DENTONS KENSINGTON SWAN

Does compromise, compromise justice? The Role of Mediation in Access to Justice

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Introduction

1 Since the development of formalized modern mediation, mediation has been viewed as the carrot to the stick of litigation. Alternative dispute resolution has long been viewed as just that, alternative. It is this perception of mediation as litigation's more agreeable sibling that has aided in the growth of mediation over the past three decades but our use of mediation must now evolve beyond this 'either or' mentality.

2 Conversations about mediation's role in relation to the Courts often focus on considerations of mandatory mediation, or options around referrals to mediation by judges and cost implications for failure to mediate. In other words, ways to use mediation as an alternative to the Courts to reduce the Court's case load, thus freeing up the Courts resources and promoting access to justice. While these are valid conversations to be had (particularly in the aftermath of COVID-19 when the back-log is significant[3]), they inevitably become somewhat hamstrung by the never-ending debate of litigation versus mediation. The assumption has always been that mediation is an alternative way of resolving disputes, which means there has been little discussion of how mediation might assist in the resolution of disputes, even if final determination of the issues is by the Courts.

3 If access to civil justice is to be promoted, it is no longer sufficient for mediation to be conceived of solely as an alternative to litigation. That view not only condemns us to repeating the same debates we have had for years, it also ignores the great opportunities that exist to integrate mediation into the institutionalized system of civil justice and improve access to those institutions.

Access to justice – a broad concept

4 The concept of access to justice can be something of an enigmatic one.[4] It can be defined broadly or narrowly and how it is defined impacts the discussion that follows. For the purposes of this paper, we adopt the following definition:[5]

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[3] See for example Geoff Sharp's suggestions around mediation in the aftermath of the lockdown: Geoff Sharp "How Mediation Will Help Flatten the Curve in New Zealand's Civil Courts" (23 April 2020) https://www.courtsofnz.govt.nz/assets/4-About-the-judiciary/rules_committee/access-to-civil-justice-consultation/Submissions-to-Initial-Consultation-Redacted/Geoff-Sharp-Article.pdf

[4] Lord Neuberger *Justice in an Age of Austerity* (Tom Sargant Memorial Lecture, 15 October 2013); Alan S Gutterman, '*What is Access to Justice'*, 17 February 2022. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4050575; Justice Helen Winkelmann, *Access to Justice – Who Needs Lawyers*?, (Ethel Benjamin Address, 7 November 2014).

[5] Rules Committee, *Improving Access to Civil Justice*, 23 November 2022 at [12].

> At its highest level, access to civil justice concerns the ability of individuals to have their civil rights vindicated, and breaches of those rights compensated, in a procedurally fair and transparent manner by neutral adjudicators in accordance with law.

5 In other words, it is the ability of individuals to access the Courts or institutionalized dispute resolution to have their rights adjudicated.

The Rules Committee Report – Improving Access to Civil Justice

6 In 2019, the Rules Committee started its consideration of how access to civil justice could be improved. The Committee submitted its proposals for consultation in 2020 and 2021 and issued its final report, '*Improving Access to Civil Justice*' (the **Report**) in 2022.[6]

The problem identified

7 Three broad issues which were impeding access to justice were identified by the Committee in their Report:[7]

a **Financial barriers:** There has long been concern that justice is too expensive. The Report raises particular concern that there is a large volume of disputes which are too high in value to be resolved in the Disputes Tribunal but too low in value to be economic to litigate in the Courts.

b **Psychological barriers:** The Report also refers to the public being unwilling to use the Courts because of feelings of shame, a lack of knowledge, inferiority, inadequacy, self-doubt and so forth.

c **Cultural and information barriers:** Litigation through the Courts is highly technical in nature and academic presentation of legal information confuses litigants. The Report notes that litigants reported being left afraid that technical mistakes would invalidate their claim. This meant that litigants were more reliant on lawyers, who were too expensive for the litigants to rely on.

8 It is clear that all these issues are intertwined and overlapping. The Committee acknowledged that these were 'deeply entrenched problems and clearly extend beyond issues with the rules of the Court'.[8]

9 The Rules Committee considered the Disputes Tribunal, the District Court and the High Court more specifically. It was generally positive about the Disputes Tribunal and noted that the reason it has been successful is that 'a tribunal hearing can be a restorative experience, not only disarming attributions but also by encouraging new perspectives, arising from the trust and influence generated by the parties' confidence in the referees knowledge and the fairness of the process.'[9] Conversely, it outlined some critical issues with the District and High Courts, particularly around expediency and cost. For instance, in the District Court, on average it takes 194 days to determine an undefended

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[6] Above n 4.
[7] Above n 4 at [16] to [30].
[8] Above n 4 at [31].
[9] Above n 4 at [51].

application for summary judgment and 342 days to hear and dispose of a defended application. [10] The position is no better in the High Court. The Committee identified three problems specifically with the High Court process – the scale and burden of discovery, the extension of trials unnecessarily by unduly extensive evidence and a lack of focus on key issues that are ultimately determinative.[11]

The solution proposed

10 In summary, the Rules Committee proposed the following recommendations:[12]

a The 'flexible and responsive' dispute resolution services provided in the Disputes Tribunal be made available in respect of awards of $70,000 and up to $100,000 by consent.

b A Principal Civil District Court Judge be appointed to oversea the District Court's civil registry and to ensure best practice case management is being implemented.

c The appointment of part-time deputy Judges of the District Court to exercise the civil jurisdiction of the Court.

d Significant changes to the High Court Rules 2016 including that "will say" statements replace briefs of evidence, "will say" statements are served before discovery, a Judicial Issues Conference occurs after the "will say" statements are served but before discovery and a greater emphasis on the documentary record for establishing the facts at trial.

But what about mediation?

11 In all 72 pages of the Report, the term 'mediation' appears twice. Once in reference to the 2019 change to the Disputes Tribunal Act 1988 that Disputes Tribunal referees have a qualification in 'law, mediation or arbitration' and the other in reference to the recommendation that the judge consider 'settlement, including mediation' at the Judicial Issues Conference.

12 This omission is surprising given the influence mediation has in dispute resolution. It is particularly striking considering that the Committee acknowledged in its Report (without mentioning mediation by name) that[13]:

> The majority of High Court general proceedings are resolved without the need for a trial. This is to be further encouraged. But settlement of proceedings earlier than just before trial would be more efficient, given the cost of preparing a case for trial and the delay that can arise before the trial date.

13 It seems that the Committee were dancing around the issue, perhaps wanting to avoid engaging in the debates that arise in any discussion of the role of mediation in the Courts system.

14 But the fact is – mediation is a key part of the resolution of civil disputes in New Zealand. When we refer to civil disputes, we are referring broadly to family, employment and commercial disputes. The majority of employment and family disputes are mediated through the Ministry of Innovation,

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[10] Above n 4 at [119].
[11] Above n 4 at [161].
[12] Above n 4 at [44].
[13] Above n 4 at [207].

Business and Employment (MBIE) or Ministry of Justice (MOJ), respectively. However, commercial mediations are mostly conducted outside of formal institutions which makes them comparatively difficult to track. Dr Grant Morris conducted research in 2015 which suggested that there are around 800 commercial mediations in New Zealand per year.[14] By 2019, Dr Morris reported that number had increased to around 1,000.[15] For reference, in 2022, there were 1,808 originating applications and general proceedings filed in the High Court.[16] While some mediations take place before proceedings are filed, the number of mediation relative to the number of originating applications/general proceedings filed in the High Court reflects the significant role that mediation plays in dispute resolution in this country. However, as commercial mediation is, for the most part, a private industry, it is notoriously difficult to track accurately the number of commercial mediations held each year.

15 Anecdotally, any dispute resolution practitioner can say that mediation makes up a dominant portion of dispute resolution in New Zealand. This is reflected in the fact that there are over 150 mediators listed on AMINZ's website alone. That number does not reflect the number of mediators registered with other bodies or unregistered.

16 With all that in mind, it is notable that the Rules Committee did not consider it relevant to discuss the role that mediation could play in access to justice. As the Rules Committee stressed throughout the Report, it was 'conscious of the need to avoid reforms that are experimental in nature' and the proposals were based on the Committee's assessment of practices and processes that have worked well in other areas.[17] Despite this apparent unwillingness to stray into the controversial, the Committee did recommend some significant procedural changes, most notably the proposed service of evidence before discovery is undertaken. And yet, no discussion of the ways mediation could be used throughout civil proceedings to assist in access to justice. The Committee acknowledged that changing the procedural rules would not address the problems with access to justice, to truly address the problems, 'litigation culture needs to change'.[18] As will be discussed further in this paper, mediation provides just the tool to assist in that culture shift.

<u>Mediation in litigation – the role of the judiciary</u>

17 Under the current High Court Rules, there are two main ways in which it is contemplated that judges will play a role in encouraging mediation – by encouraging consideration of ADR in the case management process (including referrals to mediation by consent) and by carrying out judicial settlement conferences, also by consent only.[19] The key feature of the rules in this regard is that the use of, or encouragement of, mediation is entirely discretionary. Judges have a broad ambit of how active or passive they choose to be in the promotion and encouragement of mediation. This has resulted in divergent approaches between judges depending on their particular views. However, by

[14] Grant Morris and Daniella Schroder "LEADR/Victoria University Commercial Mediation in New Zealand Project Report (June 2015)" (Research Paper, Victoria University of Wellington, 2015).
[15] Grant Morris "Mediators resolve 80 percent of disputes" (December 2019) https://www.newsroom.co.nz/ideasroom/mediators-resolve-80-percent-of-disputes
[16] Annual Statistics – High Court https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.courtsofnz.govt.nz%2Fassets%2F5-The-Courts%2Fhigh-court%2FAnnual-workload-statistics%2F2022-Annual-statistics-year-ending-31-December-2022%2F1.-HC-National-Workload-Statistics-22-12-31.xlsx&wdOrigin=BROWSELINK
[17] Above n 4 at [43].
[18] Above n 4 at [164].
[19] See rule 7.1 to 7.4 and rule 7.79, High Court Rules (2016).

and large, the commercial judges have been far more passive in their approach to referrals to or encouragement of mediation than their family and employment counterparts.

18 The Committee, while not engaging in any discussion of mediation directly, acknowledged that litigation needed a 'culture change'. The Committee did not propose to change this 'leave it to the judges' approach in the High Court Rules and their recommendations directed at encouraging a more conciliatory and less adversarial approach will likely suffer from the same flaws as similar reforms that have come before with the same aims.

Judicial views of mediation

19 Judges tend to fall somewhere on a spectrum when it comes to perspectives on the role of mediation in litigation. At the far end, there are those that are opposed to the encouragement of mediation by the judiciary once it has entered a Court process and, at the other end, there are those that actively call for some form of mandatory mediation. There is also a great deal of academic writing in New Zealand and in other jurisdictions on the issue of whether judges should be involved in mediation.[20]

20 This paper does not intend to address in any great detail the longstanding debate about whether there is merit in mandatory mediation – the literature on that question is extensive.[21] In short, the issue comes down to a debate about whether mandatory mediation is fundamentally in contradiction with the party-autonomy that is at the heart of mediation, such that it undermines the purpose and benefit of mediation. In the world of commercial disputes, mandatory mediation and judicial referrals to mediation has gained little traction. This can be contrasted with the judges of the Family and Employment Courts who take a far more active role in referrals to mediation.[22]

21 Conversely, it is rare for judges of the High Court to refer matters to mediation directly or take an active role in encouraging parties to mediate. This is primarily anecdotal, however, Dr Grant Morris, in his New Zealand Commercial Mediation Study provides some research to support this view.[23]

22 In 2022, the New Zealand Commercial Mediation Study, Part 5 was published. It was the fifth part of a study which began in 2015 with a survey of commercial mediators. Part 5 surveyed High Court and District Court judges in an attempt to illuminate the reasons for the judges' 'relatively passive approach' to mediation.[24]

23 At the time of the study, there were 189 District Court judges and 48 High Court judges. All 48 High Court judges were invited to participate in the study and all 46 District Court judges involved in civil

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[20] See for example: Grant Morris "To promote or not to promote? The rile of the judiciary in the New Zealand commercial mediation market" (2022) 53 VUWLR 85; Hon. Hugh F Landerkin QC and Andrew Pirie "Judges as Mediators: What's the problem with judicial dispute resolution in Canada" (2003) Vol. 82 La Revue Du Barreau Canadien 249; Otis and Reiter "Mediation by Judges: A new phenomenon in the transformation of justice" (2006) Pepperdine Dispute Resolution Law Journal Vol. 6 351; Hon Marilyn Warren AC, Chief Justice of Victoria "Should Judges be Mediators?", The Supreme and Federal Court Judges' Conference, Canberra (Wednesday 27 January 2010); M Galanter, "Emergence of the Judge as a Mediator in Civil Cases" (1985) US Department of Justice – Office of Justice Programs.

[21] See for example: Melissa Hanks "Perspectives on Mandatory Mediation" (2012) Vol 35(3) UNSW Law Journal 929; Micheline Dewdney "The Partial Loss of Voluntariness and Confidentiality in Mediation" (2009) 20 Australasian Dispute Resolution Journal 17; Dorcas Quek "Mandatory mediation: An oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11 Cardozo Journal of Conflict Resolution 479; Frank Sander "Another view of mandatory mediation" (2007) 13(2) Dispute Resolution Magazine 16; Sharp and South, "Is mandatory mediation a good idea?" CEDR , https://www.cedr.com/podcasts/detail/is-mandatory-mediation-a-good-idea/; Welsh "Mandatory Mediation and Its Variations" (2011) Texas A&M University School of Law.

[22] For example, parties are required to first attempt Family Dispute Resolution before proceeding to the Family Court, unless one of the exemptions applies.

[23] Grant Morris, "To Promote or Not to Promote? The Role of the Judiciary in the New Zealand Commercial Mediation Market" (2022) 53 VUWLR 85.

[24] Above n 22 at 87.

and general proceedings were invited to take part. The response rate was 16% - 9 High Court judges and six District Court judges.

24 The survey consisted of 27 questions. In one question, the judges were asked how often they specifically recommend parties to mediation. Two of the High Court judges said 'always' or often', with the remainder saying 'occasionally' or 'sometimes'. As Dr Morris noted, however, while this demonstrates what we know anecdotally, that judges are taking a passive approach to mediation, it is difficult to track how many mediations are actually taking place because of referrals to judges. Dr Morris attempted to gather this information under the Official Information Act 1982 but the response was that these records are not kept.

25 This is not surprising given that the current civil procedural rules (discussed below) leave the manner of judicial referrals/encouragement to mediation largely up to the discretion of the particular judge. However, the NZCMS noted that in a previous study (targeted at lawyers), only 49% of lawyers had at some stage in their career represented clients in a mediation following a direct recommendation from a High Court judges.[25]

26 When asked about the reasons for not referring to mediation, judges in the study cited resistance from parties and the existence of an important question of law. The latter is the primary reason some judges oppose the rise of mediation – the Chief Justice famously spoke of the risk of mediation undercutting precedent at the AMINZ conference in 2011.[26]

27 Despite views being divergent across the judiciary about the role of judges in referring to mediation, it is fair to say that judges are generally passive in their approach and it is relatively uncommon for judges to actively refer a party to mediation, even if the judge is amenable to value of mediation.

Mediation in the current civil procedural rules

28 This passive approach can be partly attributed to the way the current civil procedural rules deal with mediation. The most notable references to mediation in the High Court Rules are in the Case Management Conference (CMC) process and the optional Judicial Settlement Conference process.

Case Management Conference

29 Rule 7.1 of the High Court Rules notes that the case management process applies to certain proceedings 'in order to promote their just, speedy and inexpensive determination'. Rule 7.1(3) says that the purpose of a case management conference is to enable the Judge to assist the parties:

a to identify, define and refine the issues requiring judicial resolution; and

b to determine what steps need to be taken in order to prepare the proceeding for hearing or trial; and

c to decide how best to facilitate the conduct of the hearing or trial; and

[25] ; Grant Morris and Amanda Lamb "Resolution Institute/Victoria University 'Lawyers as Gatekeepers to Commercial Mediation in New Zealand' Report (June 2016)" (Research Paper, Victoria University of Wellington, 2016).
[26] Hon Justice Winkelmann "ADR and the Civil Justice System" (AMINZ Conference 2011 – Taking Charge of the Future) 6 August 2011;

d to ensure that the costs of the proceeding are proportionate to the subject matter of the proceeding.

30 Parties are required to file a case management memorandum, which must cover the matters set out in Schedule 5. One of the questions that must be addressed is:

(i) is alternative dispute resolution suitable to try to facilitate settlement prior to trial?

31 While this is an important question to direct the parties to consider at the pre-trial phase, it is most often, in the case management process, treated as no more than a tick box and there is often little meaningful engagement by the parties or the judge with this question. It is possible that this is because judges assume that, if ADR were appropriate, the parties will engage in that process autonomously and will not require a push from the judge to do so. In theory, a judge could decide to take a more assertive approach to this question but practice suggests they do not.

32 We suggest that Schedule 5 is amended to include the following prompts:

a Is this matter suitable for alternative dispute resolution? If not, why not?

b What forms of alternative dispute resolution have been considered?

c If alternative dispute resolution is not appropriate now, what needs to occur to facilitate it?

33 Directing the parties to both consider, and set out their response to, these matters will go some way to encouraging parties and judges to treat this exercise as more than a simple tick box.

Recommendation by the Rules Committee – Judicial Issues Conference

34 The Committee acknowledged, in its report, that 'case management conferences have largely not operated as fully effective judicial issues conferences in the way contemplated'. The Committee considered that this was partly because there were different views within the judiciary on the extent to which judges are properly able to, or should, give any views about the prospects of success of litigation at an early stage.

35 The High Court Rules provides for an Issues Conference in r 7.5 whereby a Judge may order an issues conference to advance the identification and refinement of the issues. This is, again, not a routine or presumptive process. The Committee proposed encouraging greater early judicial engagement by the introduction of a Judicial Issues Conference to refine issues for trial and possibly encourage settlement. The Committee's rationale for proposing these conferences and the techniques referred to represent what could be described a 'dip of the toe' into the vast sea of potential that is mediation techniques in civil proceedings.

36 The recommendation was for a Judicial Issues Conference to be undertaken between the Judge, counsel and parties to identify what the dispute is really about and what is important for its determination.[27] This may also, the Committee says, 'potentially facilitate early resolution'. This

[27] Above n 4 at [206] to [219].

Conference would occur after pleadings and service of evidence but before discovery. There would be six key topics for discussion:

a Identification of key issues

b What discovery is required to address those issues

c Further interlocutory applications

d Expert evidence

e Settlement – including mediation/judicial settlement conference

f Where possible, scheduling the trial.

37 This proposal is all well and good, however, as Raynor Asher KC noted in his response to the proposal, earlier judicial engagement had been the aim of the original case management reforms in 1993 but such conferences have only 'faded in their significance and no longer operate as intended'.[28]

38 The proposed Judicial Issues Conference is essentially a case management conference by another name and there is nothing to suggest that it will receive any different treatment than is currently received by the case management conference process. It also does not resolve the issue of divergent approaches in the judiciary to referrals of the ultimate dispute to mediation, as outlined above.

Judicial Settlement Conferences

39 Another mechanism for mediation, provided for in the current HCR, is the Judicial Settlement Conference. Rule 7.79 of the High Court Rules says:

> A Judge may, at any time before the hearing of a proceeding, convene a conference of the parties in chambers for the purpose of negotiating for a settlement of the proceeding or of any issue, and may assist in those negotiations.

40 Such a conference can only be conducted by consent of the parties and where the Judge deems it appropriate in the circumstances. Also under this rule, the Judge may 'make an order' directing the parties to attempt to settle their dispute by mediation, with the consent of the parties.

41 As outlined above, it seems to be rare for a judge to directly refer a matter to mediation. Similarly, judicial settlement conferences are rare but do occur in some cases.

42 There is little guidance on how these settlement conferences should proceed. The Ministry of Justice published its High Court Guidelines – Judicial Settlement Conferences in April 2012 which said that:[29]

> What is of particular importance is evaluation by the parties, not evaluation by the judge. The judge does not provide an evaluation or an opinion of the successful outcome of the litigation. The judge

[28] Above n 4 at [141].
[29] Judicial Settlement Conferences – The High Court Guidelines (April 2012).

may, however, invite the parties to consider important aspects of the case so that their evaluation is comprehensive.

43 The Guidelines are not prescriptive and largely leave the manner in which these conferences are held up to the particular judge. As Geoff Sharp noted, some judges will do no more than introduce the process and take the "leave the parties to it – I'm in my chambers if you need me" kind of approach, while others will be much more hands-on and may even be involved in the settlement itself.[30]

44 Given the results of the NZCM study, the question becomes – why judges? The two main reasons cited in support of this kind of judicial mediation is time efficiency and the mana that judges bring to such discussions.

45 First, we have the time efficiency point. The argument is that the parties are already in the process and the judge is across the detail of the case, so having the judge carry out this role saves time. However, given the pressures on the Courts, particularly post-lockdown, it is doubtful that judicial involvement in settlement provides any real time advantage as allocating judicial time for a JSC is challenging. Further, when these conferences occur, usually the same judge does not carry out both the JSC and the trial which arguably further mitigates the time efficiency afforded by JSCs because a the non-trial judge has to come up to speed on the case. In terms of time efficiency, this is no different than a mediator coming up to speed on the case in advance of a mediation.

46 There is, however, no rule that says that the same judge cannot carry out both the trial and the settlement conference. In practice, most judges will recuse themselves from the trial if they have conducted a JSC because there are very real and justifiable concerns with the same judge fulfilling this settlement as well as adjudicatory role.

47 However, as Geoff Sharp identified, the Guidelines contain no clear lines about what is and is not appropriate in a JSC environment so the concerns about divergent approaches within the judiciary are arguably exacerbated.

48 In terms of time efficiency, if the settlement judge and trial judge is the same, it may be that the process is more efficient, however, there are numerous procedural and natural justice concerns that arise. If the settlement judge and trial judge are not the same, as seems to be the convention, then what is the benefit of using a member of the judiciary over a mediator? This is where supporters of the JSC model may cite the mana inherent in the judicial role and the argument that parties are likely to respond to the 'reality testing' from a judge in light of this authority. While it is no doubt true that the judiciary bring an air of authority to the settlement room, we would suggest that the skills that mediators bring more than compensate for any lack of judicial authority. Further, a lot can be said for the importance of independence. Parties may paint all judges with the same brush in that they all belong to the same institution. This may undermine the perception of independence.

[30] Sharp "Judicial Settlement Conferences" (May 2012) Clifton Chambers https://www.cliftonchambers.co.nz/2012/05/judicial-settlement-conferences/; See also Hansen "Judicial Settlement Conferences in New Zealand" Asian Dispute Review Vol 10 (2008) 86.

49 Additionally, it may be that judicial authority does more harm than good in the mediation dynamic. As the Rules Committee highlighted, there are cultural and psychological constraints to access to justice where parties feel inferior, intimidated or ashamed to be in a litigation process. Those feelings could potentially be exacerbated by the presence of judicial authority in such discussions. Conversely, a mediator is truly independent from the process and may appear more accessible and approachable to parties than a judge.

Mediation as an integral part of litigation

50 While the judiciary plays a critical role in encouraging the use of mediation throughout the civil dispute resolution process, that encouragement does not need to be in form of mandatory mediation, judicial referrals to private mediation or judicial-led mediation. We have also seen that early judicial engagement to encourage settlement, such as through case management conferences, has not played out as intended, with many judges and parties treating it as a tick box exercise rather than an opportunity to meaningfully discuss settlement.

51 Where these attempts to incorporate mediation into the litigation process fall down is that they are either too controversial (mandatory mediation or judicial-led mediation) or too passive (case management conferences or judicial issues conferences where the 'option' of going to mediation is treated as a tick box exercise).

52 The alternative is to stop treating mediation as solely alternative and find ways to inter-weave mediation into the litigation process, using mediators as partners in our civil dispute resolution, rather than an alternative pathway to resolution. This part will explore ways in which mediation can be integrated into the litigation process and how this can help address the access to justice problem.

53 The options for integration of mediation with litigation are limitless. In this paper, we set out two such recommendations:

a formalized use of expert facilitation as an inherent part of the pre-trial process, modelled after the facilitations used in the Canterbury Earthquakes Sequence; and

b use of mediation to agree on preliminary matters connected with the trial, such as Agreed Statements of Fact and refine issues for trial.

Recommendation One - Expert Facilitation

54 Rule 9.44 of the High Court Rules provides that the Court may direct a conference of expert witnesses:

> (1) The Court may, on its own initiative or on the application of a party to a proceeding, direct expert witnesses to –
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> a. confer on specified matters;
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> b. confer in the absence of the legal advisers of the parties;
>
> c. try to reach agreement on matters in issue in the proceedings;

d. prepare and sign a joint witness statement stating the matters on which the expert witnesses agree and matters on which they do not agree, including the reasons for their disagreement;

e. prepare the joint witness statement without the assistance of the legal advisers of the parties.

(2) The court must not give a direction under subclause(1)(b) or (e) unless the parties agree.

55 This is increasingly common and was acknowledged by the Committee as 'established practice'. The Committee suggested that the existing rule being converted into a 'further presumptive requirement' and noted that:[31]

> …'there may be greater use of moderators appointed to manage the process of conferral between experts. These can be further experts within the same discipline or professional facilitators. Such facilitators have proved to be successful in maximizing the opportunity for refining the issues and disputes between experts.'

56 This appears in one paragraph of no more than a few sentences and the precise nature of what the Committee is recommending is not discussed at length. In our view, this is a fundamental area where mediation can assist the access to justice problem and it certainly warrants more attention than it has received.

57 A large portion of High Court proceedings relate to matters that are likely to involve experts – such as building defect disputes, insurance disputes and other disputes over property or land. The cases involving experts tend to consume a larger portion of the Courts time as they tend to involve longer trials, more discovery and more pre-trial disputes. It is also common for technical disagreements between experts to be one of, if not the, key driver of the underlying dispute in these cases.

58 When these technical disagreements can be resolved or even simply better understood, the pathway to resolution is often a lot clear and, if party-led resolution is not possible, the issues for trial can be clearly identified. We have seen the power of these kinds of processes particularly in the insurance space.

59 In the aftermath of the Canterbury Earthquake Sequence (2010-2011), the Courts were overloaded with disputes between insurers, EQC and residential homeowners about their insurance policies. In response, in 2018, the Government planned to launch two new initiatives to help resolve the outstanding insurance claims – the Canterbury Earthquakes Insurance Tribunal (Ministry of Justice led) and the Greater Christchurch Claims Resolution Service (Ministry of Business, Innovation and Employment led).[32]

60 There was a recognition by the Government that, at the heart of many of these disputes, were technical differences between engineers, primarily about the appropriate method of remediation. These technical differences had become particularly complicated because:

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[31] Above n 4 at [235].
[32] "New one stop service for people with outstanding Christchurch earthquake insurance claims established" (9 October 2018) 1News https://www.1news.co.nz/2018/10/08/new-one-stop-service-for-people-with-outstanding-christchurch-earthquake-insurance-claims-established/

a There was significant disagreement between insurers and homeowners about the standard of repair under the particular insurance policy so that engineers were often being engaged by homeowners to consider remediation to one standard, and engaged by insurers to consider remediation to another standard.

b There were significant disagreements about certain remediation strategies in principle – i.e. the use of epoxy resin as a method of remediating concrete foundations.

c There had been a significant loss of trust between homeowners and insurers and the relationships had become deeply polarized and tribal where certain engineers were viewed as 'insurer engineers' and others as 'homeowner engineers'.

61 MBIE approached Engineering New Zealand in early 2018 to design and implement a process for expert conferral which could address the above problems and be used by both the GCCRS and the Tribunal. The reason Engineering New Zealand were approached was because of their role as New Zealand's peak professional body for engineers but also because of the service they had previously designed in the context of disputes about commercial NBS ratings.

62 NBS (or New Building Standard) is the measure of how well a building protects life in an earthquake when compared to a hypothetical new building that complies with the minimum requirements in the Building Code. For reasons which need not be fully canvased here, engineers often come to different NBS ratings for the same building. Where that occurred, the service was designed to facilitate engineers to try to agree or where, as was most common, they could not agree, they could explain the reasons for their disagreement to help their clients understand the reasons the engineers disagreed.

63 This service provided the prototype for what was developed in 2018 for the GCCRS and the Tribunal. It was clear that, like in the NBS space, it was difficult for engineers to arrive at agreement due to differences in professional opinion and judgment. This was particularly pronounced in the Christchurch context because of how tribal the conversations had become. It was important that homeowners and insurers did not attend the meeting between the experts because that was likely to influence the outcome, prevent the experts from having a frank discussion and result in the meeting being taken off-course into a discussion about entitlement.

64 The technical discussion was facilitated by expert facilitators (leading engineers in their field who had been trained in facilitation techniques). They were trained specifically to assist the engineers in evaluating their own conclusions without the facilitator imposing their view on the engineers or over stepping the particularly delicate line of impartiality in this polarized post-earthquake Christchurch. This panel of facilitators was appointed by Engineering New Zealand and termed the Christchurch Earthquake Expert Engineering Panel.

65 The engineers would produce a templated report out of this facilitation which addressed several questions including questions around the standard of repair the particular engineer had been asked to apply in their brief, the areas of agreement, the areas of disagreement and the reasons for disagreement. This report would then be provided to the parties and to the Tribunal or GCCRS,

however, this service was also available to parties who were not currently in the GCCRS or Tribunal process.

66 The report would be used to refine the issues in dispute. An example of a relatively common scenario:

a Engineer A (for the homeowner) has advised that the foundations need to be rebuilt in order for the home to be remediated to the appropriate standard.

b Engineer B (for the insurer) has advised that the foundations can be repaired to the appropriate standard by grinding out the cracks and injecting epoxy resin.

c But, Engineer A has interpreted the standard of repair as requiring the property to be repaired to the same condition it was in when it was new.

d Engineer B has interpreted the standard of repair as requiring that the structural function of the foundations is reinstated to its pre-earthquake function.

e Engineer A agrees that, if that were the correct standard, Engineer B's method of repair would be acceptable but disagrees that the standard Engineer B has applied is the correct one.

67 Prior to the facilitation process, disputes would get stuck after (b) – that is, the parties would be proceeding on the basis that there was a technical dispute about how the property should be repaired. The facilitation process was focused on drawing out (c) and (d). Once (c) and (d) is drawn out, it becomes possible for the engineers to arrive at (e). The result is that the parties now know that the dispute is not technical in nature, it is legal (i.e. what is the standard of repair that applies under the policy). This enabled the legal process to be significantly condensed and streamlined.

68 At the outset, there was a lot of skepticism about this process. Insurers and homeowners alike had little faith that it would have any impact on the delays that litigants were experiencing or have any impact on the simplification of disputes. However, that skepticism was soon proved wrong. In the first year alone (after being launched in October 2018), the GCCRS resolved over 600 cases.[33] As at February 2023, the GCCRS had received 4,027 applications and, since 2018, 3,377 had been resolved.[34] In 2020, it was reported that 9 out of 10 homeowners using the service say they would recommend the GCCRS to others.[35]

69 In February 2023, the Government announced that the GCCRS would be replaced by the New Zealand Claims Resolution Service (NZCRS) and would be available to all homeowners for all natural disasters. Engineering New Zealand were asked to expand the existing panel to develop the Natural Disaster Recovery Panel. This was in recognition of the success that the panel (and facilitation process) had had in the Christchurch context.

70 There is no reason that a similar expert facilitation process could not be integrated into the Court process. As above, there is already provision for joint expert conferences and these are sometimes

[33] "GCCRS says it has resolved more than 600 claims in its first year" Insurance Business Mag (October 11 2019) https://www.insurancebusinessmag.com/nz/news/breaking-news/gccrs-says-it-has-resolved-more-than-600-claims-in-its-first-year-180277.aspx
[34] "New insurance claims service will help homeowners hit by disasters" (20 February 2023) Business Desk https://businessdesk.co.nz/article/finance/new-insurance-claims-service-will-help-homeowners-hit-by-disasters
[35] https://www.beehive.govt.nz/release/1000-insurance-cases-resolved

facilitated by mediators, but the approach is ad-hoc and discretionary. We suggest a similar process to that applied in the GCCRS and Tribunal is introduced – which could be termed '**Expert Facilitation'**. This would involve the following:

a This process of expert conferral should be made presumptive and required in all cases involving experts. The presumption would be that this facilitation take place unless, at the First Case Management Conference, the judge is satisfied that reasons exist that it is not appropriate for such facilitation to take place.

b The parties would endeavor to agree on the facilitator and, if the parties could not agree, the facilitator would be appointed by the Court. The costs of the facilitation would be borne in the manner determined by the Court, subject to any costs award.

c The facilitation should take place without the lawyers present. The Christchurch experience has made clear that the true benefit of these facilitations can be suppressed where the legal advisers are present.

d The experts should produce a report out of this facilitation (the **Expert Facilitation Report**) for the Court.

e The Expert Facilitation Report should be standardized so that every expert in every conference is required to address specific items in the report. This could be in the form of a Schedule to the High Court Rules (Schedule 4A for instance) or, short of reform to the civil procedural rules, in the form of guidelines published by the High Court.

f The Expert Facilitation Report should be prepared at the Expert Facilitation with both experts and the facilitator. The template in the guidelines or HCR (as is applicable) will provide standardization of both the product of the facilitation but also the process itself – providing a framework against which the discussion can take place. Some matters for consideration at the conference could include:

  i The expert's brief

  ii Areas of agreement

  iii Areas of disagreement

  iv Reasons for disagreement

  v Outstanding information/further information required (including what area of disagreement the further information may address)

71 Aspects of the above would require amendment to the High Court Rules to be effected. Under r 9.44, the judge requires the parties consent to:

a order that the facilitation take place without legal advisers; or

b order that the report be prepared without legal advisers; or

c appoint an independent expert to convene and conduct the conference; or

d give any direction for convening and conducting the conference that the Court sees fit.

72 The current r 9.44 says:

> (1) The Court may, on its own initiative or on the application of a party to a proceeding, direct expert witnesses to –
>
> a. confer on specified matters;
>
> b. confer in the absence of the legal advisers of the parties;
>
> c. try to reach agreement on matters in issues in the proceeding;
>
> d. prepare and sign a joint witness statement stating the matters on which the expert witnesses agree and the matters on which they do not agree, including the reasons for their disagreement;
>
> e. prepare the joint witness statement without the assistance of legal advisers of the parties
>
> (2) The Court must not give a direction under subclause (1)(b) or (e) unless the parties agree.
>
> (3) The Court may, on its own initiative or on the application of a party to the proceeding –
>
> a. appoint an independent expert to convene and conduct the conference of expert witnesses;
>
> b. give any directions for convening and conducting the conference the court thinks just.
>
> (4) The Court may not appoint an independent expert or give a direction under subclause (3) unless the parties agree.
>
> (5) Subject to any subsequent order of the court as to costs, the court may determine the remuneration of an independent expert and the party by whom it must be paid.
>
> (6) The matters discussed at the conference of the expert witnesses must not be referred to at the hearing unless the parties by whom the expert witnesses have been engaged agree.
>
> (7) An independent expert appointed under sub-clause (3) may not give evidence at the hearing unless the parties agree.

73 We suggest r 9.44 is amended as follows:

(1) Where the parties have engaged experts and those experts disagree on matters at issue in the proceeding, the Court will direct the experts to:

a. confer on specified matters; and

b. prepare and sign a joint witness statement in the form set out in Schedule 4A.

(2) The conference directed under subclause (1) will be facilitated by an independent facilitator who is either;

a. appointed by agreement between the parties; or

b. if the parties are unable to agree on the facilitator, appointed by the Court on the parties' behalf.

(3) The conference will take place in the absence of legal advisers and the joint witness statement will be prepared without the assistance of legal advisers.

(4) Subject to any subsequent order of the court as to costs, the court may determine the remuneration of an independent facilitator and the party by whom it must be paid.

(5) The matters discussed at the conference of the expert witnesses must not be referred to at the hearing unless the parties by whom the expert witnesses have been engaged agree.

(6) An independent facilitator appointed under sub-clause (2) may not give evidence at the hearing unless the parties agree.

74 However, the process described above could, to some degree, become standard practice without amendment to the rules. The HCR already provide for joint expert conferral and there is nothing which would prevent that conferral taking place with a facilitator and taking place as a matter of presumption.

75 This change could have a significant impact on the access to justice problem. As outlined above, cases that are expert-heavy are time intensive and use up a significant portion of the Courts time in pre-trial applications, evidence disputes and complex legal/technical disputes. As we saw in Christchurch, this process is effective at unsticking and clarifying the ultimate issues that the Court needs to determine. This frees up Court time and simplifies cases. It also avoids the concern put forward by Winkelmann CJ that the increased use of mediation puts the precedent value of the Courts at risk. That is not an issue here because the ultimate legal disputes are still determined by the Courts. More broadly, it allows mediation to assist with the access to justice problem without the need to engage in a debate of mediation vs litigation.

76 The Rules Committee said that it wanted to avoid controversial reforms and stick to solutions that had been demonstrated to work. This expert facilitation process meets that criteria. It is an extension, refinement and formalization of practices that are becoming increasingly used and it has been proven to be effective in the Canterbury case.

Recommendation Two – Issue Specific Mediation

77 Another option for interweaving mediation into the litigation process is what we have termed 'Issue Specific Mediation. In Issue Specific Mediation, the parties would not attempt to resolve the underlying dispute, rather, the aim would be to agree on preliminary matters which could include – an agreed statement of fact, an agreed list of issues for the trial and/or matters to streamline discovery. The options are endless for how this Issue Specific Mediation could be used, for example, it could be confined to only agreeing a statement of facts.

78 Rule 9.57 of the High Court Rules provides for the following:

> (1) If the parties so agree, the evidence at the trial of any proceeding heard by a Judge alone, or any issue in that proceeding, may be given, without examining any witnesses or filing any affidavits, by a statement of facts agreed upon by the parties.

79 Agreed statements of fact, while specifically provided for in the High Court Rules, are underused in practice. The most obvious reason for this is that parties are unable to agree on the critical facts so it is not considered worthwhile to prepare an agreed statement. Parties may engage in multiple rounds

of draft agreed statements of fact and end up abandoning the exercise because agreement becomes just too hard.

80 In our view, this area provides another opportunity where mediation can assist. For example, if parties have factual disagreements, they may benefit from attending an Issue Specific Mediation to agree the factual background (as much as possible). The product of such a mediation, rather than being a settlement agreement in respect of the dispute as a whole, would be an agreed statement of facts to be filed with the Court and signed by the parties at the mediation.

81 This statement would not need to be inclusive of all the facts, for example, there may be facts where the parties simply cannot agree and require the Court to weigh the evidence in the ordinary way. This mediated agreed statement of facts could include a section which identifies those facts – essentially an issues list to accompany the statement and allow the Court to direct its focus to those particular issues. The parties would then only lead evidence on those issues. Further, the parties could also agree on discovery orders at the Issue Specific Mediation.

82 This would significantly reduce the time that is spent on lengthy witness examinations and cross examinations. The Rules Committee itself acknowledged that one of the key problems with the current system was the extensiveness of the evidence that is led at trial and the complexity/cost burden of discovery. The proposals around the Judicial Issues Conference and the submission of "will say" statements before discovery were fundamentally directed at dealing with those problems.

83 Issue Specific Mediation would provide an alternative mechanism to address the problem of extensive evidence. It would also not require any amendments to the HCR which already provide for agreed statements of fact, with no parameters around how the parties come to that agreement.

84 As in the case of Expert Facilitation, this would not put the Court's role as the ultimate arbitrator of disputes at risk as it would be designed to assist with the Court's role rather than supplant it.

Conclusion

85 To mediate or not to mediate? That has long been the question.

86 While this question is a valid one to consider in any dispute, problems with access to institutional justice, which have only increased in the aftermath of the COVID-19 lockdowns (and related economic challenges), necessitate a new approach. We can no longer retreat to the diametrically opposed camps of mediation vs litigation, debating over which is superior. To do so overlooks the vast opportunities that exist to amalgamate the two processes. In our view, this amalgamation will go a long way to assisting in the change in 'litigation culture' that the Rules Committee has called for to safeguard access to justice.