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Muddying the Waters – Confidentiality and Voluntariness in the MUDs Act 2011

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One of the things I value most highly about my mediation practice is the trust that is put in me by the people with whom I work. The parties to a mediation will tell me about their hopes, wishes and fears within a conflict, and will trust me to keep these to myself. It is this trust that the mediation process be kept "off the record" and between myself and the parties, that permits the parties to negotiate freely and to really address what their interests are and what solutions might meet those interests. I am not alone in valuing this aspect of mediation. Confidentiality is one of the key hallmarks of mediation, and one that is guaranteed by many laws and mediation clauses. It is also one of the features that distinguishes mediation from many traditional dispute resolution mechanisms such as litigation. While most jurisdictions, and indeed the EU (in its recently implemented Directive on Certain Aspects of Mediation in Civil and Commercial Matters) have in place provisions safeguarding confidentiality, a recent legislative development in Ireland is taking a different approach and causes me, as a mediator, to worry about this aspect of my practice.

The Multi Unit Developments Act, 2011, (known colloquially as the MUDs Act) is a substantial piece of legislation which came into force in Ireland earlier this year and aims to regulate the way in which management companies manage multi-unit residential developments such as apartments, housing estates and mixed use multi-unit developments. As part of this aim, is enacts provisions designed to direct disputes which arise under the Act into mediation.

Under section 27 a court can, where it considers it will help in settling the matter, direct that the parties "meet to discuss and attempt to settle the matter". Such a meeting is defined under the Act as a "mediation conference". This rather curious terminology appears to have been taken from a previous piece of legislation, the Civil Liability and Courts Act 2004, which applied similar, though not identical provisions to personal injuries cases. Both Acts also provide for the appointment of a "chairperson" of the mediation conference, and assign certain duties to this chairperson.

In effect, and in practice, despite the references to conferences and chairpersons, what this legislation provides for is essentially a mediation process, which a judge can direct parties to participate in. What is unusual however are the duties placed upon the chairperson of the mediation conference, that is, the mediator, with respect to reporting back to the court.

While section 27 safeguards the confidentiality of the notes of the chairperson and all other mediation communications and records, this provision is made subject to the provisions that follow

in section 28. This section provides that the chairperson (ie the mediator) shall prepare and submit to the court a report which shall set out:
• If the mediation conference did not take place why it did not do so;
• If it did take place;
-Whether or not a settlement was reached;
-If so a statement of the terms of the settlement;
-Where no settlement was reached "**a statement as to whether such outcome is substantially due to the conduct of one or more than one of the parties, and in that case specifying the identity of such party or parties."**

Furthermore, after reviewing the report and submissions by the parties, the court can then make an order for costs against such a person when the court is satisfied that **"the conduct of such person is substantially the cause of the failure to reach a settlement."**

It is the content of the provisions highlighted above, and indeed the general concept of a mediator having to report back to a court, which makes me, and many of my fellow mediators, very uneasy. Not only are these reporting requirements clearly at odds with the generally accepted principle that the content of a mediation is confidential, but how can parties freely engage with a mediator who is charged with reporting to the court on their conduct in a mediation, with potential costs implications? It should also be noted that the Act provides for the circulation of the report to all parties at the same time as it is presented to the court – could this not potentially disclose statements and information given in private caucus that would otherwise have remained confidential?

I accept that confidentiality in mediation is a complex issue, both in theory and in its application. Many jurisdictions are in the process of debating what form such confidentiality should take, and what exceptions there should be. Even in the drafting of the EU Directive on Certain Aspects of Mediation in Civil and Commercial Matters in 2008 there was some discussion about how far confidentiality should reach. Indeed, the final text of what is now Article 7 is actually somewhat diluted, compared to an earlier draft which envisaged mediators being specifically barred from giving evidence in relation to, among other things:
• "party invitations or willingness to participate in a mediation; and
• mediator proposals for settlement and any party's expression of willingness to accept it;" [Allen "Peering behind the veil of mediation confidentiality, a new judicial move in Malmesbury v Strutt and Parker (April 2008)]

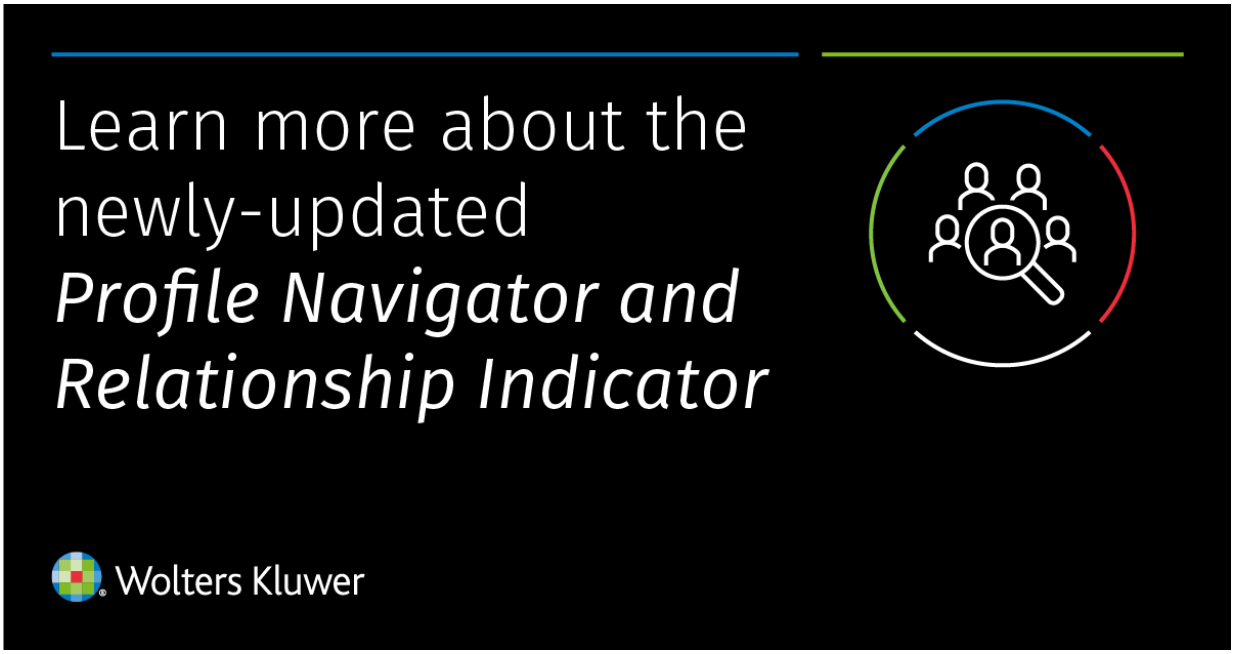
It is widely recognised however that confidentiality is a fundamental expectation of the parties to mediation, and one that differentiates it from the legal process. If the mediator and the parties are to understand all the issues, the underlying needs and motivations of the parties, and the risks of litigation, such discussions must be protected by confidentiality. Otherwise, in the words of Hobbs, "the mediation process, the mediator's role and the potential for resolution are significantly diminished." [Hobbs, "Mediation Confidentiality & Enforceability: Deal or No Deal?" (2006)]

It is the idea however that I as a mediator would, in effect, be placed in a position of having to evaluate and report upon parties' conduct in a mediation that causes me the most concern. Let's take the example of an owner of an apartment who is in dispute with the Management Company over annual fees. Such a person may already very likely be under some financial pressure. A mediation is directed by the court and all parties attend. During the mediation an offer is made by the Management Company to the owner. The owner does not feel it is a fair offer, and is not really

happy to accept it, but is afraid that if he rejects the offer and the mediation breaks down the mediator will report to the court that he was the cause of the mediation failing and the court would make an order for costs against him.

How freely can that owner really engage in the mediation? How would I, as a mediator, endeavour to reassure that party that he does not have to accept an offer he is not comfortable with without penalty? Even if one party's reasons for not settling at mediation are not as genuine, what standards do I, as a mediator, apply to ascertain whether that behaviour is reasonable or whether I should report it to the court as the reason for the mediation failing? I would (and should!) also ask myself how easily such reporting provisions would sit with my obligations, contained in my Code of Practice, to act neutrally and impartially at all times.

How these provisions are applied in practice remains to be seen. One would assume that much will depend on how the courts apply the provision. It is important to point out that costs penalties can be imposed for refusal to comply with a direction to attend mediation also, so it is not a case that parties can just choose to avoid mediation altogether. Injudicious application of the provision could therefore result three of the fundamental hallmarks of mediation – confidentiality, voluntariness and the impartiality of the mediator – being compromised. I would submit that it is necessary to engage both the legislators and the judiciary in Ireland in a renewed debate about mediation, and to focus on how it does, and should work in practice. In the mean time, I would urge any judge finding themselves considering directing a MUDs dispute to mediation to exercise caution, and be as clear as possible on what mediation is really all about.



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