

Presentation
The Launch of the
Canterbury Christ Church Mediation Clinic
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I was handed this project a little more than a year ago and in order to gauge the temperature for mediation; the attitudes towards it and the requirement for it in the Canterbury area, I thought a good starting point would be to send a questionnaire out to a number of different local organisations. The questionnaire was quite short; I think there were no more than 10 questions and they were mainly of the yes/no answer type. The questionnaire was even sent with a stamped addressed return envelope. Of the 20 or so firms of solicitors the questionnaire was sent to, only one firm responded – I would like to thank Gardner Croft for that and I am pleased to see a representative from your firm here this evening. I am also heartened that there are representatives from other local solicitors firms here this evening.

I can understand the resistance demonstrated by the private sector. I am a solicitor, although non-practising now as my primary function is to teach law, but during my years in practise, latterly specialising in personal injury and clinical negligence work, I can probably count on the fingers of one hand the number of cases I referred to mediation. In hindsight there are many more cases I can now think of where mediation may have been appropriate and may have brought the dispute to a conclusion, mutually acceptable to both parties, a lot sooner.

Since the millennium and particularly since the implementation of the Access to Justice Act 1999 and the implementation of the Civil Procedure Rules, we have witnessed a growth in alternative methods of dispute resolution for civil claims. Court of Appeal decisions such as *Dunnett v Railtrack*¹, in which Lord Justice Sir Henry Brooke made a clear indication that parties to a civil dispute should give serious thought to mediation as a method of resolving

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¹ See [2002] EWCA Civ 303

their dispute, not only for all the benefits that this process can provide, but also to avoid the risk of costs penalties which the court has power to order for failing to do so. At an international mediation conference I attended recently, the key note speech was delivered by Sir Brian Neill, himself a former Lord Justice of Appeal. He described mediation as “An unstoppable force”². Having researched the area for over a year now, I very much believe that there is a much to be said for these words.

It was Sir Brian Neill who was the first chairman of the Civil Mediation Council founded in 2003, a body comprising academics, lawyers, judges and members of the mediation community, set up to work closely with government to promote civil and commercial mediation and to represent the interests of mediation providers³. The CMC is coming to the end of a two year pilot scheme looking into, among other things, accreditation of mediation providers so as to ensure that service standards are maintained.

One matter I want to make clear is the fact that mediation is not a “fix-all” solution for all conflict situations indeed some disputes are not suitable to the process at all⁴. but what mediation can provide in many situations is the possibility for parties to explore solutions which may not be available through the court process. Courts are limited in the range of remedies they are able to provide and one party has to be on the wrong side of an adjudication.

Statistics show that of all civil disputes which enter the court system, only 10% actually reach trial.⁵ This means at some stage 90% of litigated cases settle at some stage before trial, often after having incurred a great deal of expense, time and stress. Many of these cases could perhaps be settled earlier, even before entering the court system, through the intervention of an alternative means of dispute resolution and often mediation can provide the appropriate method.

What is Mediation?

² Keynote speech given at the Second European Mediation Network Initiative's International Conference in Vienna on 28.09.07.

³ www.civilmediation.org

⁴ Those disputes which are generally accepted as being unsuitable for mediation include cases where there is some criminal element, issues of public law and cases where the parties wish to set a precedent through a binding court decision.

⁵ <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly>

A useful definition of the process of mediation has been provided by the Centre for Effective Dispute Resolution:

A flexible process conducted confidentially in which a neutral party actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution⁶.

It is important to remember that mediation is a wholly voluntary process, there is no compulsion on the parties to submit their dispute to mediation, unlike in some jurisdictions where mediation is mandatory⁷. The parties must want to try mediation as an appropriate means to resolving their dispute rather than commencing or continuing litigation.

The mediation process is also confidential. The parties sign an agreement at the commencement of the mediation to be bound by confidentiality. Essentially this means that the parties agree not to repeat anything raised during the course of the mediation. Similarly the process is accepted by the parties as being without prejudice, implying that if the dispute does not settle following the mediation and litigation commences or ensues, neither party can use any information disclosed during the course of the mediation in subsequent court proceedings.

The mediation process is neutrally facilitated by a third party mediator, which brings a completely different dynamic to the negotiations which may have been conducted hitherto and which are more often than not bi-lateral. The mediator's task is not to take sides or pass judgement. The mediator assists the parties in finding a mutually acceptable solution to the dispute which may well have reached a position of stalemate.

The parties have full control over the process, they can call the mediation to a close at any time, and with the assistance of the mediator are able to explore a whole range of options which are outside the scope of the civil court room. In so doing the process can be described as empowering.

⁶ The CEDR Mediation Handbook

⁷ See Ontario, Canada, based on the research undertaken by Dr Sue Prince of Exeter University provided in her paper entitled: Incorporating ADR into traditional civil court processes: Should mediation be mandatory? Presented at the Second European Mediation Network Initiative's International Conference

The Aims of the Clinic

The aims of the mediation clinic are threefold. The first aim is to provide mediation services to the local and wider community. Secondly, to enhance teaching across curricula within CCCU and thirdly to provide a focus for research.

Where the provision of mediation services is concerned, it is hoped that the clinic can be set up primarily to provide a pro bono service for those who cannot afford it. That is not to say that the same service cannot be provided to others on a competitive charging basis. A strict means related test will have to be adopted so as to determine the eligibility for the mediation service to be provided pro bono, thought must also be given to the retention of a legal advisor on a pro bono basis and this will no doubt rely on there being a sufficient number of local solicitors who would be prepared to provide their legal services free. There would of course be no reason why a party already represented and in receipt of public funding or legal aid, should not be able to have their certificate extended so as to cover mediation.

It should be stressed also that as CCCU is a non-profit making organisation, any income earned from the work undertaken by the CCMS will either be used to pay for independent mediators to conduct mediations and perhaps more importantly for research purposes.

The mediation field is currently unregulated in the UK. The regulation of mediation providers is a topic that is on the government's agenda and something which I have already mentioned, is being researched by the Civil Mediation Council. This is why CCMS considers that accreditation is paramount to becoming a successful and competent provider of mediation services within the UK. The public's perception of mediation is unclear, many I members of the legal profession let alone lay people, have little or no understanding of the mediation process and its appreciable benefits. Trust in the process is extremely important from the parties' point of view. They may only come into contact with the process once and if they have a bad experience it is more than likely to be the last time they will attempt such a method of ADR. This is why mediator competence is important to the ongoing success of mediation. It is our view at CCMS that all mediators should undergo training with recognised

in Vienna on 28.09.07.

mediation training organisations. Indeed it will be one of the first tasks of CCMS to become accredited with the CMC and until which time we will be unable to register with the National Mediation Helpline (NMH) the government linked organisation which holds a list of accredited mediation providers to be called upon when the court refers cases (with the consent of the parties) to mediation.

Being able to provide a range of mediators, some with particular specialisms, is a matter which CCMS intends to pursue. A panel of mediators will provide the right balance of specialism. At present we already have staff within the university who are accredited mediators with particular interest and strengths. A number of the university's personnel department went through their training accreditation recently and will be competent at providing workplace mediation and assistance with disputes which arise from within the university. It is important that the community has ready access to mediators who are local rather than having to travel, sometimes long distances for their cases to be mediated. Having conducted a very brief survey locally, it is evident that those mediators based locally do not have the opportunity to mediate enough and would welcome the opportunity of keeping their "flying hours up".

It is proposed that the main areas of work which the CCMS will cover will include disputes arising from within the university involving those between students, and students and staff, human resources and workplace issues, we have members of the personnel department who are trained workplace mediators, who will be able to provide particular expertise in this area. Community-based disputes will be considered, although I am aware that there is a very well established community mediation service based locally who help neighbours and communities find ways of living comfortably together, by promoting restorative justice engaging in victim-offender mediation and youth offending intervention and prevention initiatives. We also aim to undertake court-referred mediation and, as I mentioned earlier, in order to do this we will need to be accepted onto the National Mediation Helpline's list of approved mediation providers. Personal injury and clinical negligence is another area where we can provide specialism, this was an area in which I latterly practised. We would also like provide mediation for commercial and business disputes. Eventually we would offer mediation for family/marriage breakdown but I am conscious that the kind of mediation in this area is slightly different and would require further training, I am also aware that the Kent Family Mediation Service based in

Sittingbourne provides an existing service, however we would like to think that we could compliment that service and work closely with them to perhaps offer their mediators the opportunity to provide their services from our premises in Canterbury.

One factor which all mediators should not lose sight of is that the role of the mediator is an impartial one and in order to facilitate this a neutral setting must be provided. Three sound proofed rooms must be made available in comfortable surroundings, bearing in mind that some mediations may take in excess of eight hours to complete, parties comfort is also essential. The importance of environment should not therefore be underestimated if a mediation is to have any chance of succeeding. The venue must be accessible, which is why CCMS have decided that the mediations should take place at premises within Canterbury and most probably not on the main campus so as to reinforce neutrality. Mediation is also an informal process. The strict rules applicable to other dispute resolution forums such as the civil trial process or arbitration, do not apply to mediation thus making it more flexible as well. It is part of the mediator's role to place the parties at ease and to decide upon the structure of the mediation.

The second aim of the mediation clinic is to enhance teaching and learning. The funding which the project has received from HEFCE is specifically a research in teaching fund. The objectives of the university in this regard are fourfold: firstly to ensure that all students receive a higher education that is informed by research and scholarship, secondly to enhance teaching and learning through engagement with pedagogic research in all disciplines, thirdly to enhance the employability of graduates through engagement in research-based activities and experiences and fourthly to enhance the research profile of academic departments.⁸

By its very nature the clinic will be experiential, focusing on enabling students to understand how a mediation service provider operates through involvement as assistant mediators under the guidance of experienced members of staff and by being involved in the administration of the office. The supervisory capabilities of academic staff will be enhanced through their active involvement with the mediation clinic. Clinical legal education in the UK is still a relatively unadvanced concept. There are some nationally renowned clinics within the UK including the UKC model. What the clinic at CCCU will aim to do is to design and

⁸ See www.canterbury.ac.uk/support/learning-teaching-enhancement-unit

develop new and innovative curricula using the work of the clinic as a focus. Already a course of study has been designed around the theory of dispute resolution which is currently being offered at level 2 of undergraduate study, this will lead into a course at level three on the practical aspects of dispute resolution which will make use of the work undertaken by the clinic. Through the development of their personal and interpersonal skills, autonomy, independence of thought and decision making skills gained from their experiences within the clinic, students at level three will undoubtedly enhance their employability. It is interesting to note that few UK universities engaging in clinical legal education actually give students credit for their clinic experiences. At CCCU we consider there to be no reason why the experiential learning in which undergraduates will engage should not be credit-bearing.

CCCU has a rich tradition in providing “vocational” education, from social work and healthcare provision to policing. The work undertaken by the clinic and the exposure which students will have to it, will continue this tradition. With the development of a qualifying law degree which will be offered from September 2008, the clinic will form a cornerstone of one of the university’s driving principles, that being the concept of theory meeting practice and the reinforcement of theory through practice

To enhance the research profile of academic departments, clinics are seen as increasingly important at the academic stage of legal academic study within the UK. The mediation clinic will be the first of its kind in a UK law school and the study of alternative dispute resolution will produce a research-based curriculum. It will provide academic staff with data which will form the foundation of research projects, which may be entered into in partnership with other departments within the university, or externally with private sector, public sector and voluntary sector providers. It is hoped also that the clinic will provide a knowledge sharing forum which amongst other things will assist in spreading the message about the appreciable benefits of alternative dispute resolution and particularly mediation.

The Positives

The mediation clinic will help the university continue its close association with the local community. It will provide fresh approaches to conflict resolution by educating the next generation of graduates on participating degree programmes to think about resolving

disputes without resorting to litigation. Students who follow courses of study in association with the mediation clinic will not only gain the key graduate skills expected following their undergraduate studies, but will also gain an appreciation of the importance of effective problem-solving. They will develop professional skills and an understanding of ethical issues and importantly have a sound knowledge and understanding of the benefits and limitations of mediation and other methods of dispute resolution.

For students pursuing the law degree or the legal studies combined degree, the clinic will introduce them to the range of legal skills required to more effectively deploy their knowledge and apply it to both intellectual and practical legal problem solving.

The particular skills that students will gain through their experiential learning will enhance their employability. Employers will recognise that these students bring with them valuable knowledge and fresh approaches to problem solving into the workplace. The clinic will also be able to provide the focus for post graduate studies for those who wish to either progress from degrees at CCCU or join the department. Staff will be able to combine their interest in research in the area with supervision and postgraduate teaching.

Concluding Remarks

I am particularly proud to be leading this project, not only for the benefits already outlined, but also for the fact that mediation clinic at Canterbury Christ Church will be the first such clinic to be based within a university.

Ben Waters
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