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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **15/05/2019**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY ROSE NJOKI EDMUNDS FOR JUDICIAL REVIEW

-v-

LEGAL SERVICES AGENCY FOR NORTHERN IRELAND

_____

McCLOSKEY J

Introduction

[1] The decision under challenge in these proceedings is expressed pithily:

> *"I confirm that Civil Legal Aid is not available for mediation."*

This statement was made in a communication from the Legal Services Agency For Northern Ireland (*"the Agency"),* the Respondent, in response to an enquiry from the Applicant's solicitors concerning legal aid funding for mediation in a case proceeding in the Chancery Division of the High Court.

Basic Factual Matrix

[2] Rose Njoki Edmunds (*"the Applicant")* and her son, Christopher Edmunds, are litigants in Chancery proceedings in which Habitat For Humanity NI *("the Plaintiff"*) secured the following order, dated 25 April 2018, from the Chancery Master:

> *"Upon application by Originating Summons …*
>
> *IT IS HEREBY DECLARED that the Lease dated 22 October 2004 between the plaintiff and the defendants in respect of the premises known as Site No: 5, Tyndale Crescent, Belfast, has been forfeited …*

AND IT IS HEREBY ORDERED as follows:

(i) That the defendants do provide vacant possession of the property to the plaintiff within 28 days of service of this order upon the defendants.

(ii) That the defendants do pay the plaintiff's costs …"

[3] The Applicant was subsequently granted legal aid by an emergency certificate, dated 2 October 2018, in the following terms:

"*Ms Rose Edmunds … is entitled to legal aid in accordance with the above-mentioned Order/Regulations … as appellant/defendant to prosecute an appeal in the Court of Judicature of Northern Ireland against an Order of Master Hardstaff dated 4 May 2018 …*

The level of representation authorised under this certificate is for a solicitor and junior counsel only …

Special conditions – none …

Emergency condition – this certificate, being an emergency certificate, remains in force for a period of 10 weeks from the date hereof, or such longer period as the Agency may allow, unless it is previously discharged or revoked or is replaced by a CIVIL AID CERTIFICATE."

The signatory of the certificate is the Agency's Director of Legal Aid Casework, Paul Andrews. This was substituted by a "full" certificate, dated 30 October 2018, in substantially the same terms as its predecessor.

[4] The Notice of Appeal (dated 14 November 2018) followed. This elicited the following response from the plaintiff's solicitors, in a letter dated 23 November 2018:

"*Rules of court, particularly the overriding objective, require both parties to co-operate and consider the use of Alternative Dispute Resolution (ADR), in order to resolve any outstanding issues either in full or in part to make sure that time spent in court is as expeditious as possible. In fact one of the questions in the Chancery Division's Listing Questionnaire is 'have there been any settlement negotiations?' …*

We would like to invite your client and/or their legal representative to a mediation day at a neutral venue and our client is willing to pay for the reasonable costs of the mediator.

In order to deal with practical realities your response is invited within 5 working days of the date of this letter …

Our client has sought, on many documented occasions, to reach a resolution with your client prior to the issue of legal proceedings. Our client remains willing to explore resolution and we respectfully consider that mediation is appropriate in this case …

We invite you to agree to mediation. If your client refuses then we request the reasons for that refusal as parties must act reasonably – particularly, we suggest, where parties are in receipt of public funding …

We reserve all our client's legal rights and please note that use of this letter may be referred to on the issue of costs and in respect of other relevant issues."

By electronic communication dated 26 November 2018 the Applicant's solicitors replied as follows:

"*Thank you for your letter dated 23 November 2018 proposing mediation …*

I can confirm that my client is agreeable to the same …

I would propose a date of either 20 or 21 December. I would be grateful if you could provide a list of Mediators by way of return …

As my client's case is funded by legal aid, I will require a court order for production to the Legal Services Agency to allow me to deal with the issue of costs for mediation. Therefore, I would be grateful if you could confirm that you would be agreeable to a review being held before the end of this week in order to obtain the same."

[5] There followed a review listing before the Chancery judge on 14 December 2018, giving rise to the following order:

"*IT IS ORDERED THAT:*

(i) Parties to enter into mediation, to take place on or before 14 January 2019.

(ii) This case shall be vacated for hearing on 21 January 2019.

> *(iii) This case shall be listed for mention only on 28 January 2019 at 10:00am."*

By letter dated 14 December 2018 to the Agency, the Applicant's solicitors wrote:

> "*Please note the plaintiff has invited us to mediate on this matter. At a review this morning, McBride J directed that mediation take place on or before 14 January 2019. The plaintiff has offered to cover the costs of the Mediator and 50% of the venue costs. The Resolution Centre in Belfast has been suggested as the appropriate venue. We have a quotation for £626.50.*
>
> *We have agreed a date of 20 December 2018, subject to your authority …*
>
> *We would be grateful if you could confirm [that the] Certificate … covers solicitor and junior counsel fees for mediation."*

This letter was the stimulus for the impugned decision noted in [1] above and contained in the Agency's letter of 18 December 2018:

> "*I refer to the above matter and to your email to the Agency dated 14 December 2018. I confirm that Civil Legal Aid is not available for mediation*."

[6] A pre-action protocol ("PAP") letter, dated 20 December 2018, followed. By letter dated 29 January 2019 the Agency's Director of Civil Legal Services stated *inter alia*:

> *"Mediation within ejectment proceedings is not within the scope of the certificate granted to the applicant. It is not clear from the correspondence why the opponent's solicitors proposed mediation – as presumably they are aware from the Notice of Legal Aid in these proceedings that the applicant is an assisted person for whom mediation is not available …*
>
> *It is not stated that you have explored the prospect of a joint consultation … which would be within the scope of the legal aid certificate granted to your client …*
>
> *If a joint consultation cannot be arranged please send counsel's opinion on why …"*

This letter further requested that counsel's opinion address the discrete issue of whether this was an "*admitted debt case*", adverting to:

> *"… the legal aid principle that admitted debt cases are out of scope of legal aid where the only issue is the time and mode of payment."*

The applicant was subsequently granted legal aid for the purpose of pursuing this judicial review challenge and these proceedings were initiated on 4 March 2019. By its order dated 6 March 2019, made on the papers, this court granted leave to apply for judicial review.

Relevant Statutory Provisions

[7] The Agency is a creature of statute, exercising powers conferred by statute. It is appropriate to begin with Article 5(1) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (the "1981 Order"):

> *"5.—(1) In this Part 'assistance by way of representation' means any assistance given to a person by taking on his behalf any step in the institution or conduct of any proceedings before a court or tribunal, or of any proceedings in connection with a statutory inquiry, whether by representing him in those proceedings or by otherwise taking any step on his behalf (as distinct from assisting him in taking such a step on his own behalf)."*

The next piece of the statutory jigsaw is the Access to Justice (Northern Ireland) Order 2003 (the "2003 Order"), which established the Northern Ireland Legal Services Commission, the Agency's predecessor. In this measure one finds the familiar dichotomy of civil legal services and criminal defence services. Article 10 defines "civil legal services" in the following terms:

> *"10.—(1) For the purposes of this Order "civil legal services" means—*
>
> *(a) in relation to any time after the coming into operation of Article 21, advice, assistance and representation, other than advice, assistance or representation which the Department is required to fund as criminal defence services; and*
>
> *(b) in relation to any time before the coming into operation of Article 21, advice, assistance and representation other than representation in proceedings for the purposes of which free legal aid may be given under Part 3 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981.*

(2) The Lord Chancellor may by order provide that "civil legal services" is to include services (other than advice, assistance and representation) which –

(a) are specified in the order,

(b) fall within any of the descriptions specified in paragraph (3), and

(c) are not services which the Department is required to fund as criminal defence services.

(3) The descriptions of services referred to in paragraph (2) are –

(a) the provision of general information about the law and legal system and the availability of legal services,

(b) the provision of help by the giving of advice as to how the law applies in particular circumstances,

(c) the provision of help in preventing, or settling or otherwise resolving, disputes about legal rights and duties,

(d) the provision of help in enforcing decisions by which such disputes are resolved, and

(e) the provision of help in relation to legal proceedings not relating to disputes.

(4) An order under paragraph (2) may make provision, including provision amending this Order –

(a) about financial matters relating to services specified in the order (including, in particular, provision about eligibility, contributions, charges, remuneration and costs);

(b) modifying the application of Articles 11 to 20 in relation to such services.

(5) Every person who exercises any function relating to civil legal services shall have regard to the desirability of exercising it, so far as is reasonably practicable, so as to –

> *(a) promote improvements in the quality of those services and in the ways in which they are made accessible to those who need them,*
>
> *(b) secure that the services provided in relation to any matter are appropriate having regard to its nature and importance, and*
>
> *(c) achieve the swift and fair resolution of disputes without unnecessary or unduly protracted proceedings in court."*

[8] Article 11 makes clear that the funding entity is the Lord Chancellor. Article 12(5) precludes the Agency from funding any of the services specified in Schedule 2. Regulations prescribing financial eligibility are contemplated by Article 13. By Article 14, the Agency makes all decisions concerning the provision of funded services. The terms of Article 14 make clear the breadth of the Agency's discretion. Articles 18 and 19 make provision for costs orders against assisted parties and the costs of successful unassisted parties. Under Article 19 an unassisted party who succeeds in proceedings brought by an assisted party may in certain circumstances be granted an order for costs against the Agency.

[9] There are various provisions scattered throughout the 2003 Order empowering the Department of Justice ("the Department") to make subordinate regulations.

[10] The relevant subordinate statutory code is found in Part V of the Civil Legal Services (General) Regulations (Northern Ireland) 2015 (the "2015 Regulations"), Part V especially. Regulation 3, under the rubric "Civil Legal Services" provides:

> *"3. Civil legal services shall be available to any individual –*
>
> *(a) who is eligible under these Regulations and the Financial Regulations to receive advice and assistance; or*
>
> *(b) to whom a certificate has been issued in accordance with these Regulations."*

Part V of the 2015 Regulations is a discrete chapter entitled "Representation (Higher Courts)". Within this, Regulation 41(1) provides:

> *"41. – (1) Where it appears to the supplier that an individual requires representation in respect of any proceedings listed in paragraph 2 of Schedule 2 to the Order, an application for a certificate under this Part may be submitted to the Director."*

The "Order" is, per Regulation 2, the 2003 Order. "Supplier" is defined as "the solicitor or counsel, where applicable, being requested to provide funded services to an individual".

[11] In Regulation 2 of the 2015 Regulations, the term "Representation (Higher Courts)" is defined as:

> "*(a) in the county court, the High Court, the Court of Appeal or the Supreme Court;*
>
> *(b) before any person to whom a case is referred (in whole or in part) in any proceedings within paragraph (a);*
>
> *(c) in the Crown Court to the extent specified in paragraph 2(ba), (bb) or (c) of Schedule 2 to the Order;*
>
> *(d) before the Proscribed Organisations Appeal Commission, the Lands Tribunal for Northern Ireland or the Special Immigration Appeals Commission;*
>
> *(e) before the First-Tier Tribunal to the extent specified in paragraph 2(ia) of Schedule 2 to the Order;*
>
> *(f) before the Upper Tribunal to the extent specified in paragraph 2(ib) of Schedule 2 to the Order; or*
>
> *(g) in the Enforcement of Judgments Office to the extent specified in paragraph 2(j) of Schedule 2 to the Order."*

[12] The topic of "Conduct of proceedings and authorities" is addressed in Regulation 44 of the 2015 Regulations:

> "***Conduct of proceedings and authorities***
>
> *44.—(1) Subject to paragraph (2), it shall be a condition of every certificate issued under this Part that the prior authority of the Director shall be required—*
>
> *(a) to apply to the court for leave to add any further party to the proceedings;*
>
> *(b) to apply to the court for leave to lodge any interlocutory appeal; or*
>
> *(c) to apply to the court to set up or set off any right or claim having the same effect as a cross action (other*

than a counterclaim or set off arising out of the same transaction and capable of being pleaded as a defence), or to reply to any right or claim so set up or so set off by any other party;

(d) to obtain a report or an opinion of an expert;

(e) to tender expert evidence;

(f) to obtain a report or an opinion of a person (other than an expert);

(g) to tender such evidence as referred to in sub-paragraph (f);

(h) to obtain a transcript or recordings of any proceedings; or

(i) to perform an act which is either unusual in its nature or involves unusually large expenditure.

(2) The Director may give general authority (subject to a maximum fee payable) to suppliers in any particular class of case, including –

(a) to obtain a report or opinion of one or more experts or to tender expert evidence;

(b) to employ a person to provide a report or opinion (other than as an expert); or

(c) to obtain a transcript or recordings of any proceedings.

(3) Where it appears to the supplier necessary for the proper conduct of proceedings funded under this Part for any act to be done which is unusual in nature or involves unusually large expenditure, the supplier shall apply to the Director for authority to take any such step, and no payment for any such step shall be made in the absence of such authority."

The Agency's Evidence

[13] The Agency's affidavit has been sworn by the aforementioned Mr Andrews. Its salient averments are the following. First (paragraph 9):

"In each case, the Certificate relates only to proceedings before a Court or Tribunal. Mediation is an alternative means of dispute resolution which exists outside of court proceedings

and may examine wider issues than the proceedings themselves. If mediation is unsuccessful, the parties remain at liberty to proceed to court in the normal way with all the additional expense that this entails."

Second (paragraph 10):

> *"The Agency does not have a written policy on the funding of mediation but it has been the longstanding practice within the Agency not to provide Legal Aid funding for mediations, as a general rule. This is not a completely inflexible policy. One notable exception is mediation in the context of family proceedings. The letter of 18 December 2018 therefore accurately reflects the Agency's current policy."*

Third (paragraph 11):

> *"In the past four years (from 1 January 2015 until 24 February 2019) Legal Aid Authority has been granted for mediations relating to proceedings in the higher courts on 45 occasions. In all of these cases mediations arose out of family proceedings, of which 44 were brought under the Children (Northern Ireland) Order 1995. The remaining case was under the Family Homes and Domestic Violence (Northern Ireland) Order 1998."*

[14] Mr Andrews refers to the Access to Justice Review (Northern Ireland) Report published in August 2011, deposing:

> *"The Report addressed alternative dispute resolution, including mediation, at some length in the context of a possible alternative to court proceedings …*
>
> *There was a particular focus on family proceedings as it was in that area that most of the Legal Aid spend on civil matters occurred (70% of Civil Legal Aid in 2010/11). The Report made the following specific recommendation:*
>
> > *'We therefore recommend that private family law remains in scope, but with procedures and remuneration arrangements in place that discourage the use of the courts to prolong or re-open disputes; incentivise mediation, collaborative interventions or other pre-court solutions; and secure the economic and proportionate use of legal resources.' "*

This is followed by the averment:

> *"The current policy of the Legal Services Agency to allow the public funding of mediation in family cases reflects the recommendations of this report."*

[15] Mr Andrews then refers to the report entitled "A Strategy for Access to Justice" published in September 2015 deposing:

> *"Once again, the main focus of the consideration of mediation was in the context of family proceedings …*
>
> *The authors were of the view that 'the arguments in favour of mediation, in terms of saving costs and providing better outcomes for clients, are by no means restricted to family cases'. The report recommended a greater role for mediation in civil litigation …*
>
> *The Department of Justice intends to consider the recommendations of the 2015 Report …"*

This is followed by a fleeting reference to the Civil and Family Justice Review Report published in February 2017 and, specifically, Chapter 7 thereof ("Alternative Dispute Resolution and Mediation"). Mr Andrews avers that the Department also "*intends to consider*" the recommendations of this report.

[16] The next notable averment in Mr Andrews' affidavit is (paragraph 18):

> *"The Legal Services Agency acknowledges that the use of mediation as an alternative means of dispute resolution may represent a significant saving of costs, time and resources in some cases. Equally, there is a risk that if parties simply view mediation as another step that must be taken before ultimately going to court, there could be a substantial increase in the burden on the public purse due to the additional layer of costs that would be incurred. At the present time, the position of the Agency remains that mediation in non-family cases is not within scope but this policy remains subject to review following the 2015 Access to Justice Review and the Gillen Report."*

It is convenient at this juncture to produce paragraph 7 of the skeleton argument of Mr Aidan Sands (of counsel) on behalf of the Agency:

> *"The affidavit of the Chief Executive sets out the Respondent's policy of not providing legal aid funding for representation at mediations save in the case of family proceedings. This is a policy of longstanding."*

Mr Andrews continues (at paragraph 19):

> *"This is not an absolute barrier to preventing the Applicant from attempting to resolve matters in the Chancery proceedings. She has the benefit of a Legal Aid Certificate for a Solicitor and Counsel. It has been pointed out already in the pre-action response letter … that this Certificate allows for the holding of a joint consultation between the parties and their legal representatives in order to explore the possibility of settlement."*

Mr Andrews avers, finally:

> *"The scope of civil Legal Aid in Northern Ireland at the present time remains significantly broader than that which is available in England and Wales. The pressures on public finances are such that difficult decisions must be made on what can and cannot be within the scope of Legal Aid. The drawing of a line will inevitably mean that some cases will fall outside of it."*

The Anatomy and Aetiology of ADR

[17] The virtues and advantages of mediation and other forms of alternative dispute resolution ("ADR") are now almost universally recognised. Mediation has flourished in a context wherein civil litigation, notwithstanding multiple reforms and improvements during the past two decades, unavoidably continues to feature the three mischiefs of expense, delay and uncertainty. There are, broadly, two types of mediation. The first, which I would describe as extra-litigation mediation, is designed mainly to prevent resort to litigation. The second, intra-litigation mediation, aims to bring extant litigation to an end as speedily as possible. It is the latter species of mediation which arises for consideration in the present case.

[18] In the Access to Justice Review Report (2011) noted above, there is a discrete section dealing with ADR. One finds the observation at paragraph 5.38:

> *"5.38 …we regard the term ADR as something of a misnomer since we see its various manifestations as being integral parts of the justice system. …*
>
> *At the outset we wish to refer the reader to the Irish Law Reform Commission report, "Alternative Dispute Resolution: Mediation and Conciliation", published in November 2010 and which we regard as an authoritative work on ADR with many proposals and ideas that are potentially applicable to this jurisdiction.*
>
> *5.39 … ADR however is a more structured approach (than negotiation) that applies before, or sometimes during, the court*

> *process whereby an independent third party assists the two parties with something at issue between them to reach a decision or makes a decision on their behalf; it may also apply where the representatives of the two parties adopt a structured approach to negotiating a solution."*

Mediation is identified as the principal form of ADR.

[19] The report continues, at paragraph 5.41:

> *"5.41: There was near unanimous support for the principle of ADR amongst those who responded to our request for views, provided that it was deployed in appropriate circumstances. …*
>
> *We note that ADR has the strong support of European institutions …*
>
> *In England and Wales government departments and agencies have signed up to the mandatory 'Dispute Resolution Commitment' requiring the use of dispute avoidance mechanisms in contract management and in relations with the public and the development of appropriate ADR processes for avoiding litigation where disputes do occur."*

At paragraph 5.42 the following conclusion is expressed:

> *"We conclude that the availability of a menu of ADR mechanisms for use in differing types of legal dispute enhances access to justice and should be promoted by the department and stakeholders in the justice system. But it is not a panacea, should not be seen as a substitute for routine negotiation and does not replace the court as the ultimate means of resolving justiciable disputes."*

At paragraph 5.43 the following mischief is noted:

> *"Selecting the wrong cases for mediation, conciliation or collaborative intervention will increase costs, delay and, in all probability, exacerbate the problems between the parties. It is noteworthy that the estimated saving of £10 million per annum to the England and Wales budget attributable to mediation in 2009/10 was achieved on the basis of around 20% of eligible family cases being mediated (with 70% of those reaching a full or partial settlement)."*

[This is a reference to the legal aid budget]

[20] In the section which follows, the authors consider the topic of ADR where the parties are, or one of them is, financially eligible for legal aid. They draw a distinction between private law family cases and other civil cases on the basis that the former account for "much of the spend on civil matters". They caution against the:

> *"… temptation to refer to mediation cases that are currently resolved at much lower cost through informal negotiation."*

They recommended that the Agency's predecessor and the Department, in consultation with stakeholders, develop a funding scheme and financial model so that potential costs can be assessed.

[21] The second Access To Justice report (September 2015) formulated, at paragraph 1, four guiding principles. The third of these is noteworthy:

> *"To ensure that the public, especially the poorest and most vulnerable members of society, have reasonable access to the full range of dispute resolution systems and are assisted towards the most effective and proportionate means of resolving their problems."*

The Executive Summary continues:

> *"Legal aid is an indispensable part of our justice system. For many vulnerable clients, legal aid may be the only practical means of enforcing basic rights. Legal aid lawyers provide frontline services for the public across a range of criminal and civil cases."*

The Report explicitly cautions against the undue reduction of "scope" (Viz the ambit of legal aid) as this would contravene the aforementioned principle and risk undermining the viability of what remains. The Report then states, at paragraph 19:

> *"Developing effective alternatives to the courts, through diversion or alternative dispute resolution, is just as important as court reform. Such approaches will often be more effective at addressing the underlying issues behind a legal dispute."*

[22] Chapter 19 of this report is dedicated to the subject of "Alternative to Civil Litigation". It commences with a well-known passage from the judgment of Lord Woolf CJ in Coll v Plymouth City Council [2001] EWCA Civ 1935, at [1]:

> *"Insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible."*

There follows a discussion about the contrasts between mediation in family cases and "non-family mediation". In this context it is stated at paragraph 20.10:

> *"I believe mediation should become a more common feature of the legal aid scheme for non-family cases in Northern Ireland, although I do not think it would be beneficial to require it to be addressed in all cases. Under the 2003 Order, mediation fees are in my view a legitimate disbursement under either advice and assistance or Civil Legal Aid …*
>
> *Mediation should no longer be regarded as a cost driver: the alternative is almost always going to cost more. Although not compulsory, it would always be sensible to seek a prior authority from the Legal Services Agency before incurring mediation fees, otherwise such fees might be disallowed on assessment."*

This passage continues:

> *"The main issues for the Agency to consider would be:*
>
> - *The proposed mediator's training and qualifications … [and]*
>
> - *The reasonableness of the proposed fees and overall cost of mediation …"*

The next succeeding passage, at paragraph 20.11, resonates strongly in the present litigation context:

> *"… the question of mediation is more likely to become an issue in practice once a certificate is in force. This may well arise when the Agency receives representations from an opponent who is proposing mediation. The normal response of the Agency in that situation should be to limit the certificate to prohibit any further steps in the litigation until the legally aided client has pursued mediation. Although reaching agreement at mediation is a voluntary decision, mechanisms are needed (as in family) to require the client to give the process a try."*

This discrete chapter ends with the following summary, at paragraph 20.23:

> *"The Legal Aid Scheme has for too long been court-centred, failing to recognise the importance of complaint and ombudsman schemes and all varieties of alternative dispute resolution. Criteria for public funding should ensure that*

> *recourse to the courts is the last resort, as it would be if people had to pay for legal representation with their own money. Mediation and early neutral evaluation should be encouraged within the legal aid scheme, supported by new reporting obligations to identify cases where funding should be diverted from court resolution towards ADR."*

[23] The third of three successive reports bearing on the topics of ADR and public funding is the Civil and Family Justice Review Report published in February 2017. Chapter 7 of Volume 2 this Report is dedicated to "Resolutions Outside Court". This focuses on cases within the family justice system. In Volume 1 there is a discrete chapter entitled "Alternative Dispute Resolution as Mediation" (Chapter 9). From this valuable review of the subject I distil the following in particular:

(a) The question of mediation arises most frequently following the initiation of proceedings. Mediation is encouraged by either court procedural protocols or specific judicial directions.

(b) Mediation is "increasingly used" in civil and commercial cases.

(c) The response to judicial directions or exhortations to consider mediation is largely positive and, where undertaken, the success rate is significant.

(d) The development of mediation in commercial disputes in this jurisdiction has been somewhat slower than in other nearby jurisdictions.

(e) The growth of mediation in Northern Ireland is reflected in developments such as the creation of the Barrister Mediation Services, supported by a cohort of accredited trained mediators.

(f) Similarly, the Northern Ireland Law Society has established the Dispute Resolution Service.

(g) Mediation has been a popular option in civil and family courts in England and Wales for almost 20 years.

(h) Mediation is undertaken in a structured way, pursuant to a formal contractual instrument, is conducted and overseen by an independent trained mediator and is properly viewed as a species of confidential without prejudice negotiations.

[24] Two specific passages in Chapter 9 of the Report are worthy of reproduction. First:

> *"There was a general consensus as to the benefit of mediation as to the vital role it now plays in the justice system. This reflects a cultural change in the legal firmament and firmly*

> *entrenches the concept in our system of law."* (Paragraph 9.82)

Second, there is a need:

> *"… to continue the change in our cultural thinking to ensure that mediation is seen as a real and effective alternative to litigation for those involved in civil disputes."*

I have also considered Chapter 7 of Volume 1, entitled "The Overriding Objective: An Efficient and Timely Process". Any senior judge, serving or retired, who has been a member of the High Court or the Court of Appeal during the past two decades will recognise at once the description of the judicial role therein. This is so because intra-proceedings ADR in the various divisions of the High Court is now a phenomenon of some vintage, one whose scale and influence have increased with the passage of time.

[25] I have also been enlightened by the second edition of the Jackson ADR Handbook, first published in 2013. This contains the following account of the history of ADR:

> *"Alternative Dispute Resolution (ADR) has a long and respected history in this jurisdiction. It has received increasing support from the Civil Procedure Rules 1998 and associated Practice Directions, the judiciary and developments in government policy. We have reached the stage, not least following the introduction of the Jackson Reforms from 1 April 2013, when resolution through ADR processes needs to be given serious consideration as part of resolving almost any civil dispute, forming part of case and costs management. Rises in court fees and the limits in the availability of legal aid funding are also making the potential use of ADR more attractive."*

(Paragraph 1.01)

The following passage at paragraph 12.15 is also eye-catching:

> *"Mediation is effectively a facilitated and more structured form of negotiation. The key difference is the addition of an independent third party as mediator …*
>
> *Mediation can … identify common ground which conventional negotiation does not reach. An effective mediator can facilitate negotiation in many ways, for example maintaining structure, leaving the parties and lawyers free to focus on issues, assisting in the framing of offers and providing an independent view."*

At paragraph 13.01 the authors refer to "a relatively structured but flexible process, in a formal setting, during a defined period of time, all of which helps to create an impetus for settlement."

[26] ADR has also featured in the Practice Directions and protocols of the senior civil courts of Northern Ireland for many years. Notably, the breadth of its potential as a mechanism for the consensual resolution of disputes other than via litigation is reflected in its recognition in the first of the Judicial Review Court Practice Directions, published as long ago as 2005. The experience in this court during the past two years has been that in every case where the court has exhorted ADR two consequences have followed. First, the parties have invariably responded positively. Second, consensual resolution has been achieved in every case.

[27] The longevity of the formal recognition and integration of ADR in the procedural regimes of the senior civil courts in Northern Ireland is reflected in the Rules of Court within the framework of which the Order of the Chancery Judge reproduced in [5] above was made. Part III of the Rules of the Court of Judicature was introduced on 25 March 2011 via SR(NI) No:62. It is reproduced in Appendix I of this judgment.

Discussion and Analysis

[28] I consider that, logically, the first question for the court must be whether legal aid for intra-litigation ADR, be it mediation or some other process, falls within the scope of the statutory provisions considered above. Alternatively phrased, do the statutory provisions empower the Agency to grant legal aid for this specific purpose? On behalf of the Agency there was no suggestion that this question should be answered in the negative. I consider this acknowledgement to be correct.

[29] The statutory provisions bearing on this issue are set forth in paragraphs [7]-[12] above. These fall to be considered collectively. The broad scope of the general provisions, in particular Article 5(1) of the 1981 Order, Article 10(1) of the 2003 Order and Regulation 2 of the 2015 Regulations is unmistakable. It is difficult to see how intra-litigation ADR could be characterised anything other than a "step" (the statutory language being "any step") in the proceedings and no argument to the contrary was advanced.

[30] Furthermore, the current arrangements for litigation in the higher courts are contained in a range of rules of court, protocols and practice directions. ADR features in these instruments. It does so, *inter alia,* as a demonstration of the now established recognition of the proactive role of the judiciary in encouraging and promoting the resolution of litigious disputes by mechanisms other than full blown litigation. Intra-litigation mediation is inextricably linked with the underlying proceedings. It does not have some remote, detached existence. The present case is a paradigm illustration of this analysis. The parties proactively brought to the attention of the court their joint proposal to engage in mediation seeking, and

obtaining, a court order to this effect. This further unfolded against the background of certain relevant rules of court.

[31] There is, therefore, an indelible nexus between intra-litigation ADR and the underlying proceedings. The parties must have resort to, and must report to, the court. There is continuing judicial oversight and control throughout the ADR process. Fundamentally, it is clear from Rule 20 of Schedule 1 that the court must be satisfied that the case is suitable for ADR. This assessment will, in appropriate cases, be made with the assistance of the affidavit required by Rule 21. Furthermore, per Rule 20(2), the court will in appropriate cases make such directions as it considers will facilitate the effective deployment of ADR.

[32] Intra-litigation mediation, therefore, occurs within the ambit of extant proceedings in the court in question. Where a litigant is legally assisted the service thereby authorised is that of "representation" in the terms specified in the formal certificate. The 2015 Regulations were made in the wake of the first of the three reports considered above. In his affidavit Mr Andrews deposes that these Regulations "followed on from" this report. The meaning and scope of the Regulations are, therefore, informed by the preceding report. I have highlighted the salient passages above. If there were any intention to exclude ADR from the scope of legal aid one would expect this to have been expressed in the Regulations. Furthermore, this could have been achieved with facility. The Regulations, however, contain no provision to this effect. In addition, it is of obvious significance that intra-litigation ADR is <u>not</u> one of the excluded services under Schedule 2 to the 2003 Order.

[33] Giving effect to the foregoing analysis, I conclude firstly that the Agency is empowered to authorise a legally assisted litigant to engage in ADR in an intra–litigation context, if and insofar as prior authorisation is required by law. This, in principle, is capable of falling within the embrace of the assisted litigant's civil aid certificate. I conclude secondly that intra-litigation mediation is part and parcel of the proceedings in which it arises and, thus, is capable of being embraced by an assisted litigant's certificate. The nuanced refinements of these principal conclusions follow in the ensuing paragraphs.

[34] It is necessary to consider Regulation 44 of the 2015 Regulations, which is set forth in [12] above. The first question which arises is whether intra-litigation ADR should be considered an "unusual act" within the embrace of Regulation 44(1)(i). If 'yes', it would require the Agency's prior authority. One of the functions of the survey in [17]-[27] above has been to examine how developed ADR has become in the higher civil courts in this jurisdiction. From the outset, I was of the view that the court's assessment of this issue must be evidence based. The impressionistic and subjective opinion of a single judge would have unavoidable limitations. To this end specific directions regarding evidence were promulgated and the parties' representatives duly complied.

[35] An "act" on behalf of an assisted party would be "unusual" if, giving the latter adjective its ordinary and natural meaning, it took the form of something novel, uncommon or unexpected. I accept that these descriptors could properly have been applied to intra-litigation ADR when in its infancy. However, the evidence makes clear that ADR has progressed well beyond that stage. It has for some time been a settled feature of the civil litigation landscape in Northern Ireland. Once a newcomer, it is now an experienced member of the civil litigation club. Evidentially, its days as an "unusual" civil litigation mechanism are gone. Being no longer "unusual" in nature, I conclude that ADR, having come of age some time ago, will not normally require specific prior authority under the "unusual act" limb of Regulation 44(1)(i) since, in general, it cannot be characterised an "unusual act" in litigation. I have included the "normally" and "in general" qualifications on a precautionary basis, to reflect the limitations of the evidence assembled. The out-workings of these qualifications lie outwith the ambit of this judgment.

[36] The reason for this caution is that there is no evidence before the court which would warrant the court's endorsement of a certain type – or certain types – of ADR as standard, or typical. Indeed the court does not know whether this taxonomy is even possible. It is not difficult to conceive of ADR exercises in an intra–litigation context which may properly be considered atypical, departing from the widely established norm (whatever this may be). However, ADR exercises of this species would, in my estimation, mostly fall within the free standing "unusually large expenditure" limb of Regulation 44(1)(i). In this respect, the court must give effect to the disjunctive "either ... or" phraseology in this provision.

[37] The foregoing analysis demonstrates that there is clear scope for the Agency, in consultation with both the Department and the profession, devising appropriate protocols or other arrangements. I consider that until that this step, or something comparable, has been taken, practitioners should be alert to the recommendation in the 2015 Report (*supra*), at paragraph 20.10, to seek the Agency's permission before embarking upon an intra–litigation ADR process. I decline to suggest that this take place in every case at this stage as to do so would be in defiance of the clear language of Regulation 44(1)(i). It follows that where there is a reasonable professional assessment by an assisted litigant's legal representatives that a proposed ADR exercise is not "unusual", it will be appropriate to proceed without more. Any later dispute about this discrete issue will either be determined by agreement with the Agency at the stage of payment of legal costs or resolved by taxation.

[38] The conclusions expressed above pave the way to an orthodox public law analysis. The Agency, being a public authority invested with a discretionary power, is obliged in every case to take into account all material facts and factors, to disregard the immaterial, to direct itself correctly in law, to act without bias, to adopt a procedurally fair decision making process, to avoid the irrational and, finally, to avoid fettering its discretion. These are the familiar and well-established

touchstones by reference to which the decision under challenge in the present case falls to be evaluated.

[39] The first step in this exercise is one of analysing and construing the salient pieces of evidence, which I have set out in paragraph [2]-[5] and [13]-[19] above. I begin with the impugned decision. This states, without equivocation or reservation, that the Agency will not provide civil legal aid for mediation. A virtually identical statement, in equally unambiguous terms, is contained in the evidence in another case currently before the court (Coulter, JR, 2018/01). This was repeated, in somewhat more elaborate terms, in the PAP response letter. The final material source of evidence is the Agency's affidavit. The relevant averments, considered collectively and in tandem with the other pieces of evidence already noted, make abundantly clear that the Agency operates an inflexible policy, or practice, whereby civil legal aid for intra-litigation mediation is available only in family cases. Outwith this discrete cohort there is a blanket prohibition, or exclusion. Any doubts about the absolute nature of the prohibition are expelled by the relevant passage in counsel's skeleton argument, reproduced in [16] above.

Conclusions

[40] The preceding analysis has the following legal consequences. First, the Agency has erred in law by failing to recognise and/or exercise in a lawful manner the discretion conferred on it by the legislation to authorise public funding for intra-litigation ADR in civil cases other than family cases. Second, the Agency has impermissibly fettered the discretion conferred upon it by statute by failing to consider the application made to it on its merits. Third, the Agency has left out of account all material facts and factors. Fourth, the Agency has erred in law and/or disregarded material considerations in its consideration of "Access To Justice Review Northern Ireland" (2011) and "A Strategy For Access To Justice "(2015).

[41] The court sympathises with the Agency, being a statutory public authority with finite funding and having difficult expenditure distribution decisions to make. However, for the reasons given above the decision impugned in these proceedings is unsustainable in law.

[42] The court has no reason to doubt that the Agency, as foreshadowed in its affidavit, will continue to interact with the Department, the parent body, together with the profession, duly guided by this judgment and welcomes this.

Final Order and Remedy

[43] The further submissions received from counsel after this judgment had initially been handed down in draft underlined the importance of the issue of final order in this case. I am grateful to counsel for their respective contributions. Clearly, the impugned decision must be quashed by certiorari. More important, a declaration reflecting the central conclusions of the court is manifestly appropriate. These two

remedies are reflected in the Order (below, in operative part only) which the court has finalised following the specially convened remedies hearing on 31/05/19.

ORDER

IT IS HEREBY DECLARED THAT:

1. ADR in an intra–litigation context is capable of falling within the embrace of an assisted litigant's civil aid certificate.

2. ADR of a routinely recognized kind does not constitute an "*unusual act*" within the meaning of Regulation 44(1)(i) of the Civil Legal Services (General) Regulations (Northern Ireland) 2015 ("the Regulations") and, hence, does not require an assisted person to seek the prior authority of the Legal Services Agency For Northern Ireland ("the Agency").

3. ADR likely to involve "*unusually large expenditure*" requires the prior authority of the Agency under Regulation 44(1)(i) of the Regulations.

4. The Agency has erred in law by failing to recognize and/or exercise in a lawful manner the discretion conferred on it by the legislation to authorize public funding for intra-litigation ADR in civil cases other than family cases; has impermissibly fettered the discretion conferred upon it by statute by failing to consider the application made to it on its merits; has left out of account all material facts and factors; and has erred in law and/or disregarded material considerations in its consideration of the '*Access to Justice Review Northern Ireland*' report published in August 2011 and the report entitled '*A Strategy for Access to Justice*' published in September 2015.

AND IT IS FURTHER ORDERED that:

a. The court QUASHES the decision of the Agency dated 18 December 2018 whereby it declined to permit the Applicant to engage in intra-litigation mediation within the embrace of his extant Civil Legal Aid Certificate in the context of proceedings in the Chancery Division of the High Court, on the grounds set forth in the fourth of the declarations above.

b. The Respondent shall pay the Applicant's reasonable costs, such costs to be taxed in default of agreement;

APPENDIX 1

Rules of the Court of Judicature

PART III

MEDIATION

Interpretation

19.—(1) In this Part of this Order—

(a) "an ADR process" means mediation, conciliation or another dispute resolution process approved by the Court, but does not include arbitration; and

(b) "party" includes the personal representative of a deceased party.

Adjournment of proceedings for the purposes of ADR

20.—(1) The Court, on the application of any of the parties or of its own motion, may, when it considers it appropriate and having regard to all the circumstances of the case, order that proceedings or any issue therein be adjourned for such time as the Court considers just and convenient and—

(a) invite the parties to use an ADR process to settle or determine the proceedings or issue; or

(b) where the parties consent, refer the proceedings or issue to such process,

and may, for the purposes of such invitation or reference, invite the parties to attend such information session on the use of mediation, if any, as the Court may specify.

(2) Where the parties decide to use an ADR process, the Court may make an order extending the time for compliance by any party with any provision of these Rules or any order of the Court in the proceedings, and may make such further or other orders or give such directions as the Court considers will facilitate the effective use of that process.

Application for order under rule 20

21. An application by a party for an order under rule 20 shall be made by notice of motion and shall, unless the Court otherwise orders, be supported by an affidavit.

Time limit for application under rule 20

22. Save where the Court for special reason to be stated in the Court's order allows, an application for an order under rule 20 shall not be made later than 56 days before the date on which the proceedings are first listed for hearing.