

THE ROLE AND RESPONSIBILITIES OF THE JUDGE/MASTER IN THE  
MEDIATION PROCESS

By Justice Indra Hariprashad -Charles

1. It is a great pleasure for me to address you here today. I regret that I could not be here earlier to hear the presentations of Sir Dennis, Justice Saunders or Ms. Franklyn so I could avoid any repetition but I hope that there won't be too many because the topics are not the same.
  
2. Court-connected Mediation is a relatively new practice in the Saint Lucian Court where the pilot project started so me two years ago. In fact, Court connected Mediation was introduced in St. Lucia by Practice Direction No. 2 of 2002. As recent as 5<sup>th</sup> January 2004, Practice Direction, No. 1 of 2003 extends Court -connected mediation to all member states and makes provisio n for the referral of civil actions filed in the Court. Court meaning the High Court and in Part 62 of CPR2000, the Court of Appeal.
  
3. When the pilot project started, there was some degree of skepticism from the Bench, the Bar and society as a whole because it was completely new to the community. But, I could safely say that with intense public awareness, the citizens have come to accept this new approach to litigation.

ROLE OF THE JUDGE

4. Part 25 of the Civil Procedure Rules of 2000 states that Judges have a duty to manage cases. The Court must further the objective to deal with the cases justly by actively managing cases, and in particular by encouraging the parties to use any appropriate form of

dispute resolution including, in particular, mediation, if the court considers it appropriate and facilitating the use of such procedures.

5. Simply put, it is part of the role of the court to encourage mediation. You will note the word "encourage" which imports a wide discretion on the court.
6. First and foremost, judges must be knowledgeable about the mediation process. For example, a judge must know what exactly is mediation? Under what circumstances should a matter be referred to mediation. Then a judge has to be convinced of the benefits of mediation and how those benefits manifest themselves.
7. A judge should be able to explain to the parties and/or Counsel the advantages of mediation which is certainly more timely and cost-effective.

#### WHAT MATTERS ARE REFERRED TO MEDIATION?

8. All matters with the exception of the following may be referred to mediation:
  - (a) family proceedings
  - (b) insolvency (including winding up of companies)
  - (c) non-contentious probate proceedings
  - (d) proceedings when the High Court is acting as a prize court and
  - (e) all other proceedings in the Supreme Court instituted under any enactment, in so far as rules made under that enactment regulate those proceedings.

## REFERRAL OF CASES TO MEDIATION

9. In our pilot project, mediation referral orders must be made at Case Management Conference which may occur in 3 different types of settings. I will not burden you with that because the Practice Direction of 2004 expressly states that cases could be referred to mediation at any stage of the proceedings. Any stage in my opinion, means even on appeal.
10. Secondly, a Master or a Judge may make an Order referring any civil action filed in the court to mediation. I have attached a copy of an order.
11. In making referral orders, I would encourage the parties to choose the mediator right there and then although the procedure under the Practice Direction 2004 gives them 10 ten days to select a mediator. In fact, Part 7.2 goes further to state that if the parties fail to select a mediator, the Mediation Coordinator shall request that the master or judge assign a mediator from the roster of mediators. In my order, you will notice also that all further proceedings in the matter are stayed.
12. These Orders are done right there in court and copies are given to each party and copies are dispatched forthwith to the Court Office for onward transmission to the Mediation Coordinator.
13. I must say that in recent times, most of the matters that come before me are for trials since the Master does the bulk of Case management Conferences. At the First hearing of matters, if the criteria for referring matters to mediation are met, without a shadow

of a doubt, I refer them immediately. However, I have found that quite a good number of actions are dealt with at first hearing.

#### CRITERIA FOR REFERRAL OF CASES

14. The Practice Direction 2004 lists the criteria for referral of cases to mediation. It states that in considering whether to refer a case to mediation, a judge or master shall take into account all relevant circumstances including the following:
  - (a) the relationship between the parties.
  - (b) The willingness of the parties to resolve their dispute by collaborative process;
  - (c) Opportunities for joint gains not available through litigation in the court; or
  - (d) Any other criteria considered appropriate by the Master of Judge.

#### AFTER MEDIATION

15. After a mediation, the matter comes back to the court either for a consent order to be drawn up and initialed by the Judge if a settlement has been reached or if no agreement, the matter is returned to Case Management for directions for trial.
16. The relevant Forms are contained in the Practice Direction of 2004.

#### CONCLUSION

17. The Chief Justice and the Judicial Education Institute under the directorship of Justice Saunders have been in the vanguard of the promotion of ADR particularly mediation. New judicial initiatives

have emerged for the organization of mediation with provision for a stay of court proceedings.

18. It is time that Masters and Judges are more proactive in encouraging mediation. The Practice Direction gives judges full discretion to determine whether proceedings are suitable for mediation. The consent of the parties, though essential, is only a factor to be taken into account in making referral orders but it should not be the sole or even the determining factor.
19. The rate of settlements of cases which are mediated upon are reportedly exceedingly high. What better way it is to resolve disputes between families for land, disputes between neighbours, industrial and commercial disputes, but by mediation. There are three main features of mediation: the freedom of the parties , the absence of procedural formalities and the judge's power of initiative and review.
20. In my opinion, Mediation is therefore the best course of action to allow relationships to be resumed or continued by offering each party an honorable way out of the dispute. Recourse to mediation may also be favoured due to uncertainty regarding the legal outcome of a case, to the manifest unfairness of applying a rule of law or a clause in a contract to a particular case, the fear of too lengthy proceedings or to the overriding need to achieve a swift outcome of a dispute. It is used in the developed world of Europe, France and England to name a few.

21. After all, the primary benefits of mediation to the administration of justice are eliminating the backlog and guaranteeing quicker disposition of the cases.
  
22. In closing, I would like to throw out an innovative idea to Sir Dennis and Justice Saunders. Whatever efforts the Judiciary make to promote mediation as a way of settling disputes, a genuine 'mediation culture' will only develop if the sphere of activity of activity of mediation is extended during the period before matters are brought before the courts, in particular, through the inclusion in contracts, for example, of a preliminary mediation clause which, in the event of a dispute relating to the performance of the contract, requires the parties to refer the matter to a mediator before contemplating initiating judicial proceedings.
  
23. Last but not least, thank you for your patience.