

The Future of Mediation in Barbados

I wish to say first of all that I am humbled by your invitation to speak on the future of mediation in Barbados with reference to the OECS mediation model.

The invitation was no doubt motivated by your knowledge that I would have spent three (3) years in St. Lucia where the so called new Rules have been in operation for some ten (10) years.

This invitation therefore presents me with an opportunity to share with you information not only of my experience in the ECSC, but of my research on this topic as you prepare to take on what will be a much needed role in the reform of the administration of justice here in Barbados. I wish to compliment you for having the foresight to form this association although I must admit that I am blissfully ignorant about some aspects of it e.g. how many members you have, how often you meet and apart from continuing to hone your ADR skills, what other activities, if any, you are involved in.

Having perused your brochure, it appears to me that much of what I contemplated speaking about is already within your knowledge. But since you have invited me, and you may have certain expectations of me, I will attempt to give you the benefit of my research. And, as I said research, it reminds me of something someone sent to me via email. It said that when you copy the work of one person, that's plagiarism; when you copy the work of many persons, that's known as research. Since I have no intention of reinventing the wheel, my remarks this evening, will be the results of my research and my experience.

The ECSC CPR came into existence in December 2000. At the time the ECSC was headed by the energetic and proactive Chief Justice Dennis (now Sir Dennis) Byron whose vision it is said, was the simplification of the process and the reduction of delay and expense. I dare say that is the vision of all of us who are concerned with, and involved in the reform of the administration of justice.

With the promulgation of the CPR, and in seeking to restructure the court, Sir Dennis identified one of the solutions to the problem of case backlog in the judicial system to be the alternative resolution of conflicts, in order to remove from the system cases that could be resolved without any or any significant judicial intervention.

Through a Practice Direction in 2002 the Honourable Chief Justice Byron set up a court connected mediation pilot project in St. Lucia.

I should tell you that before the project could come into being, the ECSC sought the

assistance of USAID through whom consultants were contracted. It was sought to bring everybody on board to make them aware of this innovative alternative to litigation which if successful, would result in timely adjudication of cases and be cost effective. Island wide consultations and extensive public education programmes took place. All sections of society were involved: the Prime Minister, the Attorney General and other ministers of Government, the judiciary, the Bar Association, the churches, professionals in all disciplines, the various civic and non-governmental organizations, the schools and the general public all actively participated. In the process a cadre of mediators from diverse backgrounds and qualifications (but most especially attorneys-at-law) was trained.

By a 2003 Practice Direction, court connected mediation was extended to the other jurisdictions within the ECSC.

In setting up the project it was recognized that the judge's role (and judge includes the Master who under the CPR has the powers of a judge in chambers) was pivotal in court connected mediation in identifying and referring matters which would be appropriate for mediation.

I now fast forward to my own experience.

When I took up my assignment as a High Court judge in St. Lucia in 2005, the CPR had already been in operation for nearly five (5) years. There were only two (2) High Court judges at the time - one in Criminal Court and the other in Civil Court. As luck would have it, I was assigned to the Civil Court. This meant that I had literally to jump in with both feet at the deep end and learn as much as possible as quickly as possible. I slept with and on these Rules for a very lengthy period of time.

In reading the Rules, I eventually came to Part 25 which deals with case management and which together with mediation were the two (2) emergmg techniques in the area of civil justice reform.

I had earlier read Part 1 which indicates that the overriding objective of the Rules is to enable the court to deal with cases justly .

In other words the court must ensure as far as is practicable that the parties are on equal footing, must save expense, must deal with cases in ways that are proportional to the money involved, the importance and complexity of the case, must ensure that the case is dealt with expeditiously and allot to it an appropriate share of the court's resources.

Armed with this information and my personal training in ADR, I set about researching the ways in which this court connected mediation could assist in reducing my workload.

Remember that I was the only civil court judge.

Part 25 (1) (a) of the Rules mandates that the court must further the overriding objective by actively managing cases which may include encouraging the parties to use any appropriate form of dispute resolution including in particular, mediation, if the court considers it appropriate and facilitating the use of such procedures.

I soon learnt that with few exceptions most cases can be referred to mediation. These exceptions are stipulated in Part 2.2 of CPR. They are insolvency (including winding up of companies), non-contentious probate proceedings, family proceedings, proceedings where the High Court is acting as a prize court and any other proceedings in the Supreme Court instituted under any enactment, in so far as rules made under that enactment regulate those proceedings. At the case management conference and depending on the circumstances of the case, a referral order would be made.

Perhaps at this juncture and at the risk of insulting you, I should state the three (3) situations in which a case management conference may occur and in which a mediation referral order may be made.

First, there is the regular case management conference which is the next event which takes place after a Defence is filed. The court fixes a date of hearing and requires the parties to attend before the Master for the holding of a case management conference at which the Master and the parties may discuss the further management of the case. A referral order may be made at this stage.

Secondly there are some cases which are given a date to come before the judge immediately upon being filed. These cases include proceedings for possession of land or many of the matters that previously were commenced by way of Originating Summons. The judge holds a case management conference very often before a defence is filed. A referral order may also be made at this stage.

Thirdly, there are cases that are part of the backlog reduction; cases where a defence has been filed before the introduction of the new Rules and which had not been previously case managed, the judge holds a pre-trial conference at which the judge has all of the powers of a judge at a case management conference. A referral order may yet be made at this stage.

There is still another situation in which some thought could perhaps be given to the making of a referral order. Prior to the case management conference, e.g. on the issuance of a claim form, a claimant i,H defendant should be able to apply for a referral order.

This could lead to an earlier disposal of the case and avoidance of the costs entailed in filing a defence.

Some very interesting things occurred during my time. E.g. while attorneys-at-law perceived a particular case was appropriate for mediation, they would hesitate to proffer any such suggestion. They were fearful of being accused by their clients of collusion or of not wanting to have their matter tried or fearful of losing their clients. The clients meanwhile were champing at the bit and anticipating their "day in court". Now after reading the file and recognizing myself that the matter should more properly be referred to mediation, I would become somewhat impatient with the attorneys. By their body language it became apparent that the attorneys were depending on me to make the decision. They felt that the litigants would be more amenable to the suggestion if it came from the judge. At this stage I caught on and realised that in accordance with Part 25 it was primarily up to me to "encourage" the litigants to consider mediation. After that it became easy and so when I formed the opinion that a matter was ripe for mediation I would give the litigants a full briefing, explaining the nature of mediation, the role of mediation, the potential benefits of mediation (and here I would emphasise the difference between giving evidence in court and being asked to "tell all" before the mediator), but also that mediation allows for the case to be disposed of easily, the cost of mediation, the effect of a mediation agreement, etc, etc. I was successful in convincing the litigants to mediate in approximately 95% of the cases. There were the obdurate ones who were adamant that they wanted to talk to the judge and despite the threat of having to pay the considerably high court costs, that 5% stuck manfully to their intention to have their day in court.

The mediation is described as court connected. It is as the name suggests. It is mediation as the result of a referral by the court. After the parties have agreed to mediation, they are then invited to select a mediator from a list provided by the court. It was my experience that although the parties were free to choose anyone from that list, the attorneys for the litigants almost unhesitatingly chose another attorney to be the mediator. I never questioned their choice. Now I need to say that I cannot tell you what actually transpires (although I know what SHOULD happen) at a mediation session but I found that when attorneys mediated, the percentage settlement rate was significantly higher than when mediators from other disciplines were involved. I cannot say whether this will become the experience here in Barbados.

The mediator having been agreed, I then went on to make a mediation referral order for the parties to attend a mediation session with the named mediator within 45 days of the date of the order and to return to court on a specified date. A penal costs clause was also included for non attendance at the session. The orders were hardly ever disobeyed.

After filing, this order is sent by the Registrar of the High Court to the Mediation Coordinator who is a member of the Supreme Court staff and who in addition to her regular clerical duties is responsible for the scheduling of mediation sessions, compiling of data, maintaining of records and financial accounts and is answerable to the Chief Justice.

In St. Lucia the mediation sessions are always conducted on the premises of the Supreme Court and under its management and control.

Litigants are required to attend a mediation session of up to three (3) hours, but parties are free to go beyond that limit. Prior to the session, the parties and their lawyer sign a confidentiality agreement and at the end of the session, the mediator completes and lodges a Notice of Outcome of Mediation which is then filed at the court office.

Where an agreement has been reached, the parties or their lawyers apply to the court for an order in terms of that agreement. However, if no agreement has been reached, the matter is returned to the Court for case management. Nothing of what transpired during the sessions is ever divulged to the Court.

While in St. Lucia I was Chairman of the Mediation Committee, a committee which is multidisciplinary and brings together representatives of different stakeholder interests. This Committee which meets at least once in very month is responsible for appointing, compiling and keeping current the roster of mediators. It also monitors the performance of these rostered mediators and receives and responds to complaints by and about mediators. The Committee comprises between seven (7) and nine (9) members with a High Court judge as chairman. The other members include a senior Magistrate, President of the Bar and a member from each of the following: trade union, religious organisation, community based organization, business and an ADR practitioner. The secretarial support to the Committee is provided by the Mediation Coordinator.

I must confess to ignorance about the position of mediation within our system, e.g. the level of preparation of or by the stakeholders. While our own CPR have ostensibly been in operation since October 2008, I have been unable to discern any appreciable movement by our High Court judges towards instituting this crucial technique/tool for reduction of litigation and by extension delay and expense in accordance with the overriding objective of the Rules.

To put it bluntly, for mediation to work effectively, judges need to be both knowledgeable and accepting of the process. It is also imperative that the mediation process be regarded by litigants, lawyers and the general public not just as an alternative to the courts but as an alternative that is more reliable and efficient.

In preparation for the introduction of mediation by the ECSC it was emphasised that mediation is neither a substitute for traditional justice nor a panacea from ills affecting the judicial system. It should not be seen as a competition with the traditional adjudicatory process, but instead as a complement to the litigation process. Traditional litigation will continue to be absolutely necessary and appropriate in many cases. Mediation nevertheless gives the court an opportunity to provide litigants with an alternative to litigation to have their disputes resolved in a timely and cost effective manner. In this regard, mediation can respond to the needs of the litigating parties and could go far in improving the quality of justice.

Taking into account that the Barbados and ECSC CPR.s are with minor exceptions in pari materia, I end by positing that there is no need for Barbados to try to reinvent the wheel. All we need to do is adopt and adapt the already tested processes of the ECSC and get our show on the road. There is no time for procrastination.