Mediation
and the
Personal Injuries List

27 January 2010

Underlying Objectives
(0.1A, r.l, RHC/RDC)

- Reasonable proportionality and procedural economy (r.1(c); *c/f* CPR 1.1(2)(c))
- Facilitate settlement of disputes (r.l(e))
- Duties of parties and legal representatives to assist the Court to further the underlying objectives of the rules (0.1A, r.3, RHC/ RDC; *c/f* CPR 1.3)

Court's Duty to Manage Cases (0.1A, r.4, RHC/RDC)

- Encourage parties to use ADR if the Court considers appropriate (r.4(2)(e); *c/f* CPR 1.4(2)(e))

- Help parties to settle whole or part of case (r.4(2)(f); *c/f* CPR 1.4(2)(f))

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Proportionality

- Costs benefit analysis
- *iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd* CACV 252/2007
  - dispute over supply of goods
  - damages awarded just above $1M
  - legal costs (incl. appeal) of $4.7M
  - Court of Appeal expressed regret that parties did not explore mediation

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Success of Mediation

- Overseas and local experience
  - About 20-30% take-up rate
  - About 70-80% success rate
- PI Mediation usually takes 1 day
- Substantial saving as mediation costs lower than litigation costs

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Discretion on Costs

- Costs in the discretion of the Court (s.52A, High Court Ordinance (Cap.4) ("HCO"))
- Usual order of costs to follow the event
  (i.e. loser to pay winner)
- May be some other order as to whole or part of the costs in the circumstances of the case (O.62, r.3(2), RHC/RDC; *c/f* CPR 44.3(2))

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Discretion on Costs (Cont'd)

- Special matters to be taken into account in exercising discretion on costs (O.62, r.5, RHC/RDC)
  - Underlying objectives in O.1A (r.5(1)(aa))
  - Conduct of the parties before as well as during the proceedings (r.5(1)(e) & (2); *c/f* CPR 44.3(4)&(5))

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- Grounds upon which costs are awarded ... may extend to any matter relating to the litigation and the parties' conduct in it and also the circumstances leading to litigation *(Town Planning Board v Society for Protection of the Harbour (no.2)* [2004] 2 HKLRD 95 (CFA) endorsing English case *Scherer v Counting Instruments Ltd* [1996] 1 WLR 615 (CA))

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Costs Sanction

- *Director of Buildings and Lands v Shun Fung Ironworks* [1995] 2 HKLR 501 (PC)
  - Parties to be encouraged to settle their disputes and assisted in their attempts to do so
  - Encouragement and assistance from the Court in the form of costs sanction

Costs in Negotiation

- *Butcher v Wolfe* [1997] 1 FLR 334
  - Case settled (save as to costs) late during trial
  - Plaintiff did substantially better than the defendants' *Calderbank* offer
  - But settlement on basis asserted by the defendants
  - Judge ordered the plaintiff to pay costs because the proceedings should not have been brought in the face of the offer made, at least without an attempt by the plaintiff to negotiate on the figures

- *Chinery Construction Co Ltd v Po Kwong Marble Factory Ltd* [2005] 3 HKLRD 758
  - Costs in arbitration proceedings
  - Conduct of parties pertaining to settlement negotiation is relevant to question of costs

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Costs in Mediation

- *Dunnett v Railtrack Plc* [2002] 1 WLR 2434 (CA)
  - One of the early English cases where costs sanction against winning party was imposed due to refusal to undertake mediation
  - Jurisdictional based on overriding objectives, duty to assist court to further the objectives
  - No order for costs for winning party in boundary dispute

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■ *Halsey v Milton Keynes General NHS Trust*
[2004] 1 WLR 3002 (CA)

    – Adopted similar analysis in *Dunnett v Railtrack*

    – Confirmed conduct of parties as relevant
      consideration in costs (CPR 44.3(4)&(5))

    – Costs sanction not imposed upon consideration

Halsey v Milton Keynes (Cont'd)

▪ Relevant factors in discretion on costs

    – Nature of the dispute

    – Merits of the case

    – Extent to which other settlement methods used

    – Whether costs of ADR disproportionately high

    – Whether delay in setting up and attending
      ADR have been prejudicial

    – Whether ADR has reasonable prospect of
      success

- *P4 Ltd v Unite Integrated Solutions Plc* [2006] EWHC 2924
  - Claimant claimed £70,000, defendant made Pt 36 payment of £6,000, and judgment for £387
  - Claimant's offer to mediate rejected by defendant
  - Defendant sought costs on indemnity basis
  - Court found defendant's rejection of mediation unreasonable
  - Claimant still entitled to part of the costs

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- *Chun Wo Construction & Engineering Co Ltd v China Win Engineering Ltd* HCCT 37/2006
  - Costs incurred in mediation are in principle same as costs incurred on settlement negotiation
  - Recoverable as costs incidental to litigation under s.52A, HCO

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■ *Supply Chain & Logistics Technology Ltd v NEC Hong Kong Ltd* HCA 1939/2006
- Unreasonable refusal to participate in mediation even after suggestion by the Court is conduct relating to the litigation that should be taken into account when on question of costs
- Adopting the approach in *Dunnett v Railtrack* and *Halsey v Milton Keynes*

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■ *Leung Catherine v Tary Limited* HCPI 805/2007
- Plaintiff requested mediation
- Defendant refused by saying:
  - proceedings have reached advanced stage
  - mediation is not suitable for dispute on liability
- Court indicated reasons unreasonable at PTR

Adverse Costs Order in PD

- Court will not make adverse costs order if:
  - Parties have engaged in minimum level of participation as agreed or directed (PD 18.1 para.30(1))
  - Reasonable explanation (PD 18.1 para.30(2))
- Without prejudice negotiations that have broken down may not be reasonable explanation (PD 18.1 para.30(2))

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Mediation in PI & EC Cases

- Legal Aid available to cover mediation
- Most PI & EC cases settled at or before trial and mediation can only improve on the result
- "Day in court" for venting emotions and grievances by victims of accidents
- Reality testing conducive to early settlement without regretting too late at the trial
- Settlement in PI & EC cases usually on costs to claimant

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Mediation in PI & EC Cases (Cont'd)

- PI & ECC settlement should be fair and adequate
- Not purely commercial decision
- May require some medical expert opinions (may be less detailed than for trial purpose)
- Litigation may aggravate psychological condition and increase damages
- Still substantial costs saving if settlement achieved earlier without commitment of the costs of the trial

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Q&A

- Why mediate if lawyers can negotiate?
  - The mere fact that negotiation between solicitors fails to result in a settlement does not mean the parties would not benefit from mediation conducted by a skilled mediator (*iRiver v Thakral*)
  - By the very nature of the different role played by a lawyer acting for a party, there are things that a skilful mediator can achieve which the lawyer cannot (*Supply Chain v NEC*)
  - Skilled mediators are able to achieve results satisfactory to both parties in many cases quite beyond the power of lawyers and courts to achieve (*Dunnett v Railtrack*)

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Q&A

- Why mediate if parties can make sanctioned payment and/or sanctioned offer?
  - Outcome of litigation against sanctioned payment or w/p negotiation aside, unreasonable refusal to mediate may be taken into account in the exercise of discretion on costs (*c/f Butcher v Wolfe*; *P4 v Unite Integrated*)

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New Insurance Mediation Pilot Scheme ("NIMPS")

- Seed funding by Hong Kong Federation of Insurers
- Administered by HKIAC & Hong Kong Mediation Council
- Mediator paid by NIMPS ($15,000)
- Subsidies to claimant
  - Legal fees ($15,000)
  - Medical reports ($10,000)

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NIMPS

- Cases referred to NIMPS upon discharge of Legal Aid
- 1 successful case in the beginning of 2009
- 15 cases taken up by NIMPS, 10 settled after issue of mediation notice, 3 settled by mediation and 2 pending at the end of 2009

Conclusion

- Mediation is client and not lawyer driven
- DLA has duty to economize on public fund and to save costs and should ensure assigned lawyer advise client to attempt mediation
- DLA should consider mediation before discharge of Legal Aid
- Mediation can pick up on where negotiation and/or sanctioned payment cannot achieve
- Overall savings as costs wasted on failed mediation outweighed by costs saved on avoided litigation

END