

WAIVER: CANUTE AGAINST THE TIDE?

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A. Introduction

Increasingly in Europe, and in the wider world, an individual¹ who seeks to enforce his legal rights is encouraged or coerced to view his dispute as a problem to be solved through mediation rather than a right to be enforced. A tidal wave of ‘encouragement’ to turn to mediation and other alternative dispute resolution (ADR) procedures to resolve private law disputes², takes form through the use of standardised contractual clauses (which by their nature are not negotiable), or due to encouragement by legal advisors or the courts (with the strong backing of political will and, in some instances, through legislative force). Any settlement agreed at mediation, in the main, precludes access to the courts³. This has the potential to conflict with Article 6(1) of the European Convention on Human Rights, which provides that everyone ‘[i]n the determination of his civil rights and obligations ... is *entitled* to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’

There have, as yet, been relatively few applications to the ECtHR seeking to claim that coerced recourse to ADR procedures is in violation of an individual’s right of access to

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¹ Individuals in this article also includes other bodies with legal standing to bring or defend a claim

² In England and Wales individuals must also consider the use of ADR procedures (in particular, mediation) prior to seeking judicial review of public authority decision making (Pre-Action Protocol for Judicial Review [3.1]-[3.4])

³ In England and Wales (as is widely the case), the arbitral award takes the form of a binding judgment that is enforceable through the national courts unless the arbitral tribunal lacked jurisdiction to make the award (s67 Arbitration Act (AA) 1996), there is serious irregularity (s68 AA 1996), there is a successful appeal on a point of law (s69 AA 1996). Article 6 of the European Mediation Directive (Directive 2008/52 on certain aspects of mediation in civil and commercial matters) requires Member States to ensure that the content of agreements reached through mediation should be made enforceable unless it is contrary to the law of the relevant Member State or the law of the Member State does not provide for its enforceability. This last point seems somewhat contradictory.

court⁴. Whilst there are undoubted benefits to mediation and other ADR processes, it would seem likely that, as the pressure increases on individuals to resolve their disputes away from the national courts, the ECtHR will be asked to make decisions on whether and in what circumstances the use of mediation is in violation of Article 6(1). However, unless an individual has been compelled to mediate a claim, a State is able to argue that the individual has waived his right to Article 6(1) procedural protection. The approach that the ECtHR takes to the development of the doctrine of waiver will, therefore, be significant in determining whether Article 6(1) retains its ability to safeguard the legal rights of individuals through the national courts and also whether the important public functions of civil justice remain protected.

This article sets out the context for the increased use of mediation, analyses the doctrine of waiver in the case law of the ECtHR, and suggests that there is the potential for the ECtHR to find that, in certain circumstances at least, coerced mediation is in violation of an individual's right of access to court under Article 6(1). However, in recognition that mediation offers benefits in relation to dispute resolution, it will also, suggest that the doctrine may be developed in such a way as to leave open the possibility that a State which encourages or makes compulsory the use of alternative procedures may justify their use, at least in the circumstances of the individual case.

B. Mediation and Article 6(1) ECHR

1) The Tide of ADR in Civil Justice: Increasing Pressure to Mediate

The reasons for the current emphasis on mediation and other forms of ADR in relation to civil disputes are wide-ranging. The perceived benefits to the parties, in the event of a successful mediation, from the perspective of efficiency and, frequently, in terms of

⁴ An individual may claim that he or she has been denied access to court either where there is a restriction on access for refusal to comply with an order to attend an ADR hearing or where the individual has attended an ADR process and the resultant award or settlement precludes access to the courts or the individual has exhausted their funds and, consequently, is unable to pursue the claim for financial reasons. See S Shipman 'Compulsory Mediation: the Elephant in the Room' (2011) 30 Civil Justice Quarterly 163, 165-166

enabling business relationships to continue and reputations to remain publicly intact are well recognised. There also appears to be a wider, systemic, aspiration that mediation may offer a cure for a number of difficulties faced in civil justice systems across Europe and elsewhere. These include issues of significant delay in processing claims through the court systems⁵, as well as resource and budgetary constraints⁶. There has also been political concern voiced over the economic burden placed on businesses due to a perceived ‘move towards a compensation culture’ in England and Wales that is ‘driven by litigation’⁷. Hence, mediation is viewed as attractive since it is perceived as a less protracted and expensive means of resolving disputes. Additionally, since mediated claims frequently settle for a lower sum than negotiated or litigated claims, and parties usually meet their own costs, there are further economic advantages for businesses in using such procedures⁸.

⁵ Italy, for example, has faced numerous successful claims before the ECtHR on the ground that proceedings have failed to be heard within a reasonable time. The Italian Ministry of Justice is hopeful that the recent introduction of compulsory mediation for a range of civil claims will help to deal with the issue of delay (European Conference on Mediation, Turin 2 December 2012).

⁶ In England and Wales, for example, the civil legal aid bill has been much reduced and it is expected that the costs of the civil justice system should be met by the users: Prof Dame H Genn ‘Civil Justice: How Much is Enough?’ in H Genn *Judging Civil Justice: The Hamlyn Lectures 2008* (Cambridge University Press 2009) 48 and 45-51. S Shipman ‘Court Approaches to ADR in the Civil Justice System’ (2006) 25 CJQ 181, 181-186. According to Sir Henry Brooke, civil justice produced a profit of £30 million in 2006 which, evidence suggests, has been diverted to aid deficits caused by criminal justice overspend: Sir H Brooke ‘Should the Civil Courts be Unified’ (Judicial Office August 2008) [75] cited in H Genn ‘Civil Justice: How Much is Enough’ 48

⁷ Ministerial Forward: Kenneth Clarke, Lord Chancellor and Secretary of State for Justice, and Jonathan Djanogly, Justice Minister ‘Solving Disputes in the County Courts: Creating a Simpler, Quicker and More Proportionate System – a Consultation on Reforming Civil Justice in England and Wales’ (Consultation Paper CP6/2011 March 2011) <http://www.justice.gov.uk/downloads/consultations/solving-disputes-county-courts.pdf>) This impetus behind a heightened agenda for mediation and other forms of ADR has been described by Prof Genn as the ‘anti-law discourse’. See Prof Dame H Genn ‘ADR and Civil Justice: What’s Justice got to do with it?’ in *The Hamlyn Lectures 2008: Judging Civil Justice* (Cambridge University Press 2010) 80. See also M Galanter ‘A World Without Trials’ (2006) *Journal of Dispute Resolution* 7.

⁸ See Lord Justice Jackson ‘Review of Civil Litigation Costs: Preliminary Report’ May 2009, 302-319, for an example of the perceived costs saved through settlement at mediation and the less favourable view of parties to unsuccessful mediation in a survey undertaken by the King’s College Centre of Construction Law and Dispute Resolution in the Technology and Construction Court from June 2006 to May 2008. <http://www.judiciary.gov.uk/publications-and-reports/review-of-civil-litigation-costs/reports> Also, H Genn ‘ADR and Civil Justice’ (n8) 108-113 and footnotes to empirical surveys and S Shipman ‘Court Approaches to ADR’ (n7) 199-204 and footnotes.

Hence, in recent years, mediation, alongside other forms of ADR⁹, has become a progressively prominent feature in the civil justice landscape¹⁰. Increasingly, there is political will, a legislative basis and judicial authority to encourage and even to compel parties to undertake mediation or other ADR processes.¹¹ In Europe, the European Commission has stated that:

The European Union actively promotes the methods of alternative dispute resolution ... such as mediation ... encouraging the use of mediation and other forms of ADR assists in the resolution of disputes and helps to avoid the worry, time and cost associated with court-based litigation and so assists citizens in a real way to secure their legal rights.¹²

Italy has introduced a compulsory mediation stage for resolving a significant range of civil and commercial disputes¹³. In Spain parties to employment disputes may be required to attend mediation before referral to the courts.¹⁴ In the Czech Republic legislation will make mediation compulsory in certain family proceedings and there are significant financial advantages for parties who participate in a successful mediation process.¹⁵

The political push to a greater use of ADR - principally mediation - in England and Wales is also explicit¹⁶. From April 2011, legal aid has not been available for family proceedings (with limited exceptions) unless the parties have first attended a mediation awareness meeting (designed to encourage the parties to make use of a mediation process

⁹ For example, arbitration is frequently the method of choice for dispute resolution in the commercial context. Arbitration clauses routinely occur as non-negotiable in standard form contracts.

¹⁰ H Genn 'ADR and Civil Justice' (n8) 79

¹¹ European Mediation Directive (Directive 2008/52 on certain aspects of mediation in civil and commercial matters)

¹² https://e-justice.europa.eu/content_eu_overview_on_mediation-63-EU-en.do

¹³ Legislative Decree 28/2010: effective from 20 March 2011

¹⁴ https://e-justice.europa.eu/content_mediation_in_member_states-64-en.do.

¹⁵ *ibid*

¹⁶ Former Justice Minister, Jonathan Djanogly, made public his commitment to the use of ADR in civil justice on a number of occasions, stating in May 2011 that 'mediation plays a critical part in my plans for the future civil justice system' (2011 Civil Mediation Council Conference). In March 2012 Mr Djanogly told law students at BPP that he 'strongly believe[s] that for the vast majority of disputes in civil, family and administrative justice, [mediation] can be a better way of reaching a resolution for all concerned - quicker, less expensive, certainly less stressful, and a solution that the parties themselves will buy into because they have shaped the outcome.' <http://www.justice.gov.uk/news/features/mediation-quicker-cheaper-and-less-stressful>

in suitable cases).¹⁷ In June 2011 the Ministry of Justice launched the Dispute Resolution Commitment (DRC)¹⁸ expressly stated to ensure that Government Departments and Agencies ‘*lead by example* in resolving disputes quickly and effectively’.¹⁹ The DRC includes a commitment that all contracts with other parties will include an ‘appropriate dispute resolution clause’. Thus parties seeking to win any Government contract have no option but to agree to an ADR method of resolution for any disputes arising out of the contractual relationship. Whilst suggested methods of ADR include Early Neutral Evaluation and Arbitration, guidance issued by the Ministry of Justice states that mediation ‘should be seen as the preferred dispute resolution route in most disputes when conventional negotiation has failed or is making slow progress’²⁰. The DRC goes further than insisting on the use of ADR procedures for contractual disputes, it also advocates its use for ‘other claims’ brought by individuals against Government Departments and Agencies, although the DRC guidance suggests that claims involving the abuse of power, Public law suits and Human Rights issues *may* not be suitable for ADR but does not rule out the possibility²¹.

In the private sector there is an expectation that parties will consider an ADR procedure prior to commencing litigation. Pre-Action Protocols (PAPs), which govern pre-action party behaviour in relation to a wide range of potential civil claims and, notably, judicial review, contain advice on the use of ADR procedures as follows²²:

The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which

¹⁷http://www.legalservices.gov.uk/docs/fains_and_mediation/UnderstandingPubliclyfundedFamilyMediation.pdf

¹⁸ <http://www.justice.gov.uk/downloads/courts/mediation/drc-may2011.pdf>. This builds on the ADR Pledge, whereby all Government Departments and Agencies pledged to consider and use ADR ‘in all suitable cases where the other party accepts it’

¹⁹ <http://www.justice.gov.uk/downloads/courts/mediation/drc-may2011.pdf> 2

²⁰ Dispute Resolution Commitment: Guidance for Government Departments and Agencies <http://www.justice.gov.uk/downloads/courts/mediation/drc-guidance-may2011.pdf> [7]

²¹ *ibid* [2.5]. For an interesting empirical study of the potential value and limits of mediation as an alternative to judicial review see V Bondy & L Mulcahy with M Doyle & V Reid ‘Judicial Review and Mediation: An Empirical Study’ (Public Law Project London 2009)

<http://www.publiclawproject.org.uk/documents/MediationandJudicialReview.pdf>

²² See, for example, the Pre-Action Protocol on Defamation [3.7]-[3.9] and the Pre-Action Protocol on Judicial Review [3.1]-[3.4]: <http://www.justice.gov.uk/courts/procedure-rules/civil/protocol>

form to adopt. Both the Claimant and Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered.

The encouragement to ‘consider’ ADR is strengthened by the further advice that:

Parties are warned that if the protocol is not followed (including this paragraph) then the Court *must have regard to such conduct when determining costs*

Although, somewhat contradictorily, the PAPs also state that ‘it is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR.’ Whilst the PAPs state that parties should not be ‘forced’ to mediate, it seems that parties face significant pressure to do so. Alongside this, courts are also under a duty to encourage parties to undertake an ADR procedure where it is appropriate to do so²³. The ultimate sanction for unreasonable refusal to mediate (whether at the suggestion of the court or a litigation opponent) is an adverse costs award²⁴. The potential for adverse costs for refusal to mediate, particularly in a jurisdiction where the costs of litigation are high, together with a background of political pressure on the courts and legal advisors to encourage individuals to mediate their claims, the refusal to grant legal aid without a mediation awareness meeting in certain situations, all exert significant pressure. The aim of these measures is clearly to persuade individuals to mediate their claims but, in doing so, an individual may forego his or her right to bring or defend the claim before the courts.

2) The Public Importance of Civil Justice

In the context of the civil justice system in England and Wales, settlement of disputes is the norm. Since the introduction of the Civil Procedure Rules 1998 (CPR) the system has been designed to encourage *early* settlement of disputes with a view to creating a more

²³ Civil Procedure Rules (CPR) 1(4)(2)(e). S Shipman ‘Court Approaches to ADR in the Civil Justice System’ (2006) 25 CJQ 181: highlights a number of means adopted by the court to encourage individuals to undertake mediation in particular, ranging from education and publicity to more robust approaches such as criticism, court orders and adverse costs awards.

²⁴ *Halsey v Milton Keynes General Trust NHS* [2004] EWCA Civ 576; [2004] 1 WLR 3002 [33]. See S Shipman ‘Court Approaches to ADR’ (n26) 181

efficient civil justice system and to saving party expense²⁵. In the context of a system which encourages settlement, it may be wondered why it is deemed worthwhile to consider the relationship between mediation and the right of access to court, even should mediation become a compulsory early intervention in the pre-litigation process. The issue is that negotiated settlement, based on an early exchange of information or through Part 36 offers, is linked to the perceived legal merits of the claim and based on what is likely to be decided at trial, albeit with consideration to the expense saved through the avoidance of trial. However, in relation to mediation, whilst it may be conducted in the ‘shadow of the law’, it is based on interests rather than rights and the settlement agreement reached may be unrelated to the legal merits of the claim. Moreover the mediation process itself is not subject to fair trial requirements. Hence parties, in particular those who are not legally represented, will not necessarily be protected by the law or by the accountability afforded by public judgment and the independent judiciary. Whilst there are undoubted benefits to the mediation of claims, it is important to be mindful of the public importance of civil justice. Civil justice is about more than one way, amongst a range of alternatives, for disputes to be solved. It is more than an arena in which individuals and corporations can assert their rights and discover their obligations. It is more than the site of protection for individuals and weaker parties who seek justice against those who exercise power of them, whether in the public or private domain. It is also the place where there is public accountability for those whose wrongful acts may otherwise go unnoticed. It is also the site in which individuals can take part in democracy, through the public dimension of justice and through the opportunity to engage with the law in a public court²⁶. Moreover, it provides the secure legal backdrop against which business and economic activity can be carried out. It, therefore, supports

²⁵ Parties are required to comply with Pre-Action Protocols which require an early exchange of information in order to facilitate settlement and the CPR Part 36 offer procedure encourages claimants and respondents alike to make offers to settle. Early settlement of disputes ensures that courts are not ‘clogged’ by cases that vacate their slots at the last moment. However, it should be noted that the push towards early settlement front loads costs since successful settlement depends on early exchange of information.

²⁶ Prof J Resnik ‘The Supreme Court 2010 Term: Comment: Fairness in Numbers: A Comment on *AT & TV Concepcion, Wal-Mart v Dukes, and Turner v Rogers*’ (2011) 125 (1) *Harvard Law Review* 78, 87-93 & 132-133; Prof J Resnik ‘Courts in and out of sight, site and cite’ (2008) 53 *Villanova Law Review* 101-138

‘economic activity and development’.²⁷ Lord Justice Jackson has commented that whilst mediation has an important role in civil justice, it cannot take the place of the law and the courts:

[Mediation] is rightly reducing the burden upon the civil courts and helping many parties to arrive at satisfactory resolutions of their disputes. Nevertheless, the proper functioning of accessible civil courts alongside mediation is vital for the wellbeing of society and the economy. Indeed mediation itself could not flourish, were it not for the existence of civil courts in the background, standing ready to enforce the parties’ rights and to coerce reluctant parties.²⁸

Against this backdrop, Article 6(1) has a significant role in maintaining and upholding the important function of civil justice.

3) The relevance of Article 6(1) to Mediation in Civil Justice

Under Article 6(1) an individual is *entitled*, in the determination of his civil rights and obligations, to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Potentially there are at least three situations in which an applicant may seek to claim that his Article 6(1) right has been infringed in the context of the pressure to undertake mediation or other ADR procedures in civil justice. The first situation may occur where an individual has settled the claim at mediation and, consequently, is unable to pursue his or her claim through the courts. Satisfaction rates with mediation outcomes are generally high but not universally so²⁹. In England and Wales at least, mediation hearings most usually last for one day, mediators may be keen

²⁷ Prof Dame H Genn ‘What is Civil Justice For?’ in *The Hamlyn Lectures 2008: Judging Civil Justice* (Cambridge University Press 2010) 17

²⁸ Lord Justice Jackson ‘Review of Civil Litigation Costs’ (n9) 43

²⁹ Eg P Urwin et al ‘Evaluating the Use of Judicial Mediation in Employment Tribunals’ (Ministry of Justice Research Series 7/10 2010) 41-47; Prof Dame H Genn et al ‘Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure’ (Ministry of Justice Research Series 1/07 2007) eg 108-111, 184-187

to encourage parties to reach an agreement³⁰, and agreements may be concluded at the end of the day when parties are fatigued. As Noone states:

(a)lthough it is true that parties can never be forced to settle, once a mediation is under way a momentum builds which can place significant pressure upon all the parties to stay with the process all the way through to settlement³¹.

Moreover, since mediated agreements are based on party interests, rather than rights, there is the potential that they do not reflect the legal merits of any potential claim and, even where they do, there is evidence that parties settle for less than they would receive through negotiated settlement and that, frequently, parties bear their own costs³². Additionally, where the mediator is concerned with party empowerment in relation to the mediation process rather than with party satisfaction in relation to the outcome, the mediator is unlikely to interfere where a proposed settlement appears unfair. Hence, it is feasible, that post-mediation, an individual may be dissatisfied with the mediated agreement and conclude that he or she would have been better served through a court judgment. However, since mediated settlement agreements are drawn up as binding contracts it will not be possible to revisit the claim through the courts³³. Secondly, there is the possibility of an Article 6(1) challenge where an unsuccessful mediation exhausts funds which would otherwise be set aside for litigation costs³⁴. This may occur where a claim is relatively low value and lacking in complexity and would, therefore, take minimal court time. Additionally, however, mediation can itself be highly expensive – particularly in complex multi-party litigation where expert witnesses and legal

³⁰ Mediators, unlike the judiciary, do not have security of tenure and, hence, their reputation and future employment may depend on results.

³¹ M Noone 'Mediating Personal Injuries Disputes' in J MacFarlane (ed) *Rethinking Disputes: The Mediation Alternative* (Cavendish Publishing Ltd London 1997) 23, 31

³² eg Prof Dame H Genn 'Central London County Court Pilot Mediation Scheme: Evaluation Report' (LCD Research Series 5/98) 70, 71, 88-89, 97

³³ Mediation settlements in the context of civil disputes are drawn up as binding contracts which are enforceable through the courts. Article 6 of the European Mediation Directive (Directive 2008/52 on certain aspects of mediation in civil and commercial matters provides that EU Member States must ensure that the content of a written agreement arising from a mediation should be made enforceable at the request of the parties.

³⁴ This may occur where a claim is relatively low value and lacking in complexity and would, therefore, take minimal court time. Additionally, however, mediation can itself be highly expensive – particularly in complex multi-party litigation where expert witnesses and legal representatives are involved.

representatives are involved. Finally, where an individual has successfully brought or defended the claim through the courts but adverse costs have been awarded for unreasonable refusal to undertake an ADR procedure, he or she may argue that this renders the right of access to court ‘theoretical and illusory’ and is, therefore, effectively a denial of access to the court³⁵. This article is concerned with the first and second situations where, as a result of undertaking a mediation process, the individual is unable to bring or defend his or her claim before the courts and, hence, potentially argues that this is a denial of his or her right of access to court. Provided that the nature of the particular dispute falls within the ECtHR autonomous definition of ‘civil rights and obligations’ and hence attracts Article 6(1) applicability, a State respondent would be able to counter such a claim if it can show that, in going to mediation, the individual applicant has *waived* his or her Article 6(1) right.

C. Waiver in Article 6(1) ECHR

Whilst there is some doubt whether certain of the procedural rights encompassed in Article 6(1) are capable of waiver (for example the right to an impartial tribunal)³⁶, the right of access to court is not an absolute right and the ECtHR has made it clear on several occasions that ‘neither the letter nor spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial’³⁷. Hence the ECtHR has noted that a waiver of the right of access to court ‘is frequently encountered in civil matters, notably in the shape of arbitration clauses ...’ and that, in principle, this does ‘not offend against the Convention’³⁸. However, in assessing whether an applicant has effectively waived a right under Article 6(1), a number of criteria must be satisfied: 1) the waiver of the right

³⁵ The ECtHR reached this conclusion in the case of *Stankov v Bulgaria* (68490/01) 49 EHRR 7 where the imposition of a 4% court fee in relation to the part of the claim on which the applicant was unsuccessful rendered the right of access to court theoretical and illusory since it effectively wiped out a significant proportion of the damages won [54]. Adverse costs may be awarded for unreasonable refusal to mediate where mediation has been suggested by another party to litigation proceedings or by the court in its case management role: *Halsey v Milton Keynes General Trust NHS* [2004] EWCA Civ 576 [2004] 1 WLR 3002

³⁶ For example, it has been debated whether the right to an impartial tribunal is capable of waiver: *Pfeifer v Plankl v Austria* Series A No 227 (1992); *Ozerov v Russia* Application No 64962/01 Judgment 18/05/2010

³⁷ See, for example, *Sejdovic v Italy* -Reports of Judgments and Decisions 2006-II

³⁸ *Deweere v Belgium* (1980) 2 EHRR 429

must be established in an unequivocal manner³⁹; 2) it must be attended by minimum safeguards commensurate to its importance⁴⁰; 3) it must not run counter to any important public interest⁴¹; and 4) it must not be tainted by constraint⁴².

1) The Right Must be Waived in an Unequivocal Manner

Whilst waiver of an Article 6(1) right may be express or tacit⁴³, no clear principles emerge from the ECtHR as to what constitutes waiver in an ‘unequivocal manner’. The case law demonstrates that express waiver, either written or verbal, of an Article 6(1) right may be sufficient, even where the motive behind the waiver of the right is to protect others⁴⁴. However, the ECtHR construes the wording of such waiver strictly to ensure that it applies to the particular proceedings or right allegedly waived⁴⁵. Unequivocal waiver may be construed also by the ECtHR if established facts demonstrate an express intention not to attend proceedings⁴⁶ but not where an individual has expressly requested an opportunity to exercise his Article 6(1) right⁴⁷.

³⁹ *Le Compte, Van Leuven & De Meyere v Belgium* Series A No 58 (1983) [35]

⁴⁰ *Poitrinol v France* Series A No 277 (1993) [31]

⁴¹ *Hakansson & Sturesson v Sweden* Series A No 171 (1990) [66]

⁴² *Deweer v Belgium* (1980) 2 EHRR 429

⁴³ *Hakansson & Sturesson v Sweden* Series A No A171-A (1990) [66]

⁴⁴ See, for example, *Makarenko v Russia* Application No 5962/03 Judgment 21/12/2009 where the court held that the applicant had dismissed his lawyers and notified the court that he would no longer be present to defend himself in criminal libel proceedings in a ‘knowing, explicit and unequivocal manner’. The applicant, a government official, argued that he had dismissed his lawyers because he had feared for their lives, an argument which must attract a degree of credibility since he and his young daughter had been the targets of a shooting incident which had killed his driver, The ECtHR were not swayed by this contention.

⁴⁵ *Richard v France* (1998) Reports 1998-II: a settlement agreement, concerning a first application before the ECtHR in relation to the length of the trial, included a declaration that the applicant would ‘waive the right to bring any further proceedings on this account ...’. The ECtHR concluded that this was not a waiver of the right to take action concerning the length of the proceedings after the point of the settlement agreement. In *Young v United Kingdom*, the disabled applicant was asked at a disciplinary hearing whether she required ‘help’. She replied in the negative and consequently was not informed that ‘help’ included the possibility of legal assistance. The ECtHR considered the failure to expressly offer legal assistance, rather than simply ‘help’, could not lead to the conclusion that the applicant had waived her right to legal representation at a hearing which led to an additional period of detention of several days.

⁴⁶ *Sejdovic v Italy* Report of Judgments and Decisions 2006-II [99] – where the court found that a public statement that the applicant had ‘no intention of responding to summons’ to face a criminal prosecution of which he was aware, despite the fact that the court had failed to notify him of the proceedings issued against him.

⁴⁷ *Le Compte v Belgium*: the applicants wanted and claimed to have their disciplinary proceedings heard in public. Hence they had not unequivocally waived their right to a public hearing. *Le Compte, Van Leuven & De Meyere v Belgium* Series A No 43 (1981) [59]

Unequivocal waiver of an Article 6(1) right may also be implied. In the case of *Suovaniemi v Finland*⁴⁸, the ECtHR considered that a ‘voluntary waiver of court proceedings in favour of arbitration’ was capable of amounting to a tacit, unequivocal, waiver of certain Article 6(1) procedural guarantees. There is no reason to doubt that the ECtHR would extend this reasoning to other forms of ADR procedure. Hence, a person who voluntarily submits to mediation and reaches an agreement in that process may be considered to have unequivocally waived their right of access to court. There is no need to expressly waive the right, the action of submitting to the alternative resolution process amounts to a tacit waiver.

b) A role for intention?

However, it is not straightforward to find consistency in the ECtHR decisions in relation to the requirement that waiver of a right guaranteed by Article 6(1) must be unequivocal. A coherent explanation could be found in the notion of intention. It is arguable that where an individual has made an express statement of waiver, the individual’s intention can be impliedly construed from the deliberately provided verbal or written announcement. The notion of intention may also provide an explanation for the ECtHR’s strict construction of the wording of express statements of waiver in certain cases. For example, in the case of *Young v United Kingdom*, the applicant had responded negatively to the question of whether she required ‘help’ at a disciplinary hearing. The question was ambiguous as there was no express mention that the potential help offered was legal in nature and could equally have been general assistance to accommodate her disability. Hence, there was no clear intention on her part to waive her right to legal assistance.

The notion of intention has been expressly mentioned by the ECtHR in relation to unequivocal waiver in the case of *Jones v United Kingdom*.⁴⁹ In that case the applicant had deliberately chosen not to attend his trial for alleged conspiracy to commit robbery.

⁴⁸ *Suovaniemi v Finland* Application No 31737/96 Decision 23 February 1999

⁴⁹ *Jones v United Kingdom* Application No 30900/02 Decision 09/09/2003.: the application was declared inadmissible on other grounds.

There was no express waiver and, hence, the ECtHR considered whether the applicant had impliedly waived his right not to be present and defend himself at the trial. The ECtHR held that the applicant, as a layperson, could not have known that his refusal would result in a trial and conviction in his absence; particularly as it was not clear that this was permissible under national law at that time. Hence, the applicant had not ‘unequivocally and *intentionally*’ waived his right. Here the idea of intention was expressly linked by the Court to the fact that the individual could not have had knowledge of the consequences of his action and hence could not be said to have unequivocally waived his right.

The role of intention would seem especially significant in relation to implied or tacit waiver and hence its development by the ECtHR would be particularly useful in the light of the strong pressure on individuals throughout Europe, and in England and Wales, to mediate their civil claims. Since the voluntary undertaking of an ADR procedure has been held by the ECtHR to amount to tacit waiver of the right of access to court⁵⁰, this would ensure that national authorities put in place sufficient safeguards to ensure that individuals are aware that, in consequence of a settlement at mediation or other ADR process, they forego the right of access to court in relation to that claim. This is of particular importance in jurisdictions, such as England and Wales, where mediations are frequently conducted against the clock, with a strong desire to complete the process within a short time frame, and where mediators may take an active role in encouraging individuals to settle the claim on the day of the mediation. Individuals at that stage are likely to be tired and less aware of the need to ensure careful drafting of the settlement agreement. From the national perspective, too, it would seem advisable that, when individuals undertake mediation or other ADR procedure, they are made aware of the consequences of settling the claim, in terms of Article 6(1) protection and the right of access to court, of their implied decision. It is feasible that this could be ensured by an appropriate development of the second requirement of an effective waiver.

⁵⁰ *Suovaniemi v Finland* (n54); *Deweer v Belgium* (1980) 2 EHRR 439

2) The Waiver Must be Accompanied by Minimal Safeguards Commensurate to the Importance of the Right Waived

The ECtHR has further specified that, even where a waiver is unequivocal, it ‘must be accompanied by sufficient guarantees commensurate to the importance of the right waived’. It is unclear from the case law as to what amounts to ‘sufficient guarantees’ or ‘minimal safeguards’ (as the test is sometimes worded), nor how to weigh the importance of the Article 6 right at issue. However, two concerns evident are that an applicant has waived his Article 6(1) right without recourse to independent legal advice or that there appears to be a lack of knowledge relevant to the particular waiver.

a) Importance of Right Waived

No clear guidance emerges from the case law on the doctrine of waiver in the context of Article 6(1) about how to assess the importance of the right allegedly waived⁵¹. However, the ECtHR has consistently placed a high value on the right of access to court. The Commission has stated that ‘the right to be heard in the determination of civil rights is one of the most fundamental under Article 6(1)’ and that the ‘requirements which surround its waiver are therefore particularly demanding’⁵². The ECtHR in the case of *Golder v UK*⁵³, which established that the right of access to court is inherent to the procedural guarantees of Article 6(1), based its reasoning on the fundamental importance of the rule of law to the ECHR and the fact that ‘in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts’. But there was also a clear concern to protect the jurisdiction of the national courts to hear civil matters:

⁵¹ It is evident that the ECtHR, for example, considers the right to an impartial and independent tribunal of supreme importance, particularly in regard to its function in ensuring confidence in the judicial system. See: *Ozerov v Russia* Application No 64962/01 Judgment 18/05/2010 [49]

⁵² *Tsirlis & Kouloumpas v Greece* Application Nos 19233/91 & 19234/91 Report (31) (1996) [98]; *Giorgiadis v Greece* Application No 21522/93 Report (31) (1996) [47]

⁵³ *Golder v United Kingdom* (1975) Series A No 18 (1975) 1 EHRR 524

Were [Article 6(1)] to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government.⁵⁴

Subsequently the ECtHR has held that States have a responsibility to ensure that legal aid or assistance should be available where an individual would otherwise be denied access⁵⁵ or would have ineffective access⁵⁶ or should ensure that procedures are sufficiently uncomplicated for individuals to represent themselves in court proceedings⁵⁷. It is evident that the ECtHR has adopted a robust position in order to ensure that individuals are able to bring or defend their claims in the national courts. It would, therefore, seem that a waiver of this right should be accompanied by significant safeguards. However, it is not clear from the case law what might constitute sufficient safeguards.

i) Legislation and Legal Advice

The case law suggests that legal representation provides an important safeguard. In the *Suovaniemi* case⁵⁸ the ECtHR considered that the fact that the applicants had been represented throughout the arbitration procedure ensured that the waiver of their right to impartial arbitrators by the applicants was accompanied by sufficient guarantees. Similarly, the case of *Zu Leiningen v Germany*⁵⁹ concerned a friendly settlement which involved the withdrawal of proceedings relating to an inheritance dispute⁶⁰. The fact that

⁵⁴ *ibid* [35]

⁵⁵ *Airey v Ireland* Series A No 93 (1979) 2 EHRR 305

⁵⁶ *Steel & Morris v United Kingdom* (2005) Reports of Judgments and Decisions 2005-II [59]-[62]. See S Shipman 'Steel & Morris v United Kingdom: Legal Aid in the European Court of Human Rights' (2006) 25 CJQ 5 and S Shipman 'Defamation and Legal Aid in the European Court of Human Rights' (2005) 24 CJQ 23

⁵⁷ *Airey v Ireland* (n61) [24]-[26]

⁵⁸ *Suovaniemi v Finland* Application No 31737/96 Decision 23 February 1999. It should be noted that the ECtHR has yet to decide whether it is acceptable to waive the right to an impartial judge in court proceedings.

⁵⁹ *Zu Leiningen v Germany* Reports of Judgments and Decisions 2005-XIII

⁶⁰ See *Pfeifer & Plankl v Austria* Series A No 227 (1992) for a contrasting case in which the ECtHR found that the lack of legal advice, together with no legal basis in Austrian law for the waiver of the right to an impartial tribunal, led to a violation of Article 6(1).

the applicant had been represented by legal counsel during negotiations was influential in the finding that the waiver of the right to pursue proceedings in the court was effective.

This aspect of the ECtHR jurisprudence may be of relevance to a claim that a person who has submitted to mediation, and has settled his claim, has waived his right of access to a court. In particular, where the individual has been legally represented prior to, and during a mediation process, it may prove difficult for him to argue that in undertaking that process, and reaching a settlement agreement as a result of that process, there were insufficient safeguards to protect him from a waiver of his right of access to a court. The same may not be true where an individual is not represented by legal counsel, particularly where the waiver of the right is tacit rather than express, and is due to the fact of undertaking a mediation process and reaching a settlement agreement rather than due to an express waiver of that right. Of note here is the fact that the applicant in the *Zu Leiningen* case, had agreed as part of the settlement that no further action on the proceedings would be taken. In relation to settlement agreements reached at mediation, it may not be clear to a lay person who is unrepresented that the effect of the agreement reached, particularly once this is reduced to writing, will be to preclude access to court on the same issue. Hence, it would seem a sensible precaution for a case management judge, legal representative or mediator to explain the binding effect of an agreement reached through a mediation process to ensure that the individuals concerned are aware that reaching such an agreement in general precludes further recourse to the courts on the same issue. This would be a prudent introduction in the future regulation of any mediation practice and is related to the second concern gleaned from the ECtHR case law: that an individual has relevant knowledge when tacitly or expressly agreeing to waive an Article 6(1) right.

ii) Lack of Relevant Knowledge: A Test of Reasonable Foreseeability?

The ECtHR has refused to accept that an individual has unequivocally waived his Article 6(1) right where there is a lack of knowledge relevant to the right waived (for example,

where an individual has no knowledge of criminal proceedings issued against him⁶¹), and has held that an individual must be able to reasonably foresee what the consequences of his conduct (in waiving the right) would be⁶². Whilst the cases on this point mostly occur in the context of criminal proceedings, it would seem reasonable to conclude that the requirement that the consequences of waiver must be reasonably foreseeable is relevant also to the context of disputes over civil rights and obligations. The most recent formulation of this principle states that the waiver must ‘constitute a knowing and informed relinquishment of the right’⁶³. Hence, it would seem a minimal and rational safeguard to ensure that individuals who undertake a mediation process and, who consequently settle their claims, are informed appropriately of the impact on their right of access to court under Article 6(1). This seems particularly sensible in the light of the fact that the ECtHR has stated the procedural safeguards in place must be commensurate to the importance of the right waived.

3) The Right Waived Must Not be Counter to Important Public Interests

Article 6(1) is concerned with the procedural guarantees of the right to a fair trial. However, where an individual waives his right of access to court, this precludes the court from deciding the substantive legal issue. In some cases, however, the ECtHR has held that the substantive legal matter at stake is of such public importance that an applicant’s waiver cannot be accepted. Such cases include, for example, the right not to be racially discriminated against in the provision of education (*Orsus v Italy*)⁶⁴. The ECtHR appeared to assume, in *Zaichenko v Russia*⁶⁵, that the issue of public interest is also a principle of the doctrine of waiver in the context of Article 6(1), at least in relation to criminal proceedings. It is unclear whether the principle extends to the doctrine as it relates to civil proceedings but it is arguable, where the subject matter of proceedings is

⁶¹ *Colozza v Italy* Series A No 89 (1985) [27]-[32]; *Oberschlick v Austria* Series A No 204 (1991) [48]-[51]

⁶² *Makarenko v Russia* Application No 5962/03 Judgment 22/12/09 [135]; *Syathan Demir v Turkey* Application No 25381/02 Judgment 28/07/2009 [38]; *Sejdovic v Italy* Reports of Judgments and Decisions

⁶³ *Makarenko v Russia* Application No 5962/03 Judgment 22/12/09 [135]

⁶⁴ *Orsus v Italy* Application No 15766/03 Reports of Judgments and Decisions 2010. The right not to be racially discriminated against was of such public import that the applicants’ failure to object to racial segregation could not amount to waiver of the right.

⁶⁵ *Aleksander Zaichenko v Russia* Application No 39660/02 Judgment 18/02/2010

of particular public importance, that the ECtHR may find that a mediated settlement which deprives an individual of full protection for a particular right falls within this principle.⁶⁶ As already shown in the case of *Orsus*, the ECtHR considers the right not to be racially discriminated against of such public importance. Hence, it would be wise to ensure that care is taken to ensure that there are significant safeguards in place to ensure that, if individuals undertake a mediation process in relation to discrimination claims, they are fully informed of the effect of settlement on their legal rights. The same is likely to be true of cases involving human rights issues and in relation to judicial review proceedings, particularly since one of the prime concerns of the right of access to court under Article 6(1), as enunciated by the ECtHR, is to protect individuals against the arbitrary exercise of executive discretionary power.⁶⁷

4) Waiver must not be Tainted by Constraint

The final consideration, however, is that the waiver must not be tainted by constraint⁶⁸. In *Deweere v Belgium*, the ECtHR stated that:

*... in a democratic society too great an importance attaches to the "right to a court" ... for its benefit to be forfeited solely by reason of the fact that an individual is a party to a settlement reached in the course of a procedure ancillary to court proceedings ... absence of constraint is at all events one of the conditions to be satisfied*⁶⁹

Since a focus of this article has been to consider the pressure that is brought to bear on individuals to mediate their claims, it is useful to analyse what, according to the ECtHR in the case of *Deweere*, constituted constraint. The relevant facts of the case were that Mr Deweere had been charged with the criminal offence of over-pricing meat for sale in his butcher shop. Under the ensuing closure order the applicant was faced with the choice of paying a fine by way of compensation for his alleged offence or the closure of his

⁶⁶ For example, discrimination or human rights claims or claims which would usually be dealt with by way of judicial review.

⁶⁷ See, for example, *Matthews v Ministry of Defence* [2003] UKHL 4 [2003] 1 AC 1163 [25]-[29]; *Tinnelly & McElduff v United Kingdom* (1999) 27 EHRR 249

⁶⁸ *Deweere v Belgium* (1980) 2 EHRR 439 [49]

⁶⁹ *ibid*

business within 48 hours of issue of the order until a criminal hearing to determine his guilt. Faced with the possibility of the closure of his business, the resultant loss of income, business and client goodwill, an inability to pay his staff, together with the uncertainty of duration between closure and the potential trial, Mr Deweer opted to pay the fine. However, in consequence of doing so he had to forego his right of access to a court: this despite the fact that he had an arguable defence. The opportunity to defend his alleged offence may have resulted in a vindication of his reputation as well as non-payment of the fine.

The Belgian government contended that Mr Deweer had waived his right to a court and hence there was no violation of Article 6(1). In accepting the offer of a ‘friendly settlement’ he avoided the risk of a sentence which may have been more severe, together with the permanent closure of his business. Also, the government argued, to accept that settlement or compromise in criminal cases is legitimate necessarily entails accepting that such settlement ‘always takes place under some form of constraint’, namely the fear of criminal proceedings or the threat of a higher penalty⁷⁰. Whilst the ECtHR accepted that ‘the prospect of having to appear in court is ... liable to prompt a willingness to compromise’ in such circumstances, and that this pressure was not of itself incompatible with Article 6(1), it did not accept that it was the threat of criminal proceedings that influenced Mr Deweer to accept the settlement offer. However, even if fear of criminal proceedings may have constituted an unacceptable pressure, it was unlikely, according to the ECtHR, that Mr Deweer was apprehensive about proceedings as an acquittal appeared not improbable. Rather it was the threat of closure of his business within 48 hours that constituted the constraint in this case. As the ECtHR pointed out, Mr Deweer was faced with the prospect of not only a loss of income over a possible period of several months, but also with the potential of having to continue to pay his staff, and the loss of customers: this would have resulted in considerable consequential loss. The ECtHR also considered that the modest nature of the settlement fine (as compared to the possibility of a fine of up to 3000 times higher if found guilty of the offence at trial), added to the pressure of the closure order, thus rendering ‘the pressure so compelling that it is not

⁷⁰ *ibid* [51(a)]

surprising that Mr Deweer yielded'⁷¹. In answer to the government's argument that there was nothing to prevent Mr Deweer from refusing the settlement and taking legal measures to challenge the closure order or to claim damages for loss arising from the closure of his business, the ECtHR considered that national legislative provisions made this an unlikely route of redress⁷².

It is possible to highlight a number of comparisons that may usefully be made with the facts and circumstances of the *Deweer* case, together with the conclusions of the ECtHR in that case, and the potential argument that a litigant has waived his right of access to a court by undertaking a mediation process leading to settlement of a claim.

First, the ECtHR accepted that in a situation where the prospects of the trial itself engendered fear, such as where the consequences of refusing a settlement would lead to trial and to a potentially more severe penalty, this pressure alone would not be incompatible with Article 6(1)⁷³. Hence, there would be no violation of the defendant's right to a court. Similarly, it would not appear possible for a respondent to civil proceedings (faced on the one hand with the choice of accepting an offer to settle or to mediate in order to reach a settlement, and on the other the prospect of a civil trial), to argue that the fear of a court trial per se, or even of a higher award in damages, constituted such a pressure that this forced him or her to accept a settlement and thus violated Article 6(1).

However in deciding whether to refuse to mediate a claim in this jurisdiction, whether at the suggestion of the court or at the request of the opponent, a party encounters additional pressures, first, in the form of authoritative encouragement and secondly, in the form of potential adverse costs⁷⁴.

a) Authoritative encouragement

⁷¹ *ibid* [51(b)]

⁷² *ibid* [52]

⁷³ *ibid* [51(b)]

⁷⁴ Court approaches to encouraging parties to undertake an ADR procedure have been discussed in detail in S Shipman 'Court Approaches to ADR in the Civil Justice System' (2006) 25 CJQ 181, 186-194

An individual faced with the option of going to mediation or holding out for a trial may face pressure in the form of advice or encouragement from two principal sources. First, if legally represented, his advisors may recommend mediation. Legal advisors are themselves open to criticism from the courts for failure to pursue this option⁷⁵. Secondly, a litigant may be encouraged by the court to undertake such a procedure. It is worth noting here that the courts themselves face a degree of pressure to encourage such procedures⁷⁶: the lower courts may attract criticism from the higher courts for failure to fulfil their duty to further the overriding objective of the Civil Procedure Rules⁷⁷ and the higher courts face political pressure to encourage the use of ADR procedures⁷⁸. The persuasive influence of the courts, and of any acting legal advisors, should not be underestimated⁷⁹. With regard to conformity with Article 6(1), however, it does not appear likely that the ECtHR would construe such influence on its own as constraint, to the extent that this would nullify a tacit waiver of the right of access to court. In relation to the right of access to court under Article 6(1), the ECtHR is concerned that an individual has a real opportunity to bring or defend his claim before the courts⁸⁰. It is difficult to assert that an individual who settles his claim and thus foregoes this right, even in the face of strong advice from legal professionals or indeed from the court itself, has had no such opportunity. In the *Deweere* case, the applicant had no opportunity to defend the alleged offence following payment of the settlement fee. Whilst he no longer faced closure of his business, the effect of the payment was to bar absolutely the possibility of a criminal trial⁸¹. However, if he had refused to pay the sum involved it was acknowledged by the ECtHR and by the Belgian government that he would have faced a trial⁸². Thus, it was not that he had no real opportunity to defend the charge against him that led to the conclusion that his right of access to the court had been

⁷⁵ *ibid* 188-190

⁷⁶ This point has been discussed in relation to criticism of legal advisors but is equally applicable to the lower courts 'Court Approaches to ADR' (n81) 188-190

⁷⁷ The Civil Procedure Rules have the overriding objective of enabling the courts to deal with cases justly (CPR 1.1)

⁷⁸ *ibid* 182-186

⁷⁹ *ibid* 182

⁸⁰ For example: *Winterwerp v The Netherlands* Series A No 33 (1979) 2 EHRR 387

⁸¹ *Deweere v Belgium* (1980) 2 EHRR 439 [15]

⁸² *ibid* [51]

violated. Neither, currently under the CPR, does an individual's refusal to undertake ADR halt the process of civil litigation. In such an instance the resources and protection of the court remain available.

However, parties deciding whether or not to accept the court's advice to undertake an ADR procedure, or to refuse an opponent's offer of mediation, are in England and Wales subject to a further pressure: the possibility of adverse costs should the court find that a party has unreasonably refused to mediate⁸³. Additionally, following the decision in *Carleton v Strutt & Parker*, where the successful claimant's costs award was reduced due to his unreasonable conduct in the mediation process, there is the further possibility that refusal to engage fully with the mediation process itself may attract adverse costs⁸⁴. However, it should be noted that there are potential difficulties with this decision due to the fact that mediation proceedings are generally covered by the without prejudice rule.

b) Adverse costs

i) The ECtHR and Litigation Costs

According to *Halsey v Milton Keynes General Trust NHS*⁸⁵, it is appropriate for a court to make an adverse costs award where a party has unreasonably refused (at the request of the court or another party) to undertake an ADR procedure. The cost of legal proceedings in this jurisdiction (irrespective of the potential for adverse costs), is such that a party may prefer to compromise the claim rather than enforce his rights or vindicate his reputation. The prohibitive nature of the cost of legal proceedings has, in itself, been

⁸³ For more detailed discussion of this see 'Court Approaches to ADR' (n81) 192-193 and following

⁸⁴ *Carleton (Earl of Malmesbury) v Strutt & Parker* [2008] EWHC 424 (QB); [2008] 5 Costs LR 736. Additionally, Article 7 European Mediation Directive (Directive 2008/52 on certain aspects of mediation in civil and commercial matters) requires Member States to ensure that neither mediators or others involved in a mediation process are compelled to give evidence in civil, commercial or arbitration proceedings regarding information arising out of a mediation process except where necessary for overriding reasons of public policy or where necessary to enforce a mediation agreement.

⁸⁵ *Halsey v Milton Keynes General Trust NHS* [2004] EWCA Civ 576 [2004] 1 WLR 3002 [9]

the subject of a number of challenges before the ECtHR⁸⁶. In such cases the applicant has alleged that the actual or potential costs of litigation have prevented him from either pursuing a claim through the courts or from advancing an effective action⁸⁷. It is worth noting at this point that in such a situation the individual concerned has not been refused access to the courts, rather it is the direct or indirect effect of the lack of funds that acts as an impediment to the courts. Whilst Article 6, ECHR, does not expressly require that a contracting state provides public funding for a party seeking to make use of the civil courts, the ECtHR has found on occasion that failure to do so may violate an individual's rights⁸⁸. For example, in *Steel & Morris v United Kingdom*⁸⁹, the applicants successfully asserted that they had been denied effective access to court and that there had been an inequality of arms viz-a-viz their multi-national corporation opponent⁹⁰. The applicants, defendants to defamation litigation, had been refused legal aid to defend the longest trial in English legal history⁹¹. Given the success of Mr Morris and Miss Steel before the ECtHR, it seems unlikely that the ECtHR would have less sympathy for an applicant who has been unable to defend a claim through the courts at all due to lack of funding (and, as a result, has had to settle his opponent's claim), than for an applicant who has, in fact, progressed his cause ineffectively through the courts. This additional pressure to settle, rather than face the expense of costly legal proceedings, is enhanced by the indemnity principle, such that the unsuccessful party to the litigation is required to pay not only his own legal costs but also the reasonable costs of the winner.

The concern for this discussion, however, is not with whether a litigant is unable to advance or defend a claim due to lack of funding, but rather with whether a litigant who undergoes an ADR procedure may successfully argue that the pressure to undertake that

⁸⁶ For a more in-depth analysis of such cases: S Shipman 'Defamation and Legal Aid in the European Court of Human Rights' (2005) 24 CJQ 23, S Shipman '*Steel & Morris v United Kingdom*: Legal Aid in the European Court of Human Rights' (2006) 25 CJQ 5

⁸⁷ '*Steel & Morris v United Kingdom*: Legal Aid in the ECHR' (n57) 7-12 for an exploration of the distinction between the situation where an applicant has been effectively denied a right of access to court and where an individual has been denied the opportunity to present an effective claim or defence

⁸⁸ In the ground breaking case of *Airey v Ireland*, the ECtHR found that Mrs Airey had effectively been denied access to the courts to claim a judicial separation from her husband owing to the fact that legal aid was not available for such proceedings. *Airey v Ireland* Series A No 32 (1979) 2 EHRR 305

⁸⁹ *Steel & Morris v United Kingdom* (Application No 64816/01) 15 February 2005

⁹⁰ *ibid* [72]

⁹¹ *ibid* [19]

process constitutes constraint, thus countering the potential argument that in compromising the action through a mediation process he has waived his right of access to a court. Lack of funds may, of course, constitute a significant factor in the pressure faced by a potential litigant to avoid court proceedings but the possibility of an adverse costs award for unreasonable refusal to undertake an ADR procedure further increases the pressure on potential litigants. As noted above, the indemnity principle may operate to discourage potential litigants from pursuing a claim through the courts. However, it may also have the contrary effect where a party has a strong case. The principle may be instrumental in encouraging litigants to fight their cause through the courts, since it ensures that the successful litigant is able to recover legal costs from the unsuccessful opponent. Thus, a litigant who believes he has a good prospect of success is able to pursue his claim through the courts based on the probability of recovering his costs from the opposing party⁹². However, an adverse costs award undermines this principle. Even where a party believes he has a good case, his refusal to undertake ADR, may mean that, if successful, he does not recover his costs or, if unsuccessful, he faces a higher costs award than he would otherwise have done⁹³. Thus, the issue for discussion here is whether a party can be considered to have waived his right of access to a court in submitting to an ADR procedure in the light of this threat. The answer is not straightforward.

If the national court approach were to award adverse costs consistently for a refusal to undertake ADR then it would appear likely that this could constitute constraint in certain circumstances. Since the ECtHR is concerned with the application of a particular rule or procedure to the case before it rather than with its general operation it is unlikely that the threat of adverse costs per se would be found to conflict with the right of access to a court. Instead the ECtHR would explore whether such a threat constituted constraint in the circumstances of the particular case before it. In the *Deweer* case, it was the threat of

⁹² Defendants may not be able to recover costs in certain proceedings following the recent review of costs in civil litigation in England and Wales. Civil Procedure Rules 44.13 - 44.17.

⁹³ *Dunnett v Railtrack plc (in Railway Administration)* [2002] EWCA Civ 303 [2002] 1 WLR 2434 for a case where the respondent's belief in the strength of the defence was vindicated through the result of the appeal, but where no costs were awarded on the basis of a refusal to mediate the claim. For examples of a party's erroneous belief in the merits of his cause: *Hurst v Leeming* [2001] EWHC 105 (Ch) [2003] 1 Lloyd's Rep 379, *Burchell v Bullard* [2005] EWCA Civ 358

closure of the applicant's business with its attendant financial consequences that tainted waiver of the right of access to court with constraint⁹⁴. In that case the ECtHR did not, unfortunately, enunciate any criteria for assessing constraint (and the issue appears to have received little if any discussion in subsequent cases⁹⁵). However, the important features appear to be the direct and potentially severe nature of the threat of closure. A further factor in the *Deweer* case may have been the immediacy of effect of the closure order (within 48 hours of receipt of the order). If an automatic award of adverse costs were to be the result of refusal to mediate then that threat would also have direct and potentially severe financial consequences, depending on the potential costs involved and the individual's resources. Whilst the financial consequences would not be as immediate as in the case of *Deweer*, the decision as to whether to undertake an ADR procedure has to be made against the timescale of proceedings and also against the case management duty of the court to further the overriding objective of the CPR. As one aspect of this, the CPR rules are designed to promote expedition. Hence, a decision as to whether to accept or refuse the opportunity to use such a process may have to be made promptly. It is accepted, however, that the financial consequences of an adverse costs order would most likely have a delayed effect. Whilst, in the *Deweer* case, the threat of closure was immediate, it is arguable that immediacy ought not to be a required factor. Whilst an immediate threat certainly adds to the pressure, the potential financial consequences of paying litigation costs may be as severe as losing one's business or one's home. If it is not possible to raise finances for legal costs in the immediate future it is unlikely that such costs will be able to be met at the time of the trial. Hence, it is certainly arguable that an automatic adverse costs award for refusal to undertake an ADR procedure would have the potential to violate an individual's right of access to court.

⁹⁴ It is not clear from the judgment whether Mr Deweer had other financial resources available to him (although this would appear unlikely), hence, it is difficult to assess whether the ECtHR would have found that this threat amounted to constraint if Mr Deweer had had other means to provide for his needs and to pay the salaries of his staff. But even in such an eventuality, Mr Deweer would still have faced the potential loss of his customers and the difficulties of rebuilding his business at some indefinite point in the future.

⁹⁵ The matter has only been briefly raised and dismissed in relation to applications declared by the Commission to be inadmissible. Examples include *M v The Federal Republic of Germany* Application 12725/87 Decision of 2 October 1989, *Bojlekov v Poland* Application 22819/93 Decision of 9 April 1997

ii) Adverse Costs for Unreasonable Refusal to Mediate

In England at least, adverse costs are not automatically awarded: rather they may be imposed following trial for an unreasonable refusal to mediate a claim. A significant difficulty for a potential litigant in deciding whether to reject a request for mediation is that it is uncertain at that time what may amount to unreasonable conduct. The Court of Appeal, in the case of *Halsey v Milton Keynes General Trust NHS*⁹⁶, has highlighted a number of relevant factors including (amongst other features) the nature of the dispute, the merits of the case, the prospects of success of a mediation procedure, and the encouragement of the court⁹⁷. A brief exploration of certain of the relevant factors highlights how these features are not conclusive and consequently are likely to leave a party uncertain as to whether his refusal to undertake an ADR procedure is unreasonable.

For example, with regard to assessing the merits of the case the test is an objective one, made by a judge with the benefit of hindsight after the judgment has been delivered. It is quite clear that the subjective belief of potential litigants, particularly those who are not legally represented (and even allowing for the use of Pre-Action Protocols to ensure that parties are well-informed), may not accurately reflect the eventual outcome. For example, in the case of *Burchell v Bullard*⁹⁸, the defendants were found to have acted unreasonably in refusing the claimant's offer to mediate the claim. One factor was the court's finding that the defendants 'behaved unreasonably in believing ... that their case was so watertight that they need not engage in attempts to settle'. This is hardly surprising: the law reports are full of cases where lower courts and the appellate courts disagree about what the outcome should be⁹⁹. If the courts themselves cannot agree on the outcome in a particular case, it is unlikely that a potential litigant, who is emotionally involved and who may be financially dependent on the outcome, can be expected to make an accurate and objective assessment. However, on occasion the court has also found

⁹⁶ *Halsey v Milton Keynes General Trust NHS* [2004] EWCA Civ 576 [2004] 1 WLR 3002

⁹⁷ For a full discussion of this case see S Shipman 'Court Approaches to ADR in the Civil Justice System' (2006) 25 CJQ 181,194-211

⁹⁸ *Burchell v Bullard* (n70)

⁹⁹ See for example *Reed Executive plc v Reed Business Information Ltd* [2004] EWCA Civ 887 [2004] 1 WLR 3026

that the losing party, who has refused to mediate a claim, should not be penalised in costs where an estimation of the strengths of the claim was actually incorrect. For example, in *Hickman v Blake Laphorn*¹⁰⁰, the first defendants were willing to mediate a professional negligence claim, but the second defendants had refused. Judgment was awarded for the claimants at £130,000 whereas the second defendants had valued the claim at a much lower figure. At the costs hearing, the first defendant argued that the judge should take into account the second defendant's refusal to mediate when deciding how to apportion the costs between them. The judge refused to do so, on the basis that the refusal was not unreasonable as the second defendant's insurers did not wish to pay more than they thought the claim was worth¹⁰¹. The view of the value of the claim was not unreasonable as 'it had been formed after a review of the case by experienced solicitors and counsel'¹⁰². The judge appeared to be concerned that defendants should not be coerced into agreeing to settle for more than they consider the claim to be worth, even if this would save even more on costs, because otherwise claimants could use the threat of costs to 'extract more than a claim is worth'. This is a worthy consideration. However, the difficulty with this particular approach is that in many, if not the majority of cases, the merits or value of a claim will have been made in the light of review by experienced legal advisors. The reason that the defendants were facing negligence proceedings in the *Hickman* case is that they had previously advised the claimant to accept a settlement figure in a personal injury case which was too low because they had failed to allow for the possibility that the claimant may never be able to work again. They had been, therefore, already incorrect in their assessment of the value of the claim. Moreover, the claimant had been represented in relation to the negligence proceedings, so it could equally be argued that experienced legal advisors had come to a significantly different view of the claim's value.

The above cases demonstrate the difficulty of basing a decision as to the unreasonableness of a refusal to mediate on the merits of the claim. An objective assessment as to the merits of a claim is not always straightforward, the legal advisors for

¹⁰⁰ *Hickman v Blake Laphorn* [2006] EWHC 12 [2006] All ER (D) 67

¹⁰¹ *ibid* [30]

¹⁰² *ibid* [29]

opposing parties may form significantly different opinions as to the strength or value of the claim and, even where a party wins a claim and the opponent's refusal to mediate is based on an incorrect assessment as to the claim's strength, the court may decide that the erroneous view is not an unreasonable one to take.

A similar difficulty arises when assessing the prospects of success of a mediation process. As the Court of Appeal indicated in the *Halsey* case, this may depend both on the willingness of the parties to compromise¹⁰³ (the fact that parties have instigated the litigation process may be suggestive of the fact that there is some intransigence or lack of willingness to move on the part of at least one party to the proceedings) as well as on indeterminable factors such as the ability of the mediator¹⁰⁴. If the court faces difficulty in determining, at the case management stage of proceedings, whether the prospects of success are good, it is unlikely that the parties themselves are in a position to make a sensible judgment¹⁰⁵. Again, this is likely to be even more problematic where a party does not have the benefit of legal advice or representation: not only for the unrepresented party without prior legal knowledge (or education as to the perceived potential benefits of an ADR process) but also for his opponent who may arguably face an unpredictable adversary. Whilst an opponent without the protection of legal advisors may be more willing to settle for a lower sum it is also possible that such a party may have an unrealistic view of the claim value or its merits. Hence, it may be difficult to predict whether an unrepresented party is more or less likely to be willing to compromise. This point is illustrated by the case of *Dunnett v Railtrack*¹⁰⁶, in which the claimant was unsuccessful at first instance. Following the trial, and in order to prevent an appeal, the defendants offered the claimant £2500 to settle the claim¹⁰⁷. Miss Dunnett refused the offer and was again unsuccessful on appeal. At the time of her refusal she was acting as a litigant in person¹⁰⁸.

¹⁰³ *Halsey v Milton Keynes General Trust NHS* [2004] EWCA Civ 576 [2004] 1 WLR 3002 [25]-[26]

¹⁰⁴ *ibid* [27]

¹⁰⁵ 'Court Approaches to ADR' (n102) 206

¹⁰⁶ *Dunnett v Railtrack plc (in Railway Administration)* [2002] EWCA Civ 303 [2002] 1 WLR 2434

¹⁰⁷ *ibid* [1]

¹⁰⁸ *ibid* [6]

Perhaps the most problematic aspect of the *Halsey* guidelines as to when adverse costs should be awarded for unreasonable refusal to mediate, however, is the role of the court in encouraging parties to undertake an ADR procedure. In England and Wales, under CPR 1.4(2)(e) the court is required to encourage parties seeking court litigation to use an ADR procedure if it considers that to be appropriate. The difficulty for the courts in assessing when an ADR procedure is appropriate has been explored in a previous article¹⁰⁹. One aspect of particular relevance here, however, is that it is not clear how much weight will be accorded to this factor when deciding whether a litigant's refusal is unreasonable. The Court of Appeal has indicated that the more robust the encouragement of the court the more likely it is that a party's refusal will be considered unreasonable when the costs decision is made¹¹⁰. Hence, it is likely that where the court's encouragement is strong the litigant's refusal will be considered unreasonable. For example, the most robust form of encouragement offered by the court to a litigant is an ADR Order, made in the Admiralty and Commercial Court¹¹¹. Under this order, if the case does not settle as a result of such a procedure, the parties are required to 'inform the Court ... what steps towards ADR have been taken and ... why such steps have failed'¹¹². In *Halsey* the Court of Appeal indicated that a party who refused such an order would 'run the risk for that reason alone' that the refusal would be unreasonable, irrespective of other factors involved¹¹³. Since such a refusal is almost certain to lead to an adverse costs award this threat is likely to exert significant pressure to use an ADR procedure. Such compelling pressure arguably constitutes constraint such that a potential litigant's resultant waiver of his right of access to court must be considered tainted.

Whilst robust court encouragement appears likely to equate with an unreasonable refusal, the influence of the court's encouragement is less clear when the court uses more limited persuasion. This creates a further difficulty. This aspect of an assessment of unreasonable refusal is essentially concerned with a matter of degree: where the court's

¹⁰⁹ 'Court Approaches to ADR' (n102) 194-218

¹¹⁰ *Halsey* (n111) [29]. Discussed in 'Court Approaches to ADR' (n102) 206-210

¹¹¹ Admiralty and Commercial Courts Guide (ACG) Appendix 7 *Civil Court Practice 2005* (Lexis Nexis Butterworths London 2005) 1825

¹¹² *ibid* [5]

¹¹³ *Halsey* (n111) [31]

encouragement is robust this appears likely to indicate a finding of unreasonableness. Where it is weaker this factor may be less influential. But a matter of degree is not always easy to assess. Neither does the case law offer significant guidance on this point. Whilst a mere suggestion of mediation was sufficient to incur adverse costs in the early case of *Dunnett v Railtrack*¹¹⁴, this factor appears to have had less significance in subsequent cases¹¹⁵. However, this is not decisive.

Thus, there are a number of uncertainties involved in the decision as to whether or not a litigant's refusal to undertake an ADR procedure is or is not likely to be deemed unreasonable and, if so, will incur adverse costs consequences. The potential for an adverse costs award (even if the guidelines for determining an unreasonable refusal were more certain), adds significantly to the pressure which faces an individual deciding whether or not to undertake ADR. The uncertainty creates an additional pressure. It is this threat of adverse costs, together with the uncertainty of whether or not it will operate in a particular case, which may constitute constraint such that, in the particular circumstances of a case, the ECtHR would decide that the individual has not truly waived his right of access to a court.

In the context of Article 6(1) the essence of waiver tainted by constraint is that, whilst in theory an individual may choose to exercise his right, in reality he or she is heavily influenced by the circumstances surrounding that choice. Arguably, there is no real freedom of choice. The voluntary character of a particular decision depends on the level of freedom to choose. As discussed earlier, the ECtHR has not been prepared to accept that an individual has waived an Article 6 right when he has had no knowledge of the circumstances that in fact act to deny him that right¹¹⁶. In that situation there has been no waiver as the right has not been acceded voluntarily. The same must be true where there is constraint. For waiver to be valid there has to be a true choice to concede the particular right. It must at least be arguable that in certain circumstances the risk of an adverse costs award is likely to deny the individual concerned a true choice.

¹¹⁴ *Dunnett* (n114)

¹¹⁵ For example, *Reed v Reed* (n104)

¹¹⁶ 8

c) A Justification for Waiver Tainted by Constraint?

In the *Deweer* case the finding that the applicant had been constrained to waive his right of access to court was conclusive to a finding of violation of Article 6(1). There was no discussion of whether the state's constraint was justifiable. However, since that case the ECtHR has introduced the concept of the margin of appreciation into the jurisprudence on the right of access to court. It is suggested that in further developing the doctrine of waiver in the context discussed in this article, the ECtHR should recognise that the threat of adverse costs and other strong methods of encouragement, such as court orders to mediate, amount to pressure such that any waiver of the right of access to court is tainted by constraint. But, in doing so, since the right of access to court is not absolute, the Court should also be prepared to consider arguments by State parties that, in the circumstances of individual cases, the constraint is justifiable. This would be the case if the measure which restricts access does not impair the very essence of the right, pursues a legitimate aim, and strikes a proportionate balance between the public interest and the fundamental right of the individual in the circumstances of the case¹¹⁷. This aspect has been discussed at length elsewhere¹¹⁸, in the context of whether compulsory mediation infringes an individual's right of access to court, and it is not possible to do justice to this point here. However, it is briefly worth noting that where the aim of a measure which leads to a denial of access to court is to enable the general or efficient functioning of the civil justice system (for example, in ensuring the efficient use of court resources) or where there is concern to protect the interests of others, the ECtHR generally accepts these as legitimate aims. Arguably, as discussed above,¹¹⁹ at least to some extent these concerns are reflected in measures which encourage, or even pressurise, individuals to make use of mediation or another ADR procedure. However, such an argument may be countered by evidence that the civil justice system is, in fact, self-funding and that the need to persuade individuals away from those courts is to ensure sufficient funding is available for criminal

¹¹⁷ *Ashingdane v United Kingdom* Series A No 93 (1985) 7 EHRR 528

¹¹⁸ S Shipman 'Compulsory Mediation: the Elephant in the Room' (2011) 30 Civil Justice Quarterly 163

¹¹⁹ Text to n5, n6, n7

justice¹²⁰. It would also seem unlikely that the ECtHR would be amenable to arguments that a principal reason for discouraging litigation is to prevent individuals from asserting their rights as this is too expensive for business (ie the fear of a compensation culture)¹²¹. However, in the context of Article 6(1), the ECtHR rarely finds that a restrictive measure does not pursue a legitimate aim and the decision most usually turns on the issue of proportionality. This aspect depends on whether the restricting measure has a disproportionate impact on the particular individual. The most significant pressure on an individual to undertake a mediation process is the threat of adverse costs. The ECtHR has been particularly concerned that financial constraints do not prevent individuals from bringing or defending claims in the courts. Whilst the threat of adverse costs is not a direct financial constraint, it may be used to encourage reluctant individuals to undertake a mediation or other ADR procedure and, since the case of *Carleton v Strutt & Parker*¹²², where the successful claimant's costs award was reduced due to his unreasonable conduct in the mediation process, it may be used to encourage reluctant parties at the mediation process to engage fully with the process.¹²³

D. Conclusion

This article has suggested that the defence of waiver may encounter difficulties in relation to a claim that an applicant has been denied his right of access to court under Article 6(1) following recourse to mediation (where either a settlement has been reached at the mediation which precludes access to court on that issue or the individual has exhausted funds due to the mediation). The ECtHR has taken a robust approach to the protection of the right of access to court under Article 6(1) and it is feasible, in the context of a strong impetus away from a rights-based resolution of disputes towards consensual methods, that it may yet play a significant role in safeguarding this important constitutional right. Whilst voluntary mediation and other ADR procedures offer potential benefits to users, the ECtHR is committed to ensuring that States do not manage their civil justice systems

¹²⁰ (n7)

¹²¹ Text to n8, n9

¹²² *Carleton (Earl of Malmesbury) v Strutt & Parker* [2008] EWHC 424 (QB); [2008] 5 Costs L.R. 736. Although, as stated above, this case may be doubted. Text to n84.

¹²³ *ibid* [72]

in such a way that the important public function of civil justice is weakened and that individuals are prevented from making use of the national courts in order to protect their legally enshrined rights and one way in which the ECtHR will be able to ensure that it retains the right to scrutinise State moves which potentially undermine Article 6(1), however benign the motive, is for the ECtHR to ensure that State parties are not able to use the doctrine of waiver as an automatic defence where individuals undertake a mediation (or other consensus based ADR procedure).

The doctrine of waiver requires that an individual waives their Article 6(1) right in an unequivocal manner and that there are sufficient safeguards in place commensurate to the importance of the right. In this context it seems fundamental that an individual who enters mediation is made fully aware that a settlement agreed at the mediation, or subsequently, will preclude access to the courts on the settled claim.

Moreover (although it has been argued that it is open for the ECtHR to consider whether, in the particular case, the restriction on an individual's right of access to court is justifiable), it appears feasible that the ECtHR may recognise that the pressure brought to bear on individuals (in the form of authoritative encouragement from legal advisors and the courts and in the threat of adverse costs) is sufficient to taint any unequivocal waiver with constraint. Hence, it may be necessary to reconsider the use of adverse costs awards as a method of encouraging individuals to undertake mediation or other ADR procedure. A dispute resolution culture where legal advisors are educated as to the benefits of mediation, together with sound empirical research which demonstrates the advantages of mediation over court-based litigation, must ultimately have a significant impact on its use in civil justice. Finally, it should be noted that the ECtHR may not, in any case, permit waiver of the right of access to court in favour of mediation where the substantive legal issue in the particular dispute involves a point of public interest, such as racial discrimination or an individual's fundamental human right.