangements were in place, but an enormous amount has changed in those years. Ways of working, the use of technology and all its implications for mechanisms of communication have so dated aspects of the CPR that they could be said to belong to another generation.

The Dispute Resolution Section represents solicitors and the interests of solicitors. Too often we are just one other stakeholder contributing to someone else's consultation setting out someone else's agenda.

The Law Society remains eager to demonstrate its representative prowess. The interests of solicitors who work in dispute resolution are intertwined with the CPR and its impact on the way we work. For the Law Society to take the lead on reform here would be commendable.

The Section's Annual Conference 2008 will pick up on this theme and take it forward. Diarise 18 November at the Law Society, and be there.

Fraser Whitehead, a senior litigation partner at Russell Jones & Walker solicitors, is chair of the Dispute Resolution Section.

Solutions (ISSN 1750-337X) is the quarterly magazine of the Law Society Dispute Resolution Section. It is intended to be a forum of debate and discussion of issues relevant to civil litigators. No part of this publication may be reproduced without express written permission of the Dispute Resolution Section. The views expressed are those of the individual authors and do not necessarily represent the views of the Law Society or the Law Society Dispute Resolution Section. While every effort has been made to ensure that the information contained in this publication is accurate, neither the Law Society nor the Dispute Resolution Section accepts any responsibility or liability for any error or omission, or for any consequences resulting therefrom.

This paper is produced from pulp sourced from a sustainable resource and is elemental chlorine free (ECF).

Publishers:
Dispute Resolution Section
The Law Society
113 Chancery Lane
London WC2A 1PL
Tel: 020 7316 5668
Email: drs@lawsociety.org.uk

Editorial:
Editor-in-chief: Paul Rogerson
Editor: Alice Trouncer
Editorial Executive: Kelly Brock
Tel: 020 7320 5973
Email: alice.trouncer@lawsociety.org.uk

Design:
Jupiter 7 Graphics Ltd
Tel: 020 7407 2215
Email: jupiter7@btinternet.com
Illustrations: Diane Trenoweth

Print:
Piggott Black Bear Ltd
Tel: 01223 404800
Email: sales@piggottblackbear.co.uk

Advertising and sponsorship:
Commercial Services Directorate
The Law Society
Contact: Lois Elam
Tel: 020 7841 5541
Email: lois.elam@lawsociety.org.uk

Contents

COMMENT

Stephen Mason on the recent activities of the Civil Litigation Committee 4

NOTICE BOARD

The Section's latest news and information 5

PRESIDENTIAL POST

Paul Marsh on his presidential plans 6

LITIGATION COSTS

What needs to be done about the rising costs of litigation 7

IN MY OPINION

Michael Lee on arbitration as an alternative to retirement 8

FAMILY DISPUTES

How to help the children be heard 10

PREPARATION

What you should know about your client before mediation 12

TRAINING

Why using drama can assist in training processes 15

GRIEVANCES

How to overcome the aggravation 16

PERSONAL INJURY DISPUTES

Make negotiations easier 19

EUROPEAN DIRECTIVE

What the new Directive means for you 20

PRENUPTIAL AGREEMENTS

Help satisfy all parties involved 22

IT

How EFDM can help lawyers prepare for an uncertain future 24

BOOKS

Anthony Glaister reviews David Richbell's latest on construction mediation 27

INSIDE TRACK

Policy developments in dispute resolution 28

THE WHOLE TRUTH

Members seeking answers about practice 30



COMMENT

from the committee



Stephen Mason

CHAIR OF THE LAW SOCIETY CIVIL LITIGATION COMMITTEE

What has the Civil Litigation Committee ever done for us?

The committees of the Law Society are very bad at explaining the vital work they do on behalf of members, so here is a snapshot of what, at the time of writing, the Civil Litigation Committee (CLC) is “doing for us”. The answer is nothing, apart from the following:

1) Costs – The CLC is fighting on numerous fronts. If the Master of the Rolls’ initiative of a major review of civil costs comes to fruition, the CLC will engage with this and strongly resist any unrealistic cap on costs. Instead, the obvious way to save costs is to simplify processes and reduce the amount of unnecessary work carried out on cases – each change to the rules seems to involve extra and unnecessary work, such as multiple case summaries and statements of costs.

2) Multi-track – In terms of costs, we particularly have in mind the multi-track and are working to produce detailed proposals on simplifying procedures where appropriate in all areas, from disclosure to witness statements, via allocation questionnaires.

3) Choice – A recent short paragraph in the *Law Society Gazette* about freedom

of choice of solicitor produced a huge and passionate post bag of solicitors and clients, angered that – as a result of legal expenses insurers or referral fees – the client was forced to use a solicitor not of his or her choosing. We are campaigning to stop unnecessary restriction on freedom of choice of solicitor, including the use of the Law Society office in Brussels to maximise pressure through the European institutions.

4) Case management track limits and personal injury claims processes – At the time of writing, we all still await a long overdue Ministry of Justice (MoJ) response on case management track limits for civil claims and simplified process for personal injury claims – the Law Society “Fast and Fair” campaign was a major part of the consultation process, and we will continue to work for a system that works efficiently for solicitors and rewards them properly.

Protocols work only when drafted by experienced practitioners. They are the ultimate example of a situation in which rules need to be made “bottom up” not “top down”.

5) Court forms – We are working to oppose the introduction of claim forms and other documents that give overdue emphasis to the role and need for mediation (often in preference to, or without even mentioning, any other form of alternative dispute resolution).

6) European law – We offer unique training for solicitors by means of the annual European Union Civil Justice Day.

7) Protocols – Attempts by the Civil Justice Counsel to introduce a “one size fits all” default protocol are very unpopular with the profession, and we have strongly opposed this. Protocols work only when drafted by experienced practitioners. They are the ultimate example of a situation in which rules need to be made “bottom up” not “top down”.

8) HM Courts Service – We also have a brief to monitor the introduction of the electronic filing and document management (EFDM) programme being (slowly) created for HM Courts Service. We will endeavour to ensure that the system works to the benefit of solicitors and their clients. The steep decline in service by the courts is also on our agenda.

9) Costs (again) – We need to explore alternatives to the conditional fee agreements (CFA) (for example, possible pure contingency fees or third party funding, among other options), and we are making recommendations for ways in which they can be introduced or encouraged without creating more problems than they solve. We have also long campaigned for the abolition of the indemnity principle, which impairs many creative ways of charging for legal work that appeal to clients.

10) Roads, aqueducts, law and order ... Well, maybe not yet?

NOTICE BOARD

News from the Section

NEW PRESIDENT

Professionalism, pride and profitability

Surrey-based property lawyer, Paul Marsh, took office as Law Society President at the Law Society's recent annual general meeting, vowing to lead the solicitors' profession into being a sustainable and successful legal business sector for the 21st century.

Mr Marsh is a consultant at Surrey law firm Downs Solicitors LLP and specialises in property work. He has played a leading role in voicing the profession's criticisms of home information packs (HIPs) legislation for many years. His objective now is to ensure that solicitors remain at the centre of the conveyancing process. Unfortunately, the harsh economic downturn of late has meant that there has been a significant drop in most regions in the number of conveyancing transactions.

Mr Marsh is determined to continue the reform of the Law Society so that it provides services that solicitors want, helps them develop their practices and careers, represents them effectively to government and the regulator and promotes the solicitor brand to the public.

As president of the Law Society, Mr Marsh will also be placing an emphasis on working with the Solicitors Regulation Authority, Legal Services Board and government to secure a regulatory regime within which legal businesses can thrive and compete and the quality of service to the public is assured.

He will promote and celebrate excellence in practice following on from Andrew Holroyd's year as president in 2007–2008. Following the successful launch of the Society's Excellence Awards in 2007, the awards, this year, will be expanded with new categories reaching a wider audience and involving new sections of the legal profession.

Building on the success of the Society's work on legal aid in the current year, Mr Marsh will ensure that the Society and all legal aid solicitors will be fully engaged with the review of new legal aid schemes.

Bob Heslett stepped up to vice president and Linda Lee started her year as deputy vice president.

www.lawsociety.org.uk

SMALL BUSINESSES

Avoid tribunal costs with early mediation

Acas, the employment relations service, is urging small businesses to avoid the risk of facing employment tribunals by considering mediation earlier when solving workplace disputes. The advice comes after new research revealed that most managers only see mediation – when an impartial party is brought in to help those in dispute to resolve their differences – as a last resort.

The study polled 500 decision makers from small businesses to assess their awareness of the use of mediation as a means of solving workplace disputes. The findings revealed only seven per cent of businesses had used mediation and that 52 per cent of respondents thought mediation was only suited to large organisations.

Despite this, it was clear that respondents recognise the value of mediation, with nearly three-quarters (72 per cent) of decision makers saying mediation sounds like a good tool for resolving workplace disputes, and almost two-thirds (63 per cent) saying that a more widespread use of mediation would reduce the number of employment tribunal claims. Of the businesses that had used mediation, 82 per cent said it had resolved the issues completely or partly.

Mediation was often used to address

several issues at once. Of the organisations that had used mediation, 43 per cent had used it for discipline issues, whilst 36 per cent had used it for relationship breakdowns and 31 per cent had used it for bullying and harassment.

www.acas.org.uk

CIVIL JUSTICE COUNCIL

Call for more users of justice

The Civil Justice Council should have more "users" of justice and fewer lawyers among its members, an independent review has recommended.

Jonathan Spencer's review, published this week by the Ministry of Justice, says the concept of the council is sound, and commends its "essential mediating role" in resolving disputes over conditional fee arrangements and other costs issues.

However, the body, set up in 1997 to advise ministers and senior judges on reforms to the justice system, needs to "take a sharper and more strategic focus on the needs of users, rather than what has sometimes been seen to be essentially a compilation of [...] personal enthusiasms".

This would involve doubling the user representation on the 25-strong council, to around 50 per cent of its membership.

Justice Minister Bridget Prentice said the government accepted "the broad thrust of the recommendations".

Robert Musgrove, the council's chief executive, welcomed the review, which he said would inform a new stage in the body's existence. "For the past seven years we've been very practical, working in the trenches. It's perhaps time to do a bit more horizon-gazing," he said.

This article was first published in the Law Society Gazette (10 July 2008).

www.lawgazette.co.uk

PRESIDENTIAL POST



Paul Marsh

PRESIDENT OF THE LAW SOCIETY OF ENGLAND AND WALES

I am delighted to write my first “Presidential Post” for the Law Society’s Dispute Resolution Section.

While the challenges arising out of the current economic downturn are less acute for many readers of *Solutions* magazine than those in the conveyancing sector, they are certainly not confined to the property market. The sense of uncertainty is real, and for good reason. The less propitious economic circumstances come at the very time when many practices are already nervous about the prospect of increased competition following the passage of the Legal Services Act 2007.

These twin challenges – economic pressures and competition – will form the backdrop to my year as president of the Law Society. My central task will be to ensure that the whole profession, from sole practitioner to high street to the City, and from private sector in-house to local government, can fully exploit its unique expertise to meet those challenges and embrace those opportunities.

Our aim must be to help practices evolve so they not only survive, but thrive. My mantra for my year as president – “law as a business” – is much more than a sound-bite. It will be the overarching theme for a range of

activities focusing on helping all solicitors in all sectors to maximise their success and respond effectively in this period of change and uncertainty.

The Law Society’s message about change has been a simple, but very important one. While we should not underestimate the challenges that change will pose for some practices – just like in any sector – nor should we underestimate the opportunities the future holds. The challenge is, therefore, as much about business mindset as business model; a choice between hoping to survive and planning to thrive. For some, that will require radical change; for others, less so, but the one common denominator is that no

While alternative business structures remain a few years away still, the passage of the Legal Services Act has already had an important symbolic effect, and many practices are already embracing change and planning for the future.

practice will have a divine right to profit in the new market of tomorrow.

While alternative business structures remain a few years away still, the passage of the Legal Services Act has already had an important symbolic effect, and many practices are now embracing change and planning for the future. This should be of no surprise, as history has shown that the profession is not only very resilient in the face of change, but also that it very often leads change. We are better business people and more innovative than we care to admit.

Changes to the law bring with them opportunities for members of the Dispute Resolution Section. *Solutions* gives practitioners an insight into the ever evolving legal landscape. Topics covered in this issue alone include family law and mediation – and hopefully, ideas about how to develop their business.

Collective redress, in particular, is an area of law to which the Law Society pays particularly close attention. We recently held a debate at our headquarters at Chancery Lane with Richard Wiseman, chief ethics and compliance officer for Shell; John Wright, national chairman of the Federation for Small Businesses; and Philip Cullum, acting chief executive officer of the National Consumer Council. Three speakers from three organisations with three very different perspectives, but all agreed that we could soon see a very different collective redress regime, and one that spells “opportunity” for solicitors.

Whatever opportunities the future holds, I remain confident that the solicitors’ profession will emerge from the economic downturn stronger, more businesslike and, above all, more successful.

Whose fault is it anyway?

The cost of litigation is ever increasing, but what needs to be done about it?

BY TONY GUISE

The recent news that the Master of the Rolls is initiating a root and branch review of costs by a senior member of the judiciary, which will leave no stone unturned in its effort to identify the problem of costs leads to shivers down my spine as I think back over the past decade or more of similar efforts to minimise costs.

I hope the review is much more than an exercise in pointing to the allegedly high fees charged by solicitors for their services. Such an exercise would miss the cause of the problem altogether, and I am sure that the kind of high-level review envisaged will consider matters more deeply.

The truth of the matter is that the cause of the high cost of litigation is not a new problem. The problem originated long before the introduction of the Woolf reforms, and people (clients and judges among them) always complained about the high cost of litigation. However, relatively recent developments serve to compound the problem several times over.

Everyone recognised the introduction of the Woolf reforms as a necessary overhaul of the 1965 Rules, but court users also recognised that the introduction of the new system would massively frontload costs and increase the costs of managing litigation generally. Lord Woolf also expressly said that the reforms were proposed on the basis that effective IT would be in place to facilitate the system.

It will not have escaped practitioners' attention that effective IT (of almost any description) is noticeable by its absence from the civil justice system. Of course, where courts share a combined court centre with the criminal courts, they gain valuable access to the criminal justice system's generous IT budget. Otherwise (and notably the Royal Courts of Justice are not classified as a combined court centre, despite hosting the Criminal Division of the Court of Appeal), the provision of IT is typically old and desperately in need of improvement.

Disclosure has been identified as a major source of cost, and rightly so. The wide, sweeping standard basis needs to become more focused, and the recent introduction of a new approach in the Commercial Court may be worthwhile trying in other Divisions. This new procedure looks at disclosure from an issues-based perspective and necessarily involves agreement being reached with the court as to the relevant issues. A schedule, rather similar to the Scott Schedule much loved by construction lawyers, is adopted to identify each party's position as to disclosure issues. An example can be seen in appendix 3 to the *Report and Recommendations of the Commercial*

Court Long Trials Working Party (Judiciary of England and Wales, 2007), available from www.judiciary.gov.uk.

Reducing the burden of disclosure is, of course, an important element in reducing the overall cost of litigation, but it is not the whole story. The recent development of e-disclosure threatens to swamp courts with masses of material considered relevant under the standard basis and lead to even more lever arches of material culled from servers, personal digital assistants (PDAs), laptops and mobile phones to name but a few of the likely candidates for data processing.

Unless the courts develop the infrastructure to manage this kind of disclosure, such material will simply make trials longer and longer. Indeed, there will be few courts in the country capable of holding the volume of paper involved. Only Manchester's newly opened Civil Justice Centre, which has probably the largest court rooms in England and Wales, might be able to do the job. This, however, misses the point. To reduce the enormous associated costs, the courts and their users must take full advantage of technology in terms of data processing and scanning.

To give a simple example, one recent case involved the preparation of a bundle which would have cost more than £130,000 to print using traditional means. Having scanned it and made the bundle available online, those costs were reduced to little more than £13,000. Now that is the kind of root and branch issue the forthcoming costs review needs to take into account.

Over the past financial year, HM Treasury made available more than £9 million to HM Courts Services for improvements to the old system, and there appears to be an understanding gained that higher court fees need to be reinvested in the system for it to perform at even a basic level. This may lead, eventually, to the introduction of electronic filing and document management (EFDM), which I understand to cost about £60 million on the basis of present forecasts. Even that investment does not bring in systems capable of addressing the fundamental problem of disclosure.

The government and judiciary must recognise that, to reduce costs and trial days further, more investment is necessary on the government's part in appropriate technology to facilitate not only the new technologies for managing disclosure, but also the Woolf reforms overall. It is long overdue.

Tony N Guise is a partner in GUISE and a member of the Law Society's Civil Litigation Committee and the Dispute Resolution Section Executive Committee.

In my opinion...

Lucy Trevelyan talks to Michael Lee about international arbitration as an alternative to retirement

Seven years ago – before the age discrimination regulations came along and threw doubt on the legality of the compulsory retirement policies in force at most City law firms – Michael Lee, manager of Norton Rose’s Paris office and head of the firm’s international arbitration group, decided retirement (forced or otherwise) was not part of his game plan.

“I was getting close to the compulsory retirement age at Norton Rose, but I wanted to keep working. I’ve always been interested in international arbitration, so joining the Bar seemed a good way to continue working in a field I was interested in,” he says.

He chose to join 20 Essex Street, but fortunately for Mr Lee, the switch did not entail a plethora of conversion exams or a stint as an elderly pupil barrister. “I already had a higher rights of audience certificate, which exempted me from having to take transfer exams, and I was also exempted from having to do pupillage, so I was able to go straight in as a barrister,” he says.

Now a fully-fledged barrister and Centre for Effective Dispute Resolution (CEDR) accredited mediator, Mr Lee spends much of his time as an international arbitrator. A fellow of the Chartered Institute of Arbitrators, he has served as a member of the tribunal in more than 40 international arbitrations administered under the rules of various international arbitration institutions, as well as ad hoc arbitrations.

Mr Lee’s arbitrator role sees him practising all over the world: from London to Paris; from Singapore to Hong Kong. He says, however, that arbitration proceedings in different jurisdictions are more similar than one might think.

“The method of conducting an international arbitration – particularly under institutional rules – is pretty much the same; although individual tribunals may have different ways of dealing with things, the basic framework is similar.”

He says that these days, although in some fields ad hoc arbitrations are favoured, in general, institutional arbitrations are more common in the international commercial world.

An institutional arbitration has a supervising institution that exerts administrative control over the arbitral process and has a set of specific rules (such as the

“My only criticism is that English arbitration is too much a mirror of High Court litigation, and that’s not the way things are done necessarily abroad.”

Rules of Arbitration of the International Chamber of Commerce effective since January 1998). In ad hoc arbitrations, parties execute their own arrangement without reference to institutional supervision. The most popular rules for these arbitrations are those of the United Nations Commission on International Trade Law (the UNCITRAL Rules).

Mr Lee says, that in recent years, the number of arbitrations has increased in volume and possibly in complexity. “But

then with the increase in international trade, one can say international arbitration was bound to increase, as well,” he says. “It may be because arbitration is becoming better known, but increasing trade brings more arbitration.”

He says one of the benefits of international arbitration compared to litigation is that most countries are parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the NY Convention), which has given arbitration awards almost global enforceability and provides limited scope for challenging an award.

“Most international commercial contracts have arbitration clauses because most don’t want to litigate in another party’s courts. It’s also relatively easy to enforce an international award – sometimes more so than a court judgment. You do get an extra layer of cost in arbitration – that of the tribunal and the institution if it is an institutional arbitration – but this makes up a very small percentage of the overall costs.”

He says arbitrations can sometimes be made overly complex, and arbitration can, therefore, be a victim of its own success. “They can become long and drawn out, but this tends to be the exception rather than the rule, and in general, arbitrations are easier than going to court.”

He says all the major institutions are seeing an increase in work and on a geographical level, Singapore and Hong Kong are very much “getting in on the act”.

“They have always been there as arbitration centres, but Singapore in particular is going out of its way to get people to put arbitration clauses in contracts. It has got an arbitration friendly Arbitration Act [Singapore Arbitration Act 2001]

and has incentives to sit as an arbitrator. Hong Kong is also seeing an increase in the number of arbitrations. It has an Arbitration Ordinance and has a pool of good arbitrators. It is seeing a lot of disputes involving China," he says.

The UK, he says, is one of the leaders in the world in terms of arbitration, with the Arbitration Act 1996 creating a very favourable environment for arbitration. He says that the Act "cuts down the possibility of referring to the court: although there is always reference to the court in exceptional circumstances, there is no automatic right of appeal, and in general the courts now are very pro arbitration."

"My only criticism is that English arbitration is too much a mirror of High Court litigation, and that's not the way things are done necessarily abroad, particularly in continental Europe. We can certainly learn from our friends across the Channel. It's just becoming too bound up in pleading and formality. The average length of a hearing of an international arbitration in Paris was two days, but here the average is probably about five days."

The American Arbitration Association (AAA), also clearly feels the arbitration process should be hauled back to its original roots: that of providing a simple, fast and cost-effective way of sorting out commercial disputes outside the formality of the court system. It has recently published new guidelines that set out a blueprint for arbitrations conducted under the AAA International Arbitration Rules and aim to stop the arbitration process being excessively sluggish, complex and costly.

Mr Lee says the new guidelines are similar to the International Bar Association

Rules on the Taking of Evidence in International Commercial Arbitration, particularly as concerns disclosure of documents. He welcomes them as enshrining "what are generally thought now to be good practice in international arbitration, in particular, to try to do away with practices, which are common in US litigation but not generally to be found in international arbitration these days, [for example] depositions and interrogatories. I have never been in an arbitration where pre-hearing depositions or written interrogatories have been allowed (and very few indeed

"The average length of a hearing of an international arbitration in Paris was two days, but here the average is probably about five days."

where they have been asked for) although requests for information are sometimes used to seek clarification of an opponent's case."

A big area of growth over the past 20 years, says Mr Lee, are arbitrations stemming from bilateral investment treaties (BITs) – agreements establishing the terms and conditions for private investment by nationals and companies of one state in the state of the other. BITs, he says, generally contain an

arbitration clause that allows an investor whose rights under the BIT have been violated to have recourse to international arbitration, often under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID), rather than suing the host state in its own courts.

He explains: "A so-called developed country enters into a BIT with a less developed country, which is seeking outside investment. The treaty will have provisions which guarantee the investor fair and equitable treatment, protection from expropriation, etc. If the investor has been discriminated against, they can bring an arbitration claim, rather than a contractual claim against the other contracting party.

"What has grown up is a field of international public law dealing with matters such as fair and equitable treatment, etc. These awards are usually under the auspices of ICSID. They are made public, so what is developing is a kind of jurisprudence in that area: counsel will refer to cases and previous awards in the hope of persuading a tribunal to follow them."

He does not see the credit crunch and the widely predicted worldwide economic downturn as threatening the popularity and increase in international arbitration.

"I don't see it changing. In my experience, when financial conditions are tight, people tend to litigate or arbitrate. I don't see work falling off; even if there is a decrease in the amount of trade, people may concentrate on disputes rather than going on to the next deal." Retirement for Mr Lee could, therefore, still be a very far off notion.

Lucy Trevelyan is a freelance journalist.

Small part, big reward

The work of mediators in the family process is wonderful, remarkable, challenging, ever-changing and immensely rewarding

BY ANGELA RILEY

We all form part of “the global village”. The benefits to us in the west are obvious – fruit and vegetables all year round, cheaper goods and mobility of work. The downside of this increased mobility is that we move away from extended families and form small nuclear, fragile units comprising parents and children, with little or no support from family and friends as we move around the country or even the globe to pursue more highly paid work, affordable housing or that intangible better lifestyle.

Some of these changes are wonderful and exciting, but, as with every change, there are bad and good results. Perhaps the worst is the effect it has on family life and the way bringing up children now rests heavily on the parents, both of whom usually work, without the loving care of grandparents, aunts and uncles, brothers and sisters, to share the load, the responsibility, the care and the pleasure!

This reflects itself within the working environment of family mediation. We see more couples unable to cope emotionally, and often financially, too, as relationships are stretched beyond endurance. Marriages are split in two, and the legal arguments begin, often generated by a legal system that pits one party against the other, each striving to secure the larger part of the family pot – however small that might be. We end up with “serial monogamy” as one relationship ends and another begins.

The real losers are the children. Parting parents may seek to do what is best for the children in the family, but this may involve returning to the bosom of their own families for comfort, support and solace. Sometimes it may mean a new start somewhere else in the country or even in the world. It may be the introduction of new step relationships, of sharing their now divided parents with new partners and siblings. All of this has a most devastating effect unless it is handled carefully and lovingly.

If the parties have moved to this country, they may bring their own standards, ideals and cultures, and these can be accommodated in mediation in a way that is less likely to happen in court. As Lord Philips said at the East London Muslim Centre in Whitechapel (3 July 2008): “There is no reason why

principles of Sharia law, or any other religious code should not be the basis for mediation or other forms of alternative dispute resolution.” By accepting and respecting the needs and cultures of others, the mediator can help couples reach settlements that not only fall within our legal system in England and Wales, but also accommodate the ideals and principles that the mediating couple holds dear. By understanding the customs and rites of other communities, couples can be helped through this difficult time and their ideals upheld and respected while still adhering to the laws of the land. The real joy of mediating is that it allows creative discussion and problem solving in a way that cannot happen in a court situation. When mediators are familiar with the way husbands, wives and children are viewed in different cultures, and the influence of family and religion, couples can be guided sensitively towards lasting settlements that allow for their particular needs, which may be overlooked when settlements are imposed upon them by the court.

When couples fight out their problems in court, whatever the ruling, their relationship as parents is often damaged beyond repair, and they are unable to rebuild a working relationship, which is every child’s need and right. It would be foolish to think that all couples can sort out their disputes through mediation, but many can. By mediating, they are able to work at complex parenting plans.

There are moves to give children a voice, to help them come to terms with their parents’ separation and give them coping strategies at a time when they may feel totally out of control and unable to deal with the fallout of their parents’ choices. Mediators are now frequently trained in consulting with children, helping children to voice their hopes and fears and, when old enough, to help in the decision making process. This can be particularly relevant when one parent wishes to relocate, whether out of the immediate area or abroad. As their ages reach “double figures”, children can be adamant about where they want to live. Often their peer group can be influential in their decision making when changing schools. Whereas some children look forward to the change, others can be very reluctant to leave the familiar, particularly when everything else in their lives is being changed. Again, the mediation format

enables these views to be expressed and for parents to take them on board. If the parents can cooperate in supporting the children or explaining clearly when they cannot accommodate their viewpoint, a better relationship develops both between the two parents and between the parents and children. This can help greatly in making the inevitable changes run smoothly, making life less stressful for everyone.

When one parent wants to take a child to a new area – whether abroad or to a different part of the county – mediation can be very successful in helping the couple talk through the problems that arise. Initially, one parent is very often totally hostile to the suggestion – usually the one staying put – and with the help of their solicitor, letters fly around threatening prohibited steps or specific issue proceedings. By sitting the parents down together – sometimes with new partners if appropriate – the whole matter can be aired. These are not easy mediations, as one party fears they will lose touch with their child, and the other is frightened they may be stopped from going ahead with their cherished plans for a new life.

When the focus is taken away from the parents, and they start to consider the child, the parents can begin to see things in a less confrontational way. When discussing the benefits and disadvantages to the child, most parents can see things more clearly, and then progress can be made. Their own fears can also be verbalised, and plans made to take into account their feelings and needs alongside those of the child. By discussing the advantages and disadvantages of the plans, looking at the possible snags and how they can be overcome, parents work together in finding workable solutions.

These are practical sessions discussing issues such as travel arrangements. Can children fly on their own; at what age; who goes with them? Can there be a video link from home? Can free phone calls be set up? Where will the children go to school? How will they cope with holidays with the other parent in a different country? How can the family cope with these changes and still enable the parents to work together, putting their children's needs before their own?

If parents focus on the advantages to the child (and every situation has its advantages), this helps them work towards practical arrangements that will enhance life for the child, while keeping them in touch. The parents need to accept that there is no “ideal” answer and no rulebook. As long as parents continue to reassure their children of their continued love for them (even though the parents no longer love each other), the children can move more securely into the next stage of their lives. For children, there can be an excitement in having two happy homes instead of one war zone; of holidays with both parents and even new siblings and step-parents.

There is no substitute for discussion, and when children are involved in the decision making process, parents and children can help and support one another through the changes and the inevitable problems so that the parents can continue to function, each within a loving relationship with their children and a respect for the other parent. The children who pass through the divorce process best are those whose parents show



The parents need to accept that there is no “ideal” answer and no rulebook.

solidarity as parents, who reassure their child of their continued love, who speak to their child as a child and not as their “new best friend and confidante”, who encourage the child to have a good relationship with the other parent and give the child emotional permission to love and speak about the other parent and his or her new family.

The work of mediators in the family process is wonderful, remarkable, challenging, ever changing and immensely rewarding. To see distraught, stressed, frightened, warring parents learn to accept their situation, to support their children and to reframe their relationship away from themselves as a couple to themselves as parents and to know that the mediator has played a small part in this is job satisfaction in the extreme!

Angela Riley is a full-time mediator with 12 years' experience. Qualified in civil and family mediation and accredited by the Legal Services Commission to carry out family mediation, she is a member of both the Law Society Family Mediation Panel and Court of Appeal Mediation Panel.

Be prepared

Preparing for mediation is half the battle

BY PAUL HOUGHTON

The number of mediations increases weekly, but so does the proportion of those in which one or both parties mediate simply because they fear the costs of sanctions or because the court “suggests” that mediation should take place. This makes the process more difficult and highlights the need for good preparation for the process to be effective. Some may consider the following observations blindingly obvious, but they reflect several of the issues that I have come across in mediations over the past 12 months.

Preparation by parties is often late and inadequate. Lawyers tend to spend a lot of their clients’ money on preparation and attendance at mediation, and they really should maximise that impact on possible settlements by preparing properly.

Papers are often prepared and delivered as little as 48 hours prior to the mediation. Mediators can be considerably more effective if briefed well in advance of the mediation and given an opportunity to prepare and ask questions of the lawyers. Lawyers can assist by being open and frank with the mediator at an early stage and making contact prior to the mediation to explain their client’s stance, whether by a confidential “eyes only” written statement or a telephone conversation. I ask all parties to consider some form of confidential statement setting out the realities (as opposed to legalities) of their position, but fewer than 10 per cent make use of this process.

Mediators charge in a variety of ways for preparation. If preparation is inclusive but limited to a number of hours, do not send more than can be handled in the limited time allowed. If hourly charges are involved, then send only what is absolutely necessary for the mediator to see. Sending two or three hundred sheets of tables is fine if you can explain to the mediator what they mean and why they are important to the

mediation. If you cannot, or do not feel the need to explain what they are, then the chances are they are not important and ought not to be in the bundle. The mediator will ignore them and assume that they will be explained on the day. That wastes time and money.

The bundle of documents should be a joint exercise with the other party. Never fight with the other side over what the mediator is sent. Either party is free to send whatever they want in any event. Far better to agree to a single bundle, ensuring that what you send is relevant to the points you want to get across.

A good case summary or position statement will set out the history of the dispute and the main players involved. It will not be a rehash of the pleadings. If the pleadings do not yet deal with everything in dispute, make that clear. Use the case summary to expand the story, not to repeat it.

Beyond the dispute itself, a mediator needs to know of issues that affect the parties and their ability to come to an agreement. For example, if your client is being sued but has no assets and no possibility of making payment to the other side, whatever the merits of the case or its outcome, then this is something that should be made clear to the mediator. There may be reasons why this has not been made apparent to the other side prior to the mediation, but the mediator needs to be made aware of it, by way of a confidential note if necessary. There is nothing more certain to get peoples’ backs up than mediating until 5pm and the likely paying party then announcing that there is no prospect of a payment being made in any event. Better by far to get the issue in the open at an early stage so as to ensure that discussions are held in the knowledge of what is possible by way of settlement.

Understand your case in detail. Be in a position to discuss it with the mediator in front of your client.

Set out any funding issues. Is it a conditional fee arrangement? If so, what are the terms? Is there going to be an issue between you and your client over the effect of the arrangement, given the various possible settlement outcomes? Discuss with your client in advance the effect the arrangement will have if you settle – that is, what does he or she receive (or have to pay you in costs)?

After the event (ATE) and legal costs insurance have requirements as to settlement. Make sure you know the terms of the offering, and have (or can obtain) the authority of the necessary people during the mediation (no matter how late it may run).

Consider in advance how the matter might settle and whether there will be a tax or VAT issue. If it is an invoice claim, there will need to be something done with the original invoice. Should it be a credit note? Is a new one necessary? If so, what is the VAT position? Not knowing this in advance will substantially increase the length of time taken in structuring the settlement.

It is vital to know (or at least to have made the effort to try and find out) your client's personal or corporate circumstances. What does your client want? What can he or she afford? What is he or she risking in the terms of personal finances or lifestyle? Why would a retired person hazard his or her life savings on litigation? What impact would having the managing director and financial director of a medium-sized company in preparation for a year for a three-week trial have on the performance of a company? These are issues that will be discussed at mediation. You need to know the position in advance.

By all means, turn up with a basic precedent for a settlement agreement, but do not make it a 12-page epic with 50 standard boiler plate clauses unless that is actually necessary. Remember that the other side will need to read and consider it. Why make the agreement longer than necessary? Why introduce further scope for argument?

Above all, understand your case in detail. Be in a position to discuss it with the mediator in front of your

client – both its strengths and its weaknesses. Know what is realistic about your case and what is problematic, and be prepared to share that with the mediator. It is confidential. He or she will not tell the other side. You need to be able to advance the case realistically with the mediator during reality testing and possibly directly with the other side in joint sessions. Be prepared to do so, or if you are uncertain about it, avoid being pushed into positions that make you uncomfortable – but explain your position to the mediator so that he or she can assist you.

With the prospect of more unwilling parties being required to mediate, we all need to maximise the prospects of an outcome for our clients by proper, focused preparation. Know your client's requirements and prepare accordingly.

Paul Houghton is head of dispute management at Lupton Fawcett in Leeds and has been a mediator for the past 14 years.



Dramatic training

How law firms and in-house legal teams use drama to enliven the employment law training they provide relating to workplace disputes, arbitration, litigation and mediation

BY RICHARD WILKES

Responsible employers always aim to resolve workplace disputes fairly and amicably to avoid tribunal cases and their damaging consequences if at all possible. Law firms, or in-house legal teams, often help instigate procedures and practices to avoid employment relations difficulties.

However, sometimes people just cannot find common ground, and even the best run organisations may become involved in a tribunal case. If this happens, everyone involved needs to be properly prepared.

The traditional response from organisations is either to sweep the issue under the carpet and hope it never arises, or provide blanket employment law training as a pre-emptive measure for all staff. The latter option is universally seen as costly, intrusive into the working day and dull. Now, it seems, there is a more creative alternative.

Law firms are teaming up with drama-based training providers to enliven employment law-related training and explain the implications of legislation.

CHANGES IN DRAMA PROVISION

Professional actors have long been used in learning and development, but their usage has changed remarkably. Actors were originally used almost exclusively in assessment centres or as one-to-one role players to enhance development. When pioneering trainers introduced role plays into training courses to recreate situations and behaviours found in the workplace, they found that many people found it embarrassing to be “put on the spot” in front of colleagues, reducing the effectiveness of the course. Hence, professional actors were brought in to run the role plays.

Firms of actors / facilitators then began to develop extraordinarily realistic interactive theatre initiatives for large groups on subjects such as diversity, performance management and leadership. Freed from the need to role play themselves, the delegates were able to concentrate on the training issues, and they learnt by analysing and summarising what they saw. Some drama firms have since further extended this concept and created entire business simulations to help client organisations meet learning challenges.

THE BENEFITS

When combined with legal guidance, facilitated drama-based training provides an engaging and effective approach that

helps the participants to gain knowledge of their legal obligations and of best practice. The advantage of using drama is that it can quickly bring issues to life and highlight specific behaviour, in a way that resonates with all members of staff.

Drama-based employment law training is often used to show those with managerial responsibility how they can manage within the law and minimise the risk of claims from workplace disputes. It is also used for issues such as handling grievance and disciplinary interviews, tackling bullying, harassment and discrimination in the workplace, promoting diversity and equality and preparing managers for an employment tribunal, should the worst happen.

Experiential training of this kind has proved to be particularly effective in bringing to life the people aspects of disputes. It helps delegates to see a situation from both sides. In some disputes, it is necessary to establish who is right and who is wrong, for example, in matters of employee rights, company policy, health and safety and other legal issues. However, in other cases of conflict, taking a right or wrong approach ignores the relationship aspects and reduces the possibility of a win / win result. Drama is flexible enough to highlight either instance.

Providing employment law-related training is important for line managers, as they are at the sharp end. If and when situations arise, they need to deal with them efficiently and effectively while complying with legislation. If they are to follow the right procedures and work with people in a fair and reasonable manner, it is important that organisations ensure that they feel equipped and ready to handle these situations.

However, providing training in this area is also beneficial to the organisation, not only from an ethical position but also from a business standpoint because it can help the organisation to differentiate itself and create a competitive edge. Today's organisations want to be seen as good corporate citizens, with global awareness and high diversity and ethical standards. By providing this training, they can position themselves as one step further down the road to being an employer of choice.

Richard Wilkes (richard@stepsdrama.com) is a director of Steps Drama Learning Development, drama-based learning specialists (www.stepsdrama.com).

The aggravation process

Why the grievance process make matters worse

BY AMANDA BUCKLOW

A starting point for articles and speeches is frequently the dictionary. I find looking at the root of a word very helpful, and so it was in this instance. Aggravation and grievance have the same root, which means heavy and burden. I found one very apt definition of aggravation in my computer dictionary, which actually refers to the context of homeopathic medicine: “the temporary appearance or worsening of symptoms that a remedy is intended to eliminate, taken to be caused by too strong a dose”.

Over the past few years, I have come to the view that grievances, especially those that claim bullying and harassment, are in fact forms of bullying and harassment themselves. Grievances have provoked “a worsening of symptoms that a remedy is intended to eliminate”.

I believe we need to do something else to stop the vicious cycle.

For those of you who are curious about how I get to this point and what it means for the potential success of the new Employment Bill and, perhaps most importantly, what it means for our understanding of what is bullying and what is not, please read on.

Bullying is used to describe a whole range of behaviours received as intimidating and threatening. The definition found in grievance policies includes variations like “intrusion by pestering, spying, staring and leering; unwelcome advances; public humiliation, derogatory or belittling remarks concerning job performance or personal attributes; shouting and / or sarcasm, personal insults and name-calling; removing areas of responsibility without good reason, punishing with trivial tasks, setting an individual up for failure with impossible workloads and deadlines; persistently ignoring or patronising a person, isolation or non-cooperation at work, exclusion from social activities. These behaviours happen in the workplace from time to time and usually as a means of communicating deep unhappiness about something else.” If the “something else” is not addressed, the behaviours become more consistent, to “live the claim”.

Of course, these behaviours are not acceptable as persistent conditions at work. For the most part, they are symptoms of an underlying condition and are rarely dealt with until they reach a critical mass and are eventually enshrined in a grievance. Then they take on quite a different tone. The claimant seeks to illustrate their claim with examples, often from their notes. The

existence of the notes will often be known to their colleagues and might even be considered by them as “intimidating” or “spying”.

In truth, the development of the grievance procedure has been a truly “heavy burden” for both employers and the tribunal system, partly because the drivers were first to find a remedy for the stressed tribunal system, and second to catch disputes before they get out of hand. If you read the guidance notes on the Department for Business, Enterprise and Regulatory Reform’s (BERR) website and several other information sites, the message to employees is that: “You must go through a grievance process; otherwise you risk being excluded from the Employment Tribunal system.” This prioritisation has contributed to the lack of success, amply evidenced in the *Gibbons Report*.

We know that the dispute regulations have been a failure because they have resulted in more disputes and certainly cannot claim to have “nipped problems in the bud”. The problems have simply been temporarily relocated from the Tribunal back to the workplace. I see that as a positive move in principle, because the problems do belong in the workplace and so do the solutions. However, it only works when there is both the willingness and the skills to deal with the root causes of disputes.

From my own experience, the regulations have been far worse than just a failure. Perhaps my experience is biased towards very complex cases, but the “costs” of managing disputes have been passed from the State to the individual and then back to the State (via the organisation), frequently with long-term consequences for individuals and at huge hidden cost to the organisation and the tax payer. Productivity has suffered, but no one has quantified what that really means other than by the measurement of sickness and absence in the workplace. The interventions to manage absence, however well thought out, do not get to the root of the problems. The grievance process is effectively a mini-trial; it is an adversarial process, and the stress of taking part is no less than in any litigation. In fact, it might conceivably be worse: there is no value on the table to argue about. So guess what? Claimants work hard to put value on the table because they do not see how anyone can really make people behave; and they are right.

I have a case in mind by way of illustration. This is a current case that I am mediating, involving a whole department (19 people) which has five grievances and counter-grievances in



play. The grievances refer to “oppressive management style”, and the counter-grievances focus on “bullying” and “pack mentality” by the junior staff.

Their story is not unusual. To capture the main issues, I have drawn a word map (see overleaf). The asterisks denote issues that may be handled in factual terms or that would form the basis of an employment claim should it go that far. Indeed, this one might go that far, because the person targeted in the grievance is very distressed about this happening to her only four months after joining the organisation. She has a very strong need to be vindicated, and she has lost hope that her new job can be saved. With the prospect of “leaving” in her mind, she is almost certainly thinking that someone should “pay” for this, and she may be reluctant to counter advice which supports that view, whether from family, friends or legal advisers. The hamster wheel is turning.

Several people are on sick leave or “extended” compassionate leave. The absence rate is 26 man weeks in 4 months across 12 employees. The organisation has a policy on managing sickness and absence. It is not working. HR have arguably followed their grievance procedure (the grievances are now all stayed pending the outcome of the mediation), and they are following the advice of their legal advisers.

What are the real issues? The business issues are the real issues. A department that can deliver on its promises to its customers, compete and prosper in a very competitive market. What is getting in the way? The “performance” of a senior manager. She is in the wrong place doing the wrong job for the wrong reasons, and she is struggling to gain influence and keep her authority because no one trusts her to do the right thing. The right thing? To act in the best interests of the group and according to the shared values of the group. This is not a

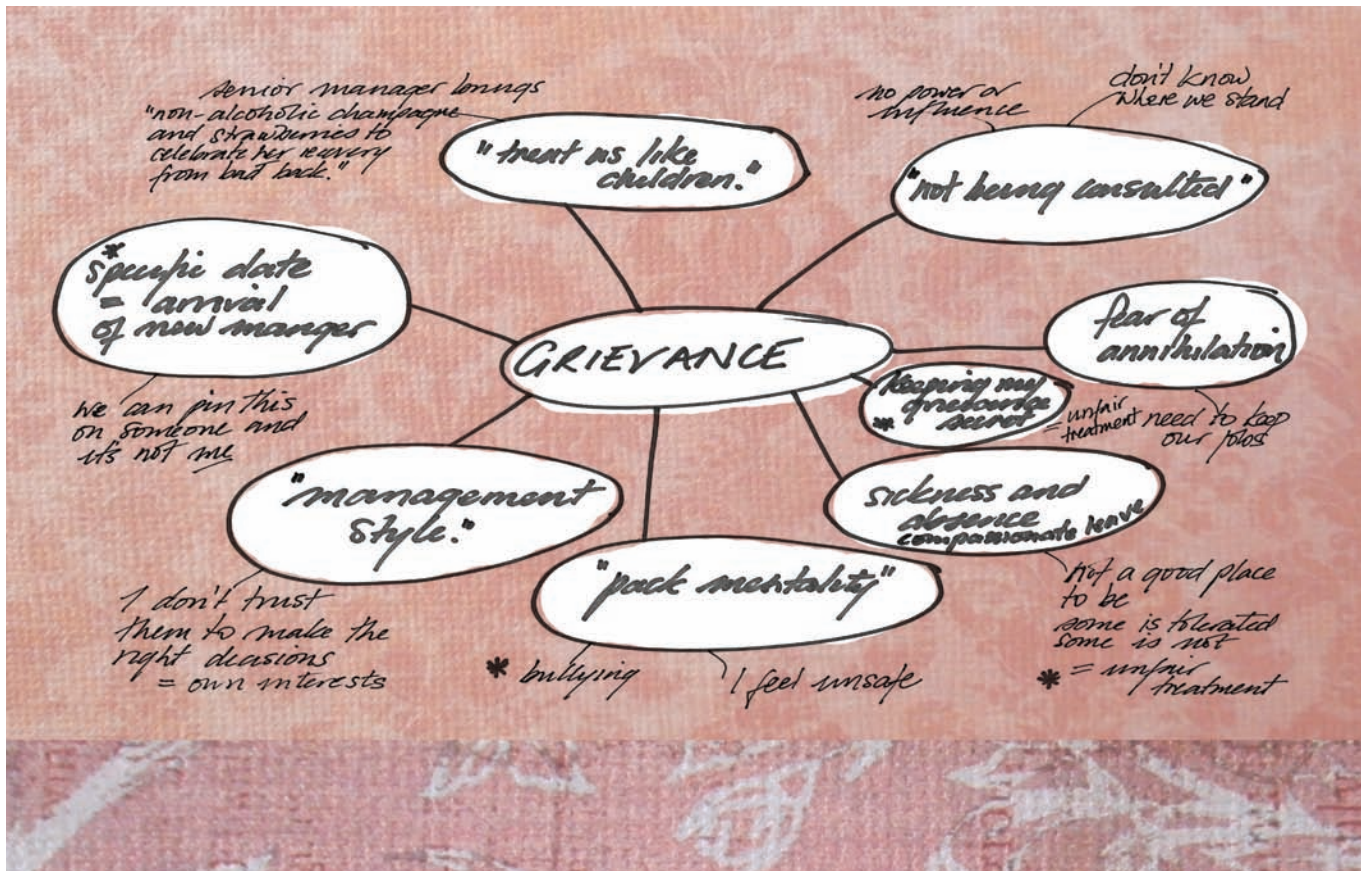
personality clash. That would be the easy diagnosis and is so often used. This is a clash of values. This is about identity, self worth and survival for individuals and the inability of the organisation to deal with those.

Subordinates are very good at identifying incompetence and insecurity. When they do, what follows is lack of trust in that person to make decisions in an even-handed way or in a way that will ensure the continued success of the business. They can smell self-interest and self-protection a mile away. When anyone says “the manager is paid to manage”, you can be fairly sure there is a feeling of insecurity about the ability of that manager to manage. Behaviour is the expression of feelings. Bullying behaviour is the expression of extreme feelings of insecurity and loss of control. That applies to employees and employers and customers.

In this case mediation has brought about a significant turning point: the group that raised the original grievance has realised that their intention to depersonalise the grievance by citing “oppressive management style” has in fact facilitated the personalisation of the grievance against the wrong person. The “wrong person” is their immediate line manager whose arrival coincides with the date they cite for when things started to go wrong. It has been an easy step for everyone to make the link.

They are now horrified that their motives have been so misunderstood and have done so much damage. When they realised what had happened, they asked me, “are we legally allowed to change the grievance?” They feel they are in a legal process, and they believe that it would be difficult to change anything without admitting they were wrong about the issues. The issues remain, and the dispute remains, so how can they say they were wrong? Stalemate.

>>



<< Nevertheless, they approached the respondent and acknowledged their responsibility and regret. She accepted the apology but replied that it was "probably too late to stop things now". I hope not.

I am very positive that mediation will resolve some, if not all, the issues and help the whole department to see: 1) what went wrong; 2) what matters to them; and, 3) how they can do things differently in the future, which includes managing differences of opinion and clashes of values.

I believe that mediation is the only process that can address the underlying causes, especially when things have gone too far, and yes, I do wish that we were invited in before things got so bad. Mediators share the same fate as solicitors: we are only thought of when there is a crisis and the employer has recognised its own risks within the legal context. So we work with what we have, and it is not ideal. When it is over, everyone likes to forget it ever happened, which is not great for repeat business. So we have to develop services which add value and provide a self-supporting context, so that employers can deal with things in the future, and are not afraid to ask for our advice before things get too serious.

People raise a grievance when informal attempts to resolve issues fail. As this group explained to me: "We had to make it official because no one was listening to us." The grievance process is a formal step in the Tribunal process, and the result is that grievances are framed in terms which will qualify for hearing at a Tribunal if required. That means there is only a short list of possible issues – bullying and harassment being one; discrimination being another. If issues are filtered too soon into a short-list of "qualifying criteria", then the hamster wheel runs faster.

I am a supporter of the new Employment Bill, which repeals the statutory dispute resolution procedures set out in the Employment

Act 2002. There is no reason why anyone should throw the baby out with the bath water, however tempting that might be. It does not, however, change the fact that when you have a process for dealing with something, people will use it, and once they start, it is very difficult to stop. If no one is hearing them in the informal process, then they will keep raising the volume. So I do have reservations about how much things will improve.

In truth, I have seen few cases of extreme intimidation and bullying. They have been in the construction industry, the rail industry and engineering. One example would be a female train driver who crossed a "picket line" and who subsequently received a funeral wreath and had her garden dug up to leave the shape of a coffin. Another would be a signaller who was trying to blow the whistle on safety issues because he was terrified that he might have another massive train crash on his conscience if he did not. I have sat with these people and many others and talked through how they might deal with these terrifying events and still keep their jobs. I observe that in the end it comes down to a conflict of values, and no one really knows how to deal with that. There is no process other than talking about what really matters and supporting people in finding the way to do things differently. Before they can do that, they have to feel differently. If all that fails, then there should be a process to decide and to protect the truly vulnerable. It should be the last resort because it never really gets to the issues, and it never really delivers what people need. Only seven per cent of claimants in Employment Tribunals remain in their current employment.

Amanda Bucklow (www.amandabucklow.co.uk) is an independent commercial mediator and the first ever fellow (for mediation) of the Chartered Institute of Arbitrators for her contributions to the development of the profession of mediation.

Personal injury litigated disputes

Refusal by either party to discuss or negotiate in litigated personal injury cases will likely meet with no sympathy from the trial judge and result in costs sanctions against the party unwilling to negotiate

BY PETER SEYMOUR

Under the Civil Procedure Rules (CPR), parties are now required to make every effort to settle their cases before hearing. This does not have to be through formal mediation; it may simply be through discussion or negotiation.

The new style allocation questionnaires specifically state that the court wants to know what steps have been taken. Legal representatives now have to confirm that they have explained to their client the need to try to settle, the options available and the possibility of costs sanctions if they refuse to try to settle. Parties are also asked whether they want to attempt to settle at the stage of filing the allocation questionnaire or wish for a one-month stay of proceedings. There is the option of requesting the court to arrange a mediation appointment.

It is now common practice in larger multi-track personal injury claims to hold a round table meeting or settlement conference. If both parties come to the table expressing a willingness to settle, then even if no settlement can be reached on that day, at least the issues can be narrowed, rendering these meetings extremely effective. From a claimant's viewpoint, it can remove the trauma of having to give evidence and be cross-examined. From the defendant's perspective, early settlement can often avoid the insurer client having to pay many thousands of pounds in trial costs.

It is always helpful to have the claimant present at settlement meetings so that instructions can be taken during the course of the meeting. The general practice, however, is not to have the claimant present while discussions are actually taking place between the parties because his or her presence can inhibit frank discussion.

At one time, it was thought that parties could not be forced into mediation and that the burden of proving unreasonableness when refusing to mediate was not on the party that refused (*Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576*). That view has been criticised by Mr Justice Lightman as being: "Unfortunate, clearly wrong and unreasonable". More recently, in the case of *Egan v Motor Services (Bath) Ltd [2007] EWCA Civ 1002*, it was said of mediation "It is not a sign of weakness to suggest it. It is the hallmark of commonsense. Mediation is a perfectly proper adjunct to litigation."

The best time to consider a settlement meeting in the larger multi-track personal injury claims is when the medical evidence and any other expert evidence has been finalised, and that will include joint statements from the experts as to areas of agreement or disagreement. There should also be updated witness statements from the claimant and supporting witnesses on quantum, together with updated schedules and counter-schedules so

that both parties can go into the settlement meeting armed with all relevant information.

Thus, in every litigated personal injury case, a refusal by either party to discuss or negotiate and just plough on to trial is likely to be met with no sympathy from the trial judge and almost certainly costs sanctions against the party unwilling to negotiate.

CASE STUDY

The claimant (C) was a motorcyclist severely injured in an accident. He was riding his motorcycle approaching a junction when the defendant (D) pulled out of the junction into the path of the motorcycle. Liability was agreed 80/20 in C's favour.

C sustained a serious injury to his spine and underwent a number of operations. He was unable to return to his pre-accident employment as a plumber and was handicapped on the labour market. The back injury resulted in ongoing urinary tract symptoms and erectile dysfunction. Due to many years of pre-existing heavy smoking, C had already developed chronic obstructive pulmonary disease which, in the opinion of medical experts, would have prevented him from continuing as a plumber in any event beyond the age of 50.

The claim included a care claim past and future.

Both parties finalised and exchanged their medical evidence and final schedules of special damage and future loss and counter-schedule had been served. The claimant had served all updated witness statements as to quantum.

Updated schedule of C claimed losses (at 80 per cent) of £527,975. Updated counter-schedule of D claimed losses (80 per cent) of £210,773.

The parties agreed to a settlement meeting with C present but not in the room during the discussions between solicitors and counsel.

C's opening offer to settle, to include general damages at £46,000, was £420,970.

D's opening counter-offer £275,000.

C rejected D's opening offer and came back with counter-offer of £384,800. D made a final offer of £317,490, which was accepted.

Result: C was able to walk away with a significant lump sum, enabling him to get on with his future life without the trauma of having to attend court and give evidence. D was able to settle without the insurer paying out at least £20,000 to £30,000 in the party's preparation for trial and trial costs.

Peter Seymour is chairman and head of personal injury at Actons.

Providing directions

What will the newly-approved European Directive on mediation in civil and commercial matters mean in practice?

BY TONY ALLEN

Although the European Directive's scope is limited to cross border disputes – in which at least one of the parties is domiciled or habitually resident in an EU Member State other than that of any other parties, at the time mediation is agreed – its thinking is likely to pervade civil justice thinking more widely. Some of its contents are, in a sense, peripheral to the English civil justice system, which largely complies with the Directive's requirements already, but in several respects it consolidates sensible thinking about mediation and should stimulate debate about whether and how we should create a statutory framework for mediation here.

The Directive takes a restrictive approach to the boundaries of mediation, providing helpful definition for a term which (together with the umbrella term alternative dispute resolution, or ADR) has been subject to painful stretching beyond the point of confusion. The legal profession, and perhaps especially judges, should know what is and is not mediation and when it is being ordered.

Mediation is defined as: “a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a member state.” This clarifies that mediation's voluntary nature relates to voluntary continued participation in the process once started, and not to the question of whether to participate in the first place, which may be made compulsory by order of a judge or by statutory provision.

Article 5 of the Directive actually underlines the right of any Member State to make mediation compulsory or sanction failure to use it, providing legislation does not prevent access to the judicial system. This will, it is hoped, put an end to the suggestion that ordering mediation contravenes Article 6 of the European Convention on Human Rights (ECHR).

Article 3 specifically encompasses mediation by a judge who is not responsible for the judicial proceedings in question, but excludes judicial settlement attempts during proceedings. Therefore, a retired judge who sits occasionally but has no

responsibility for judicial management of a dispute can validly act as a mediator.

ENSURING QUALITY OF MEDIATION SERVICES (ARTICLE 4)

Quality standards for mediators and mediation providers are handled by requiring Member States to ensure that voluntary codes of conduct are published and adopted, and that mediation training standards are encouraged.

This sounds anodyne, and a standard easily satisfied in England, if all that is required is for the Ministry of Justice to satisfy itself that such provisions exist (which they do). The Civil Mediation Council's formal adoption of oversight of such issues may be all that is required. The Directive's reluctance to impose a formal registration scheme is to be welcomed.

Article 9 also encourages ready availability of contact information for mediators and mediation providers.

ENFORCEABILITY OF MEDIATED SETTLEMENTS (ARTICLE 6)

This provision requires that it should be possible for a written settlement agreement negotiated at a mediation to be enforceable by a court, unless (in broad terms) it is illegal according to the law of the Member State where enforcement is sought. It would seem that the English system complies with this requirement already. In other common law jurisdictions, such as Nigeria, India and Pakistan, the need for the agreed terms to be incorporated into a decree of the court for enforcement purposes has been discerned. This seems unnecessary here, where performance of mediated settlements seems to have been commendably good.

This provision only applies to written settlement agreements, a formality that all good mediation agreements require. Doubt has been expressed in an English case as to whether parties can make enforceable “side agreements”, even if the mediation agreement imposed an obligation for a settlement to be signed in writing for it to be enforceable. Statutory clarification may well avoid the difficulties created in that case.

CONFIDENTIALITY OF MEDIATION (ARTICLE 7)

Of all the provisions of the Directive, this one requires most attention and debate in England and Wales. The assumption on

Mediation's voluntary nature relates to voluntary continued participation in the process once started, and not to the question of whether to participate in the first place.

which this Article is based is stated as: "Mediation is intended to take place in a manner which respects confidentiality". The main provision is that Member States must ensure that mediators and providers shall not be compelled to give evidence in civil proceedings or arbitrations regarding information arising out, of or in connection with, a mediation process. This is subject to three exceptions:

- 1) if the parties agree otherwise;
- 2) if there are overriding public policy considerations, such as to child protection or physical or psychological harm; or
- 3) if disclosure of the content of the agreement is necessary to implement or enforce that agreement.

Paragraph 2 makes it clear that Member States can enact stricter measures to protect the confidentiality of mediation.

This is a watered-down provision, dealing only with mediator privilege from being called to give evidence, subject to exceptions. In the earlier draft of the Directive, mediators and providers were specifically placed under an absolute bar over giving evidence about the following:

- party invitations or willingness to participate in a mediation;
- parties' statements, admissions and settlement proposals made during a mediation;
- any mediator proposal for settlement and any party's expression of willingness to accept it; or
- any document prepared solely for the purpose of a mediation.

That draft went further, by providing that such evidence could not be ordered by a court and, if offered, should be treated as inadmissible in both proceedings related to the mediated dispute, and in other litigation. It could only be admitted to the extent required to implement or enforce a mediated settlement agreement; for overriding public policy reasons; or if the mediator and the parties agreed. It also provided that otherwise admissible evidence would not be rendered admissible simply because it was used in a mediation.

However, in the current draft, not only has the mediator lost the right to veto admission of what happened at the mediation, but he or she can even be compelled to give evidence about that, if all the parties agree. These are minimum standards indeed, ones we certainly reach and probably surpass in English law as it stands, so compliance with the Directive standard is no

problem. The question is whether we want to give greater protection than we already do to the mediation process. This is one area where judges have shown some inquisitiveness, perhaps through not appreciating the delicacy of what they were investigating, and where the line needs to be drawn clearly. Once mediation confidentiality is breached as a principle, the whole value of the process can be quickly undermined.

MEDIATION AND LIMITATION PERIODS (ARTICLE 8)

This Article requires Member States ensure parties to a mediation process cannot be prevented from initiating judicial or arbitration proceedings by the expiry of a limitation period "during the mediation process". This is an odd requirement to English eyes. Limitation never prevents the issue of proceedings here, as a limitation defence "is a shield, not a sword". The question is whether a defendant should be prevented from asserting a limitation defence that has accrued during the mediation process. English commentators expressed lack of enthusiasm for this proposal during the European debate, as it seems to risk satellite litigation over when "the mediation process" both starts and stops, again courting the possibility of evidence from either mediator or mediation provider on this ancillary but important issue.

ONLY CROSS BORDER MEDIATIONS?

A key limitation to the effect of the Directive lies in the recently imported paragraph 8, which provides that its provisions shall only apply to mediation in cross border disputes, though nothing is said to prevent member states from applying similar provisions to internal mediation processes. In these internationalist days, domicile of the parties never requires much consideration in the conduct of mediations. Everyone needs to know what law governs the dispute and which courts would have jurisdiction in the event of non-settlement, but one of mediation's great advantages is that such matters are not particularly relevant to the conduct of the process or even to terms of settlement, only to reality testing alternatives to settlement.

Tony Allen is a solicitor and a director of the Centre for Effective Dispute Resolution and is also one of the country's best known mediators.

Prenuptial pleadings

*Partners and practitioners talk about mediating between couples
creating prenuptial agreements*

BY GRANIA LANGDON-DOWN



The UK is almost alone in Europe in not having statutorily enforceable prenuptial agreements – and with divorce lawyers warning that fears of widespread City job losses have sent divorce inquiries spiralling, pressure is mounting on the government to reform the law, which a senior family judge has called “out of date, hardly fit for purpose and crying out for a thorough overhaul”.

Godfrey Freeman, chair of the family lawyers’ group Resolution, says it is time the government legislated to make pre-nups enforceable and get rid of the “fault” basis in divorce that creates such acrimony.

Mr Freeman, senior partner of Liverpool law firm Morecrofts, says: “There is also a desperate need for action to give legal rights to cohabitating couples who are splitting up. It is atrocious that the government has put the recommendations for reform on the back burner.”

Overall, he says clients are very keen to explore other options to court. “They see big money cases being splashed over the

papers and hear the horrific amounts of costs involved, and they are frightened – and rightly so, as that money will come out of the family pot.”

The credit crunch is likely to raise some challenging issues as separating couples seek to protect their positions. As Sandra Davis, partner with London law firm Mischon de Reya, says: “When money looks like flying out of the window, love walks out of the door.”

The recent acrimonious divorce between Sir Paul McCartney and Heather Mills, fought out so publicly and at such huge expense, ended up with Ms Mills pouring a carafe of water over the head of her former husband’s lawyer while they were still in court.

So what are the alternatives to such high profile courtroom battles – and how do lawyers avoid a soaking?

Rachael Smethurst, partner and head of family law with Oxford law firm Henmans LLP, sets out the four options for divorcing or separating couples:

- reaching an agreement between themselves, with the solicitor putting the agreement into effect (guideline cost of between £2,000 and £4,000 each);
- mediation, where an independent mediator helps the couple reach agreement on financial and children issues (cost of between £3,000 and £5,000 each);
- utilising collaborative law, in which couples sit down together, with their lawyers, and draw up an agreement, having agreed from the start that if negotiations fail they must appoint new lawyers to take the case to court (cost of between £4,000 and £8,000 each); or
- resolving disputes the traditional way through solicitor-to-solicitor negotiations that, if an agreement is not possible, will lead to an application to the court (cost of between £15,000 and £20,000 each).

Ms Smethurst was one of the first family practitioners to train as a collaborative lawyer, an innovative system imported from the US in 2003. There are now 1,100 lawyers trained in collaborative practice around the country.

About 25 per cent of Ms Smethurst's clients now opt for collaborative law, compared with just a handful two years ago – “and, touch wood, I haven't had one fail yet”.

She says mediation referrals are also on the increase, a trend identified by Mr Freeman, who comments: “Mediation had gone a bit quiet, but it has recently had a revival. The point with mediation is that you don't have your lawyer with you. The mediator is there to explain the law and help the couple come to their own decision – they are not there to arbitrate or referee or make the decision for them.”

The problem with mediation is in choosing the right time to suggest it to clients, particularly those eligible for public funding, Mr Freeman says. “The Legal Services Commission [LSC] always insisted mediation should be offered on day one, before you applied for legal aid, but it may still be too painful for one or other party to sit round a table with just a mediator, and it may be further down the line before it can be valuable.”

Jane McCulloch, partner with specialist family law practice Prince McCulloch in Derbyshire and south Yorkshire, has also seen a rise in mediation. “I thought it was going nowhere, but in the past few months a lot more of my clients have been prepared to accept a referral, and it is being successful in resolving both children and financial issues.”

Over the last year, Mr Freeman, who specialises in financial matters, has handled more than 18 collaborative law cases, with only one failure in which a client was reluctant to produce the necessary information to reach an agreement. “He was a bit pig-headed to be honest,” he says.

He would like to see the LSC run a pilot scheme to provide public funding for the collaborative process. “We have had

some husbands, whose wives would be eligible for legal aid, say they will pay for both sides so it can happen.

“At the moment, it is charged out at private client rates, and I never pretend to clients that it will necessarily be cheaper than other options, although it will invariably be quicker.”

While collaborative law is gaining ground around the country, Ms Smethurst is concerned that some lawyers suggest clients do their case on a collaborative basis without signing the initial participation agreement because they do not want to lose the client if the negotiations break down. “But the participation agreement is the glue for the whole process, and we don't want some hybrid version developing,” she says.

What is becoming increasingly common is for clients to ask their solicitors to draw up prenuptial agreements, even though they have no statutory backing, as a way of pre-empting disputes if the relationship breaks down.

Ms McCulloch says: “At one time, people wouldn't have dreamt of doing them in the provinces, but we are starting to see more and more. I think this government is quite fond of self-regulation, so there might be mileage in giving them statutory backing.”

Anyone with any money is mad not to have a pre-nup, says Mark Harper, a family partner with City firm Withers LLP, bluntly. He acted for multi-millionaire Stuart Crossley in his divorce, a case in which the Court of Appeal said the pre-nup Crossley drew up with his ex-wife was a “magnetic factor”.

Mr Harper says the case gave a huge boost to the enforceability of pre-nups.

“We do three or four times as many as we did three years ago, and they are now a substantial part of our practice.”

What the high profile cases do, agrees Ms Smethurst, is make people focus on pre-nups. “I have been instructed by two husbands who want to draw up pre-nups before entering into second marriages. One has assets of £12.5 million and the other assets of more than £17 million, and they want to protect them. You need to make sure pre-nups are signed at least 21 days before the marriage, with independent advice on both sides and full disclosure. If it is still fair and reasonable at the time of a divorce, it is difficult to see anything going against it.”

Mr Freeman has also been doing more pre-nups. “The problem is some couples only come to see me shortly before the wedding when there is too much pressure, but what I have done in those cases is draw up a post-nuptial agreement.”

The question now is whether the government will be brave enough to respond to family judge Mr Justice Coleridge's demand at the Resolution conference that it “stop ducking the issue” and tackle divorce and ancillary relief law, which was last properly reformed two generations ago.

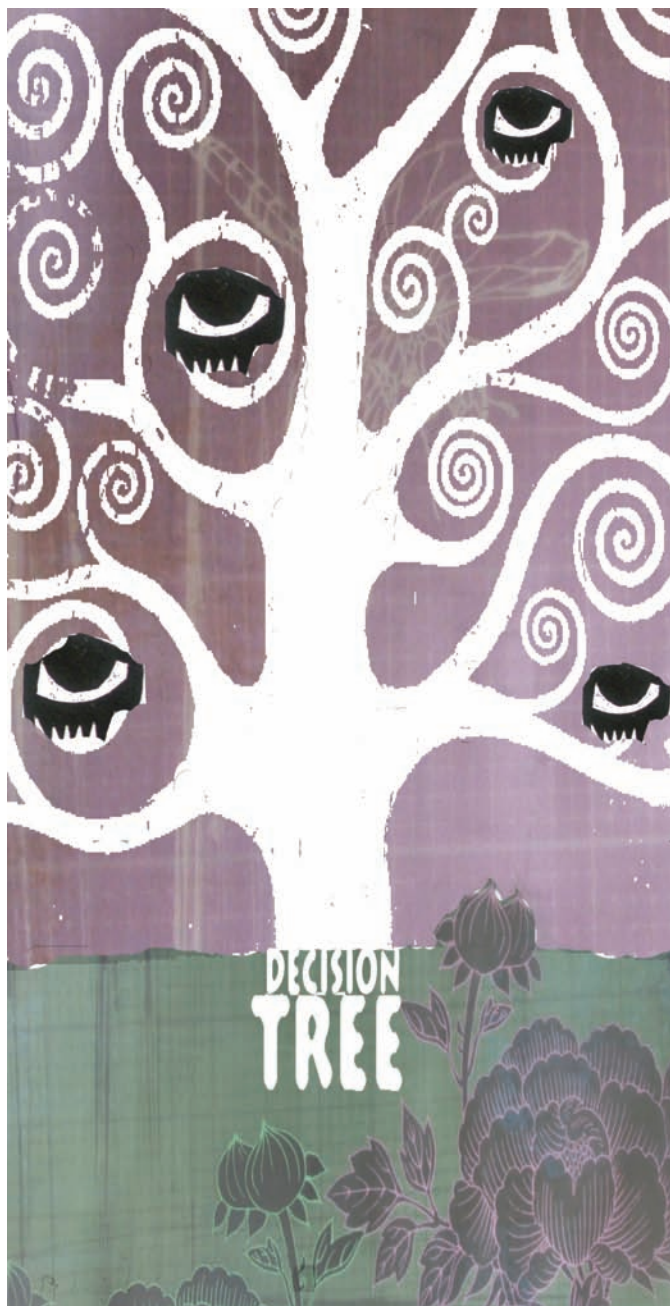
Grania Langdon-Down is a freelance journalist.

“The mediator is there to explain the law and help the couple come to their own decision – they are not there to arbitrate or referee or make the decision for them.”

Chance favours the prepared mind

Applying a variety of planning techniques and tracking potentially significant initiatives like EFDM can help lawyers prepare for an uncertain future

BY TIMOTHY HILL



In June 2008 the *Law Society Gazette* carried a report about electronic filing and document management (EFDM) in the Commercial Court. The gist of the article was captured in the headline “More delays for court IT roll-out”.

Now, whatever the ins and outs of the Commercial Court IT project and its relationship to other court IT programmes, it is generally agreed that modernisation of the Civil Courts’ information systems and technology is much needed. Some work on this modernisation is being taken forward by HM Court Services, but the apparently simple question of exactly what will be delivered, and when, is bound to receive a complex, incomplete and conditional answer. This is not because civil servants are poor planners – the government has more or less written the book on planning (literally in the case of the widely used PRINCE2 project methodology) – but in large measure because of the inherent complexity of IT-related change programmes and the government’s particular need to accommodate an extremely wide range of stakeholders with conflicting interests. There is a tension between welcome flexibility, responsiveness and compromise and equally welcome certainty and clarity of direction. This poses a dilemma for firms wishing to formulate their own technology strategies to support their litigation and dispute resolution practices. How is it possible to plan strategically in uncertain times?

The “classic” business strategy approach, dating from the 1960s, is to assess a firm’s internal strengths and weaknesses in light of threats and opportunities in its environment (SWOT analysis) and to craft a strategy that minimises the former while exploiting the latter.

For many firms, an analysis of the social, technological, economic and political forces in their macro-environment might indicate downward pressure on legal aid rates, low margins on conveyancing work and a recent dramatic decline in the residential property market. There is also growing pressure to extend electronic communications (including e-government initiatives affecting the courts, criminal justice, conveyancing and legal aid) and the prospect of significant new competition from 2010-11 onwards following deregulation of the legal services market by the Legal Services Act 2007. Firms like Allen & Overy (A&O) also see “unprecedented change in the legal services market”, in part resulting from the size and scale of

their clients and the globalisation of capital markets (*Annual Report 2007*).

All firms face technological uncertainty, whether from the new corporate entities (like Tesco-law) that could pose a threat to high-street firms by investing heavily in technology (such as expert systems and case management tools) or the as yet unrecognised (or perhaps non-existent) threat posed by international players from outside the legal services industry, who might one day develop the information systems capability to challenge the “global elite of law firms that target the flow of capital around the world” like A&O. So much for the environment! What about a strategic response?

The key is to recognise that techniques for managing uncertainty have been developed and can be of use. Three are briefly considered below.

SCENARIO PLANNING

Pioneered by Royal Dutch Shell since the late 1960s, scenario planning involves structured consideration of the possible futures to which organisations may need to adapt (or may seek to influence). These futures are not forecasts, and much of the benefit of any scenario planning exercise may derive from pushing the boundaries of an organisation’s thinking in circumstances in which the past may be an unreliable guide to the future. For example, scenarios could be constructed around futures in which new corporate entrants to the legal services market commoditise key areas of a firm’s current services using internet technology and relationship management systems (“death of the high street”), or a new demand for personal, face-to-face advice – perhaps mediation services – leads to a new role for solicitors as general intermediaries (“rejuvenation”). An “ideal” strategic response would develop a firm’s resources and capabilities (including its technology) in a way that allowed it to respond effectively to as many of its chosen scenarios as possible. Paul Shoemaker developed a procedure for constructing scenarios and making use of them (“Scenario planning: a tool for strategic thinking”, *Sloan Management Review*, volume 36, number 2, 1995).

REAL OPTIONS

A real options approach (“real” by way of contrast with financial options from which it is derived) seeks to recognise that potential investments that might be rejected using traditional appraisal methods, such as payback or discounted cash flow, could still offer a variety of benefits. By constructing decision trees showing how these potential benefits might accrue (and assigning values and probabilities to each potential outcome), it is possible to obtain an alternative perspective. Uncertainty in the environment can then be treated as opportunity – but only if the real options are managed. So progress must be monitored, assumptions updated and decisions made in a timely fashion. A technology example might be the development of a web services platform to support a number of different legal services including, for example, electronic filing and document management (EFDM) in the courts. Active monitoring of the EFDM project would allow appropriate and timely decisions to be made about whether the option to interface with EFDM should actually be exercised. A failure

There is a tension between welcome flexibility, responsiveness and compromise and equally welcome certainty and clarity of direction.

to make the initial investment decision would have precluded this opportunity.

TECHNOLOGY ROAD-MAP

A “technology road-map” at the level of the firm (they are often constructed for industries) might help with uncertainty. Such a map would consider application technologies against practice areas and the timing of external technology and business related events like the introduction of EFDM or the effective deregulation of legal services.

STRATEGIC CONVERSATION

These techniques can be combined and others added. Their greatest value may lie in the debate they generate within an organisation – sometimes described as “strategic conversation”. Particularly in larger organisations, the value of strategic conversation may lie in bridging the gulf between business managers and technologists and the sudden recognition of “hidden” opportunities.

The application of all these techniques by firms engaged in dispute resolution, scenario planning in particular, may be particularly useful. The temptation is to argue that information technology will only ever have a supporting role in relation to dispute resolution. This must be right, but as a practice area often sitting in firms alongside other practice areas in which commoditisation can be imagined, hard thinking about the overall technology mix in the firm and its contribution to the relationship between face-to-face and impersonal legal services may yield interesting insights and opportunities.

To conclude on the topic of opportunity it is interesting to consider the entrepreneurial perspective on strategic direction. The real value that is derived from the introduction of new technology (or innovation in the use of existing technologies as represented by the EFDM programme) only becomes clear over time. How a new technology will be applied unfolds gradually as do the benefits that users derive from it. Entrepreneurs seem willing to shift direction to take advantage of this uncertainty. To do so, of course, they have to be in a position to perceive the opportunities. In the introductory speech delivered when he became professor and dean of the faculty of sciences in Lille, France, on 7 December 1854, Louis Pasteur famously suggested that “where observation is concerned, chance favours only the prepared mind”. Applying a variety of planning techniques and tracking potentially significant initiatives like EFDM are ways to prepare for an uncertain future.

Timothy Hill is the IT programme manager at the Law Society of England and Wales.

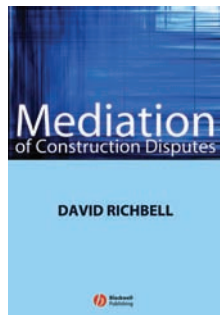
BOOKS

Anthony Glaister considers David Richbell's latest book on construction mediation

It is high time that a book came out that is specifically aimed at mediating in the construction sector, which is probably the most prone of any area of business to fractious disputes. However, this book is a veritable punnet of strawberries for anyone looking at managing conflict, whether in construction or not. Throughout, it is written in a practical, easy-to-read format, laced throughout with examples from Mr Richbell's enormous experience as a surveyor, mediator and trainer of mediators.

It begins with a punchy chapter on how the construction industry gets into so many disputes, taking us through such problem areas as poor communication, personality clashes and unusually complex arrangements. The challenge for lawyers is how to advise appropriately, so he then looks at the various options ranging from negotiation to arbitration and litigation. Given the ease of using adjudication, that is a tempting route; but the very real benefits of using mediation are set out in easy-to-read sections. You would expect a seasoned mediator to conclude that "mediation restores the focus on business needs and sensible solutions". He writes about achieving better deals with speed, economy, flexibility, preserving ongoing relationships and finality.

The best sections are in the middle, guiding us through how best to prepare for and present your client's case in mediation. Hence, my comment that this is a good read for anyone involved in commercial mediation. If the mediator's role is to move the parties into becoming more cooperative, then that can involve a very different mindset from the lawyer's role in litigation. We are given a really good insight into how



Mediation of Construction Disputes

AUTHOR: DAVID RICHBELL

PUBLISHER: BLACKWELLS PUBLISHING LIMITED

TYPE: PAPERBACK

ISBN 978-1-4051-6931-8

best to prepare for mediation, key to getting the mediation off to a good start. Position statements, documents and pre-mediation discussions are all explored. Then we move into mediation itself, looking at best practice for both mediator and representative – it is easy to foul up a mediation simply by choosing the wrong words said in the wrong way. The example of the barrister who tried to steal the show is particularly revealing. While mediators can prime parties and their lawyers, there is a big responsibility on the representatives to advise, prepare and present their client's case, and then to help the clients do their own risk assessment (two examples of risk assessments are provided, both particularly useful). Mr Richbell sees the role of "de-demonising parties" as vital in achieving a realistic foundation for negotiation and settlement.

Mr Richbell includes helpful hints on how best to manage the mediation – written with great flexibility, and

tailor-made for the dispute in question. Take, for example, this pearl of wisdom: "Don't let the joint session end until its usefulness is exhausted." We tend to forget that mediation is a branch of assisted negotiation and not an isolated process, and oiling the wheels of parties' ability to negotiate directly is as important as the shuttle-cocking during the private sessions. There is mention, also, of looking at particular qualities in the mediator and developing rapport based on patience, optimism, clarity of communication and ability to build a good relationship with the parties. Sense of humour and the ability to source the wine bottles to toast a successful settlement are other skills – the latter being mentioned at least four times.

It does not end there, as there is a useful chapter on dispute avoidance that perhaps should have come at the beginning, rather than towards the end of the book. Any solicitor reading this could do worse than memorise the 12 rules on how to avoid disputes arising in the first place. It hones in on the life-changing skills needed to reduce levels of conflict, lessons for the good manager, as well as a good mediator. At the back, you will find precedents for agreements, checklists, risk assessment methods, Tomlin orders and the sorts of things you would expect from a very "hands-on", user-friendly guide to mediation. This is a great little guide that is easy to read for anyone involved in sorting out commercial disputes.

Anthony Glaister is a mediator, construction specialist, and consultant with Keeble Hawson. He is also chair of the Association of Northern Mediators and a member of the Law Society's ADR and Dispute Resolution Section Committee.

INSIDE TRACK

Policy developments in dispute resolution

CIVIL PROCEDURE AND COSTS REVIEW

In June, the Master of the Rolls and the Ministry of Justice announced reviews on civil costs and conditional fee agreements.

The Master of the Rolls decided that there should be a “root and branch” review of civil costs by a senior costs judge. The government decided that there should be a research-based review of “no win, no fee” agreements by senior academics who will look at whether such agreements are still operating in the best interests of giving people access to justice.

It was in a climate of restrictions placed upon public funding by the government that conditional fee agreements (CFAs) developed and continue to evolve. In particular, the removal of legal aid funding for personal injury cases and the introduction of recoverability of after the event (ATE) insurance premiums and success fees from the losing party brought about a marked increase in their use.

Solicitors have a vested interest in these cases, and the presumption is clearly that if the solicitor considers the risk worthwhile, then the client is likely to have more than a reasonable prospect of success. However, since their inception, they have been, and continue to be, the cause of criticism and an abundant source of satellite litigation.

Criticism has generally been restricted to the increase in the amount of legal costs paid to solicitors since the introduction of CFAs and what is perceived to be the willingness of some solicitors and claims management companies to take on spurious claims. However, there is a strong financial disincentive for

solicitors acting on a conditional fee basis to take on a case that has little or no merits, as they would only be entitled to payment if the case is successful. Satellite litigation surrounding CFAs has been a major source of concern and expense for the legal professions and the insurance industry.

Despite criticism and complaints by insurers and other compensators and the amount of satellite litigation funded by them, CFAs have, to a large extent, been successful. There are very many genuine claimants who, had it not been for a CFA, would not have succeeded in obtaining compensation for genuine claims. These agreements have, therefore, made a major contribution to ensuring access to justice, particularly as legal aid has been subject to increasing restrictions. The review needs to build on that success and also attempt to eradicate the causes of satellite litigation.

Most practitioners believe that it is impossible to separate the process from the cost and that if the costs are too high, then it could be the case that the process is disproportionate and, therefore, expensive. In the vast majority of cases, justice is delivered at low cost and without trial. It is usually only the minority of cases which proceed to trial and which tend to be used as examples to justify claims that litigation is too expensive.

The review should not, therefore, concentrate on reducing solicitor’s costs *per se* but should also take into account all factors which have a bearing on the expense of litigation, including the court’s resources, a lack of which causes delay and unnecessary expense for clients, court fees and the cost of evidence (for instance, experts and disclosure).

The profuse amount of satellite

litigation surrounding costs needs to be curtailed, and this would be assisted by the removal of the indemnity principle and, hopefully, the government’s review of conditional fees.

If you have any comments you wish to make on these issues please email them to insidetrack@lawsociety.org.uk.

THIRD PARTY FUNDING

Agreements involving a third party who supports legal proceedings without being a party to it have historically been held to be unlawful under the law of maintenance and champerty. However, in recent times, in so far as third party funding (TPF) is concerned, the law has changed, mainly driven by judicial decisions made in the public interest. Gradually, the courts have moved away from declaring champertous agreements unlawful and making the third party funder of an unsuccessful party liable for all of the successful party’s costs.

TPF is now well established and has been accepted by the courts as a lawful means of funding litigation. It is undoubtedly a method of funding which may be available to litigants in circumstances in which no other method of funding is available and / or when, for example, a commercial client may not want to risk its own funds for the sake of “losing” a proportion of the value of the claim.

The relationship between the client and a funder is contractual, and the contract provides for the funder to withdraw the funding in certain circumstances. The most common example of this would be when the merits of a case have changed so as to make it unreasonable to continue.

There is no guarantee or protection against a third party funder becoming insolvent and, therefore, having to withdraw funding prematurely and / or being unable to meet its liability under the terms of the contract. This would leave the funded party being liable for his or her own costs and disbursements and possibly any adverse costs order in the absence of after the event insurance cover. It is thought that amending the Civil Procedure Rules (CPR) by strengthening the security for costs rules would help to avoid this and would also be a considerable deterrent against "rogue traders".

The Ministry of Justice, with the assistance of the Civil Justice Council, is currently reviewing the issue of regulating third party funders. The Law Society is represented on the reviewing group.

Solicitor's Conduct Rule 9 (Referrals of Business) appears to prevent solicitors from acting for a personal injury client with the benefit of third party funding. Rule 9.04(1) states: "You must not, in respect of any claim arising as a result of death or personal injury [...] act in association with any person whose business, or any part of whose business, is to make, support or prosecute (whether by action or otherwise,

and whether by a solicitor or agent or otherwise) claims arising as a result of death or personal injury, and who, in the course of such business, solicits or receives contingency fees in respect of such claims."

While it is unlikely that claims arising from personal injury or death will be a large market for third party funders, it is, nevertheless, an area likely to become an issue, especially in group actions.

PERSONAL INJURY CLAIMS

Law Society proposals to streamline the personal injury claims process have been reflected in the Ministry of Justice's response to last year's consultation on *Case Track Limits and the Claims Process for Personal Injury Claims*.

Many of the proposals closely mirror those made in September 2006 by the Society in its publication *Compensation: Fast and Fair*, which proposed to streamline the current claims process for lower value personal injury claims.

Law Society president, Paul Marsh, said:

"We are delighted that the government's long awaited response to last year's consultation has now been published and that so many of the Law

Society's proposals were taken on board by the government.

"Solicitors will now be able to concentrate on streamlining their procedures for the benefit of claimants. It is in the interests of claimants to proceed with their claims through a solicitor. The new procedures in these proposals will assist with that process.

"However, the new procedures will place considerable pressure on all parties to comply with the requirements and it will be important that the proposals are implemented in a way which is achievable by all concerned.

"The Society will be working closely with the Ministry of Justice in order to develop the procedures which will be necessary for the new process."

The main proposals include:

- no change in the small claims limits for personal injury or housing disrepair cases
- fast track limit to be increased to £25,000 (for all claims)
- new streamlined procedure to apply to RTA claims up to £10,000 only
- defendants only allowed 15 days to respond on liability issues with no right to an extension of time.

Martin Heskins is Civil Justice Policy Officer for the Law Society.

ABOUT THE SECTION

The Dispute Resolution Section is a representative membership association of the Law Society. Launched in 2006, it provides best practice information and support in all areas of dispute resolution, including arbitration, litigation and mediation. Membership is open to practising solicitors. The comprehensive range of products and services includes a quarterly magazine with up to eight hours free CPD per year, electronic newsletter 10 times per year with case law updates, annual conference, regional seminars and discounts on a variety of related products.

Members can claim up to eight hours free CPD points each year with *Solutions*.
For more information, contact drs@lawsociety.org.uk or telephone 020 7316 5668.

THE WHOLE TRUTH

Members seeking answers

■ Does the Law Society set a recommended mileage rate?

No. However, the Legal Services Commission (LSC) has prescribed mileage rates for publicly funded work, which could be used as a guideline. Since 1 April 2001, the LSC mileage rate for civil work is 45p per mile and the criminal contract rate for work done in the Magistrates Court is 36p per mile (Crown Court mileage rates are not prescribed). As of 1 April 2002, criminal rates were brought in line with civil work. For further information on LSC mileage rates, see the *Law Society Gazette* articles "Getting a grip on the new legal landscape" (21 June 2001, pages 50-51) and "LCS puts brake on rates row" (2 November 2001, page 3) (www.lawgazette.co.uk).

■ Does the Law Society recommend a fee we should charge for certifying copies of documents?

No. There are no specific rules that apply to the certification of documents in the same way as there are for the swearing of oaths, affirmations and declarations. It is, therefore, entirely up to you how you charge. You may wish to charge the equivalent of the fee prescribed for the swearing of affidavits, declarations and affirmations, which is £5, or you may wish to charge purely on a time basis or other fixed fee basis. However, your charge should be fair and reasonable in all the circumstances.

■ I act for a tenant who is required to pay his landlord's legal costs. Will my client be able to recover the VAT charged on the bill?

HM Revenue and Customs Notice 742 (Land and Property) points out that payment by a tenant of a landlord's costs incurred in respect of the grant of a lease or licence would be regarded as part of the consideration for the supply by the landlord to the tenant. If the supply to the tenant is a taxable supply, then the landlord should issue a VAT invoice addressed to the tenant for the amount of the legal costs plus VAT (note that the landlord's solicitor should not invoice the tenant for the legal costs as the tenant is not the recipient of the supply by the solicitor). As the paying party, if your client is registered for VAT, he or she will be able to recover the whole or part of the VAT charged.

The ability to recover VAT will depend on whether the landlord has elected to waive exemption from VAT in relation to the property (usually referred to as the option to tax).

If no option to tax has been made, the landlord would not be entitled to an input tax credit on his costs, so your client would be required to pay the gross costs, including the VAT element. There will have been no taxable supply to your client, so he or she will not receive a VAT invoice and will be unable to recover as input tax the amount representing VAT on the landlord's costs which he or she has paid to the landlord.

If the landlord has opted to tax so that VAT is payable in respect of the rent or premium, the landlord can recover the VAT element of the costs he or she pays to the solicitor.

Your client will only be required to pay the net amount of the landlord's costs, but to that net amount the landlord will add a VAT charge in respect of the supply he or she makes to the tenant.

In effect, the amount paid by the tenant would be the same whether or not the landlord has opted to tax, but only if the landlord has done so will the tenant receive a VAT invoice from the landlord and be able to recover the VAT element if the tenant is a registered taxable person.

Please see the *Law Society VAT Guide 1996* available at www.lawsociety.org.uk.

■ I am a trainee solicitor assisting in the preparation of a bill of costs in a contentious matter. My firm's cost draftsman tells me that I cannot make a charge for incoming letters in my bill of costs. Is this correct?

Yes. The unit charge for letters out will include perusing and considering the relevant letters in, and no separate charge should be made for incoming letters (section 4.16(1), Costs Practice Direction relating to part 43 of the Civil Procedure Rules 1998), although the terms of your retainer may allow recovery of this from your client.

This column is compiled by the Law Society's Practice Advice Service (tel 0870 606 2522). Comments relating to the questions should be sent to Ms Nasrin Master, Practice Advice Service Manager, The Law Society, 113 Chancery Lane, London, WCA 1PL.

While every effort has been made to ensure the accuracy of the information in this article, it does not constitute legal advice and cannot be relied upon as such. The Law Society does not accept any responsibility for liabilities arising as a result of reliance upon the information given.