

“The St. Lucia experience and the Role of the Judicial Officer in Court –connected Mediation”

By Justice Adrian Saunders

It is a great privilege for me to address such an august gathering. When I was invited so to do I remembered a speech I had read recently. It was delivered by the then Attorney General of Barbados, Sir David Simmons. Sir David gave an address to the 1998 graduating class of the HWLS. He began by giving what, for him, was a joke but what, in my circumstances here today, I would like you to treat somewhat more earnestly. After reminding the budding lawyers that he was there to talk and they were there to listen, he then expressed the fervent hope that he finished before they did. Of course Sir David is an exceptionally fluent speaker. Today, you've got me.

Much has occurred in the Eastern Caribbean Supreme Court and in particular in St. Lucia, with respect to court connected **mediation** over the last two years. As Mrs. Mendez-Bowen might later tell you in greater detail, we have trained a corps of mediators, established a **mediation** supervisory committee, dedicated premises for conducting mediations and commenced a pilot project for court connected **mediation**. All of this activity forms part of the major reforms underway in our judiciary inspired by our Chief Justice Sir Dennis Byron.

Court connected **mediation** in St. Lucia is still in its infancy and I don't want to convey the impression either that we have all the answers or that we present a model that cannot be improved upon. Nonetheless we take justifiable pride in the fact that our pilot project is up and running and it is making a difference.

As one of the High Court Judges assigned to St. Lucia and Chairman of the **Mediation** Committee, I have been intimately associated with the pilot project. It has truly been an exciting and rewarding period. Exciting because much that has been happening is so new, so strange. Rewarding because you can instantly see that what you are embarked upon is making a positive impact upon what used to be regarded as intractable problems.

We are all experienced persons in this room and each of us has, in one setting or another, witnessed the dynamics of change, of profound change. Change requires people to adapt, to learn new skills, to cope differently. Sometimes it is not easy. A person might be poised quite comfortably, ahead of the pack, confidently sailing through life's well charted seas. And then some nutty administrator begins talk of something new, something that will require you to steer a different course, to enter uncharted territory, a course that you fear you may never **master**, or one that you think might take you so long to **master** that you will lose your place in the pecking order by the time you have mastered it . The natural instinct of some people who find themselves in such situations is to resist this intrusion, this unwelcome imposition.

But equally, there are those, sometimes just a few, sometimes more than just a few, who are enthusiastic about the change, because they understand it, they appreciate the reasons for it and the benefits which it will bring.

And then there are those who fall somewhere in between these two extremes, ranging from the skeptical to the luke warm supporters.

This is how it is with change generally, and that is how it has been with the introduction of court connected **mediation** in St. Lucia. Unlike the situation here in Trinidad & Tobago, we had no previous experience of formal **mediation**. **Mediation** was completely new to the community. The initial **role** of the **judge** therefore was to act as a sort of missionary of **mediation**, to be an advocate of **mediation**.

You couldn't bring any zeal, any conviction to your missionary **role** unless two things were in place. First of all judges had to be knowledgeable about the **mediation** process.

What exactly is **mediation**? How does a mediator's **role** differ from your **role**, as a **judge**, of encouraging a settlement? Do counsel have any **role** to play in **mediation**? Under what circumstances should a **judge** refer or not refer a matter to **mediation**? The judges needed first to have some awareness of the responses to these and a host of other questions.

Secondly, the judges had to be convinced of the benefits of **mediation**. What were likely to be the advantages to litigants, to lawyers and to the justice system? And how would those benefits manifest themselves?

Before our pilot began in November last year, our court therefore held several workshops for the judges where these questions were explored; sessions like these, for example, where the philosophy of **mediation** and the experiences of other countries were shared and considered. In this regard we relied heavily on the skill and experience of experts like Mrs. Mendez-Bowen along with other experts from the USA.

As the start time for the project approached and our familiarity with the subject matter increased, the St. Lucia judges and some of the **mediation** trainees as well began doing some public relations work by for example appearing on radio programmes to speak to the public about court connected **mediation**.

It was also important for the judges to spark and maintain the interest of the lawyers and identify and encourage those who were ready for this new adjunct to the litigation process. This task was helped by the fact that several lawyers had applied to be trained as mediators. Actually, approximately one third of the trained mediators come from the private Bar.

When the pilot finally commenced, the primary **role** of the **judge** (and by **judge** I include **Master** who under our Rules has the powers of a **Judge** in Chambers), the primary **role** of the **judge** was to identify and send matters on for **mediation**. Now, you recall what I said earlier about the dynamics of change. There were some lawyers who from the very start were curious but not very supportive of the pilot project. Given all the circumstances therefore, our judges were initially very circumspect when exercising their discretion to refer matters to **mediation**.

To explain this better I should perhaps indicate how referral orders are made. The relevant provision in our Civil Procedure Rules that facilitates the process of **mediation** is to be found in Part 25.

Before I indicate what Part 25 says, I should mention that earlier in the Rules, in Part 1 to be exact, the overriding objective of the Civil Procedure Rules is stated to be to enable the court to deal with cases justly. In other words ensuring so far as practicable that the parties are on an equal footing; saving expense; dealing with cases in ways that are proportionate to the money involved, the importance and complexity of the case and so on. The overriding objective is therefore to take all the variables of the particular case into account and to deal with the case justly.

Part 25 then goes on to state that “The court must further the overriding objective by actively managing cases. This may include

g) 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”.

Simply put, it is part of the **role** of the court to encourage **mediation**. Now, the verb “encourage” imports a fairly wide discretion. Someone can be encouraged tacitly or expressly, by cautious or by aggressive measures. I think that this precise word was used because of the relative flexibility it affords. I will tell you now how we have been encouraging **mediation** and how the nature of our encouragement of **mediation** has been undergoing some subtle changes with time. But first I need to explain how **mediation** referral orders are made.

In our pilot project in St. Lucia **mediation** referral orders must be made at a Case Management Conference (CMC). A CMC may occur in any of three types of settings. Firstly, there is the regular Case Management Conference (CMC) which is the next event that takes place after a Defence is filed. After the filing of a defence the court fixes a hearing day and requires the parties to attend before a **Master** for the holding of a CMC. The **Master** and the parties then discuss the further management of the case at that hearing and a referral order may be made at that stage.

A **Judge** may also conduct CMCs in two kinds of scenarios. Firstly there are some cases that are given a date to come before a **Judge** immediately upon being filed. These cases include proceedings for possession of land or many of the matters that formerly were commenced by what used to be called an Originating summons. When these matters come before a **Judge** on that date, the **Judge** holds a CMC. Very often these matters reach the **Judge** before a Defence is filed. In any event, the Rules stipulate that the **Judge** must hold a CMC at that stage. So this is the second circumstance in which a referral order might be made.

Thirdly, there are those cases that are part of the backlog reduction programme. These are cases in which a defence had been filed before the introduction of the new Rules and which have not been previously case managed. These matters are placed before a **Judge** for pre-trial conferences and at these conferences all the powers of a **Judge** at a CMC are open to the **Judge** and of course one of these powers is a **mediation** referral order. Pursuant to our Rules and our **Mediation** Practice Direction, in any of these three instances, it is open to the judicial officer to refer matters to **mediation**.

At the outset, the judges took the view that it was important for the pilot project to get off to a good, uncontroversial start. We didn't know what the litigants would make of **mediation**. We didn't know whether they would take kindly to being ordered to mediate their disputes... and be forced to pay the non refundable **mediation** fee as well. And so, before making a referral order the judges would patiently give the litigant a full briefing and explain the nature of **mediation**, the **role** of the mediator, the potential benefits of **mediation**, its cost (\$250 per person), the effect of a **mediation** agreement etc etc. Then the court would seek to discover how disposed the litigant was to **mediation**. Initially, only if the litigant was not opposed to **mediation** would we make a referral order.

I remember once going through the whole spiel with a young man who was before me. His lawyer was engaged in the Assizes and so he was there alone, unrepresented. The other side had agreed to **mediation** and so I sought his consent.

He listened to me patiently and when he still seemed a little puzzled after I had gone through all the explanations with him, I told him that I would adjourn the matter and defer a decision about making a referral order so that he could first consult with his lawyer. I asked him to return two days later and let me know whether he was disposed to a **mediation** referral order.

When the young man came back before me, as soon as the court clerk called his matter he stepped forward and simply said to me, "Yeah I will go". I didn't remember him so I said "Excuse me?" Whereupon he said, with a touch of impatience, "the meditation thing nuh. I talk to mih lawyer. I want to go for it". Needless to say I promptly sent him for the meditation thing.

In St. Lucia we have a roster of 27 trained mediators. All trained by Mrs. Mendez -Bowen and **Judge** Sandra Paul. Litigants are invited to select their preferred mediator. If there is deadlock between them then the court selects a mediator for them but I have had no experience where they have been unable to agree on a mediator. When I am making a referral I would encourage the parties to choose the mediator right there and then. If the lawyers don't have the List of mediators I print a copy of the list for them and ask them to agree on a mediator. Sometimes they agree while still at the bar table. If they can't then I invite them to go outside and see if they could reach agreement. The Practice Direction establishing the Pilot actually gives the parties 10 days to reach agreement but I like to encourage them to reach agreement right there and then and I think the lawyers prefer that as well. After they have selected a mediator, they give me the name, I put in that name and all the case details on my template, print 6 copies of the order, and initial, as approved drafts, three copies right there and then. Each litigant gets an approved draft and the third copy goes straight to the **Mediation** Coordinator who then starts her file on that matter. Our pilot project got off to a really good start, partly because of our cautious approach to referring matters and partly because we tended to refer matters that we thought might settle. We referred for example, Landlord and tenant disputes. Motor vehicle accidents where there was no counterclaim.

Disputes between common law spouses over property allegedly jointly acquired. Defamation actions. The rate of settlements was exceedingly high and even the skeptical lawyers began, grudgingly at first, to admit that **mediation** was worth the while.

I was amused when the **mediation** coordinator told me that one of the features of some mediations was the ringing peals of laughter that sometimes poured forth from the **mediation** room. Can you imagine that? From litigants who have been at each other's throats for years? The process is a truly therapeutic one for some litigants.

As the frequency of referral orders increased, we began to run into scheduling difficulties. We had one center. A **mediation** session lasted a maximum of three hours. We could have only two mediations per day. On a bad day a sole practitioner could have appearances before the **Judge**, the **master** and mediator. The first casualty usually was the **mediation** session. We thought that having a second center would ease the scheduling difficulties somewhat and so we opened a second center right next to the first one and this has indeed eased the scheduling problems considerably.

I should say something at this point about the administrative case flow. The **mediation** center is housed at the Supreme Court Head Quarters. It is currently staffed by two persons - A coordinator, Ms. Lenore St. Croix, who has other duties at the Supreme Court, and an assistant. These two persons are responsible for taking care of all the administrative arrangements that are required between the making of the order and the referral of the matter back to the court after a **mediation** is held. Among other things, they see to it that the mediator is provided with the Statements of Case (what we used to call "pleadings") and that a date is scheduled that meets the convenience of the litigants, the parties and of course the mediator. This could be quite tricky sometimes. The staff also enter into our computer system all the necessary details to enable us to properly manage the project and to generate appropriate reports.

After a **mediation**, the matter comes back to the court either for a consent order to be drawn up and initialed by a **Judge** if a settlement has been arrived at or for the court to place the matter back on the case management list for directions for trial if there has not been a settlement.

From the start, our **mediation** consultant, Mrs. Mendez-Bowen, insisted that our **mediation** center had to function at a high level of efficiency. It was no use replacing the inefficient court system with an equally inefficient **mediation** process. Well, I don't know about Mrs. Bowen but, as Chairman, I am reasonably satisfied with the level of efficiency at which the project has been functioning. Just over a week ago I had a meeting with the lawyers to review the project. It was a pleasing sight to witness a good solid turnout of lawyers including those who were initially very skeptical. I asked the lawyers what was their assessment of the administrative case flow, whether they were satisfied with the manner in which the matters were being processed. It turned out that the lawyers were being spoiled by the **mediation** staff. The staff would bend over backwards to accommodate them with the scheduling and then they would ring the lawyers every day to remind them of their scheduled session. One lawyer said to me "Justice Saunders, they harass you all the time just to make sure you are prepared and turn up for the **mediation**."

Now why can't the High Court be like that?" Prior to that meeting with the lawyers the Project supervisory committee had met to make one of our periodic appraisals of the pilot project. We noted that the rate of settlements at mediations was close to 70%. This we thought was a very high percentage, far higher than the norm in other places where court connected **mediation** is carried out. I think that norm is around 50%. We also noted that the rate of referrals had been falling off. We thought that there might be a connection between these two circumstances. We felt that our caution in "encouraging" parties to mediate was now working against us. In order to start the project off it might have been fine to seek the consent of the parties and to refer only those cases that seemed as though they might settle. Now that **mediation** was on a fairly sound footing, we thought that we should become somewhat more aggressive in encouraging parties to mediate.

After all, if the prime benefits of **mediation** to the administration of justice are eliminating the backlog and guaranteeing quicker disposition of the cases then if 72% of 100 cases referred are settled this means that less cases are actually disposed of than if 200 cases were referred but the settlement rate among the latter was only 50%

When I met with the lawyers last week therefore, I pointed out to them and we discussed the fact that the Judges were henceforth going to be asked to be more forceful in making referral orders. The consent of the parties is only *a factor* to be taken into account but it should not be the sole or even the determining factor.

We, ie the Bench and the Bar, also had a frank discussion about costs and the **mediation** process. The Supervisory Committee has been observing that in many of the **mediation** settlements little or no provision is made for costs. The parties hammer out a settlement and then at that point, after the settlement is reached, no one wants to broach the subject of costs because everyone knows that once that issue is raised the settlement will fly through the window and three hours, of tension and anger and reconciliation and sometimes laughter, would go straight down the drain. And so, the conditions are ripe for an insidious tendency to develop whereby defendants, especially those with shaky defences, might be quick to say at case management conferences “Yes, let’s mediate” while Claimants with strong cases on the other hand, would want to say, “No **mediation**. I will recover a whole lot more if I went to court”.

At the meeting with the lawyers I took the view that this issue of costs should be addressed openly and frankly. I see no reason why a defendant with no counterclaim ought not to bear some costs even though a consensual settlement is worked out at the **mediation**. After all, the claimant was required to incur legal expense in order to bring the matter to court in the first place. I thought that the lawyers should address the issue of costs with their respective clients before the **mediation** and, if necessary, discuss it as one of the substantive issues in the dispute rather than leave it until after the dispute has been settled to be raised as an issue. One alternative is to consciously factor the costs into the money settlement rather than deal with costs as a separate issue.

Ultimately these are matters for the lawyers and the litigants to address however. As a **Judge** my only concern is that the favourable disposition of lawyers and litigants to mediate is not compromised because litigants are being unjustly deprived of their reasonable costs. I suppose the attitude of some lawyers to costs can be summed up in what one lawyer told me. She said she had a most difficult land dispute that she was dreading having to prepare for trial. She was for the claimants. She agreed that the matter should go to **mediation** but she never for a moment expected it to settle because of the hostility between these two families. To her surprise, the matter was settled at **mediation**. She said she was so happy she didn't have to go to trial with that matter that she could not care less about the fact that no provision was made for costs at the settlement. She was just happy to be able to close her file on that case and see the back of these hitherto warring factions.

I was also gratified to hear from the lawyers that the speed and rate of compliance with **mediation** settlements were better than was the case with ordinary court judgments. The experts had posited this as a theory namely, that a consensual settlement would be quicker and better obeyed than an order imposed by a **judge**. The logic behind that theory is unassailable but it was still somewhat of a pleasant surprise for me to hear that it works in practice. My most depressing court is Wednesdays when I do 3 -4 straight hours of judgment summonses and other enforcement matters.

Just before coming down to Trinidad Ms. St. Croix was asked to produce her latest statistics as to the status of the project. Between 6th November, 2002 (when we started) and last Monday, we had referred 117 cases to **mediation**. Sixty of these cases have already been mediated. 68% of those mediated have been settled. Only in one instance did a litigant fail to comply with a referral order. To be sure, that litigant is likely to be sanctioned by a costs order when his matter is ultimately tried.

Interestingly, in 73% of the matters already mediated the parties had selected a lawyer as their preferred mediator. With notable exceptions, the lawyers tend to choose lawyers. There is still this completely false theory among the lawyers that because the matter as pleaded involves some questions of law, the mediator should know some law.

I know one silk however who is adamantly opposed to selecting a lawyer as a mediator on any of his matters. There is nothing to suggest that lawyers make better or worse mediators than lay people or that settlements are more prevalent when the mediator is or is not a lawyer. I believe the reason why lawyers are chosen so often is because they are better known by counsel who is advising the client in the choice of a mediator.

The cases that have gone to **mediation** and have settled include in addition to those types I have previously mentioned, land disputes and breaches of contract. The Practice Direction does not permit a limited type of cases including family matters to be mediated because these require specialized skill on the part of the mediators and while we fully intend to go in that direction, we have not yet done so.

So, what are some of the lessons we have learned thus far. There are two I can think of. I would say that first and foremost, it is necessary for us constantly to monitor the project and ensure that we identify and resolve problems as soon as they occur. It is imperative that the **mediation** process is regarded by litigants, lawyers and the general public not just as an alternative to the courts but an alternative that is more reliable and more efficient.

Secondly, we need to accommodate the making of referral orders at a stage prior to a case management conference. Upon the issuance of a claim form, a claimant or a defendant should be able to apply for a referral order. This will ensure even earlier disposal of many cases and will also avoid in many cases the costs entailed in the filing of a Defence. This is the way that we will probably go in the pilot projects of other territories in the jurisdiction.

There are many aspects of our **mediation** project that I have not addressed. Those that interest you and are not covered by Mrs. Mendez -Bowen in her address can be taken up during the time allotted for questions.

At this stage I wish to thank you most sincerely for your attentiveness as I endeavoured to share with you some of our experiences. It truly was an honour to address you.