Kluwer Mediation Blog

Of Oysters and Unfortunate Injuries – Who is Regulating Mediation in Ireland in 2016?

Sabine Walsh (Sabine Walsh Mediation) · Monday, January 4th, 2016

First of all a very happy New Year to all our readers! May 2016 bring you peace, happiness and many, many hours of successful mediation. Here in Ireland, all we would really like is for it to stop raining, even for an hour or two. With the last month having been the wettest on record, ever, and half the country submerged in floodwaters, there is much to feel a little miserable about, even before re-reading my post from this time last year and seeing what little progress has been made in relation to mediation regulation in this soggy country.

Readers of my posts are probably as sick of reading about the proposed Mediation Bill as I am writing about it so I won't go into it other than to say that despite promises from the Department of Justice the Bill has not progressed in any way whatsoever and will not now do so this side of the general election in the Spring. Mediation is just not sexy enough to buy votes so the Bill has been pushed to one side again. Fortunately, this does not mean that mediation is languishing in the unregulated shadows. Being a common law country, in the absence of legislation, the construction and interpretation of law is in the hands of the judges, who have handed down a few interesting judgments on mediation over the past year.

The first of these was a factually very complex dispute between an oyster fishery and local and national state authorities arising out of the alleged pollution of the waters in Cork Harbour. (Atlantic Shellfish Limited & David Hugh-Jones –v- Cork County Council and Others [2015] IEHC 570) The decision of Mr Justice Gilligan in this case arose out of an application seeking an order under Order 56A of the Rules of the Superior Courts by which the Court can invite a party, the defendants in this case, to engage in mediation. The plaintiffs in this case had previously asked the defendants to go to mediation, but the defendants had said that in this case mediation would not be suitable for a number of different reasons. They further contended that, based on what had happened in the case to date, the plaintiffs had already accepted the case could not be resolved at mediation by reason of the complex factual circumstances and other issues and were therefore only bringing the application under Order 56A so that, when it came to a decision on costs, they would be treated favourably under Order 99 of the Rules pursuant to which a court can have regard to the refusal to mediate a matter . In essence, it was contended that the plaintiffs knew the defendants could and would not engage in mediation and by applying for the defendants to be so invited, were seeking to ultimately secure a more favourable position with regard to costs.

The judge agreed with the defendants, finding that "the sole purpose of this application is artificial, and that, in effect, the plaintiff is attempting to, as it sees it, copper-fasten its position with regard

to a future application for costs." He felt that the plaintiffs already knew the defendants would refuse mediation for the same reasons they had set out previously when an informal invitation to mediation was issued.

This judgement is interesting both for its interpretation of its powers and duties to invite parties to mediation under Order 56A, and for its views on "unreasonable refusal to mediate". Both focus on the bona fides of the parties. In relation to the former provision, the judge found bona fides to be lacking on behalf of the plaintiffs in making the application, in essence he found them to be making it with an ulterior motive. He emphasised again the voluntary nature of mediation and that no one should be forced to participate. He further emphasised the discretionary nature of Order 56A and held that all the circumstanced of the case have to be taken into account when deciding whether to grant such an order.

In relation to costs, he recognised this as the true motivation behind the plaintiffs' application and found instead that the defendants did have bona fide reasons for refusing to go to mediation, not least the fact that too many parties would have to be involved on the defendants' side, and other issues relating to liability. He felt therefore that to invite the parties to mediation knowing this and potentially exposing them to a costs penalty was not acceptable. Again though, he emphasised the necessity to take each case on its own merits, stating that "(t)here could well be different circumstances if the reasons as set out for declining to consider the mediation process were not considered to be bona fide or there was a borderline situation.."

This case was one of the first detailed interpretations of Order 56A which is being used with increasing frequency by litigants in order to divert cases into mediation though not, as this case has shown, always for the right reasons. It might also be useful in clarifying the situation in relation to potential costs penalties as I have recently experienced many clients reporting to me that their solicitors told them to go to mediation or "it could look bad for me in court" – precisely the danger associated with costs penalties for refusal to mediate that have been flagged since Halsey and similar cases.

A few months later, Judge Peter Kelly, the original judicial champion of mediation in Ireland, gave an extensive and detailed judgment on the status of mediation in Ireland, describing reforms in this area to date as "piecemeal and patchy with little to demonstrate any coherent policy or plan supporting them.", a message our legislature needs to hear as often as possible… Judge Kelly in his judgment talked at length about the Woolf reforms in the UK and judgments such as Halsey. In particular, he spoke about the tension between encouraging parties to mediate and compelling them to do so stating that., "(m)y own experience…for in excess of 10 years leads me to conclude that any element of compulsion attendant upon a reference to mediation will certainly not enhance its prospects of success."
In this Court of Appeal case, Ryan –v- Walls Construction Limited [2015] IEHC 214, the section at issue was section 15 of the Courts and Civil Liability Act, 2004 under which a judge can direct parties in a personal injuries case to go to mediation, even where one party may be opposed to it. Unlike the provision at issue in the previous case, which permits a judge to "invite" parties to attend mediation, this provision permits a judge to "direct" such attendance. The unfortunate plaintiff in this case was involved in two workplace accidents, being struck by a roller on one occasion and having a piece of concrete embedded in his nether regions on another. In the High Court, the trial judge directed that mediation take place pursuant to an application under section 15. It should be noted that there had already been substantial delays in this case, the accidents having taken place in 2005 and 2006 and the order for mediation being made in 2014.

The judge took care to contrast the provisions of Order 56 and Section 15, making it clear that, whether the legislative provision was a good one or not, it did not permit either side to "veto" the direction to attend mediation. However, he did find that in applying the provisions of section 15, a court "must consider whether…the making of an order under s. 15 would have any realistic prospect of assisting in reaching a settlement." In establishing this, he said, in a similar vein to Judge Gilligan in the previous case, each case must be considered on its own facts and merits and "care must be taken to ensure that by making such an order under s.15 the court is doing no more than adding a further layer of delay and costs to proceedings He highlighted a number of relevant factors in this case, including the substantial delays that had already been incurred in this case, the fact that pleadings were closed, lengthy discovery was completed and the case had a trial date. He pointed out that the usual method of settlement in personal injuries cases was by direct settlement negotiation and this had not occurred in this case. Furthermore, due to the late stage at which mediation was directed it would not result in any substantial costs savings to the parties.

He found that the trial judge had made an error in directing the mediation as, due to the fact that no realistic attempt at settlement had been made thus far, and as matters were so advanced the making of such an order against an unwilling party at such a late stage would only lead to further delay and cost. Judge Kelly was of the view that the pre-condition that the mediation should have some chance of assisting in the settlement of an action was not met in this case. He finished by expressing his distaste for the "unconscionable delay" in this case and how it reflected on "the lawyers who are responsible for it (and the) legal system which permits it."

What these two cases show, other than a reluctance compel mediation, even when the law allows it, is that it is the courts who will really be regulating how mediation in works in this country in the months and years to come. Even if the Mediation Bill were to be passed and provisions similar to those in Order 56 were enacted, as is proposed, it will be in the hands of the judges applying such provisions, on a case by case basis, to determine how and in what circumstances they are utilised. This brings with it both risks and potential. This risk is that the development of the law will continue in a piecemeal manner, as different aspects of different provisions are litigated, in different circumstances, before different judges. The potential is that the law will develop in a more nuanced way, and therefore be easier to interpret according to different sets of circumstances. Assumptions such as costs penalties always following refusal to mediate may be challenged, and new legal provisions will be tested to see whether they are fit for purpose.

The development of the law in this manner takes time, but given that we are into our fourth year of waiting for mediation legislation this might just be time well spent.

i. A statutory instrument regulating proceedings in the Circuit and High Courts.
ii. If such a refusal to engage in mediation is seen as unjustified the court can take this into account when assigning the costs of an action.
iii. A piece of legislating regulating the management by the courts of personal injuries claims.
*Both cases are available online at www.courts.ie

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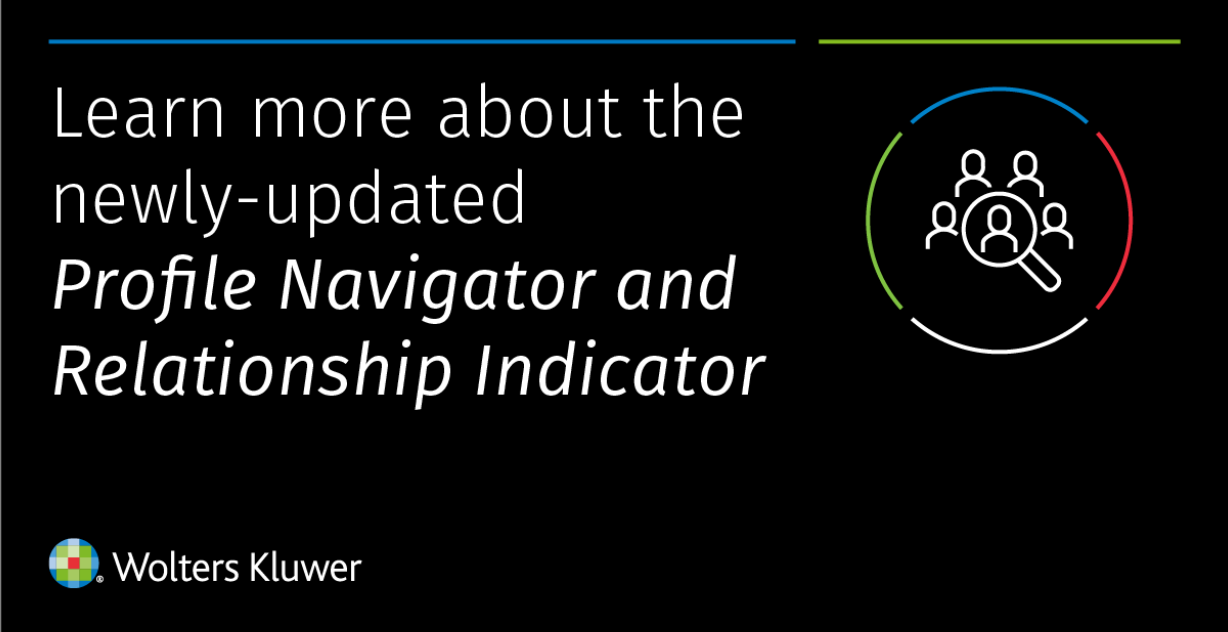

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